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INTERNATIONAL LAW AND PRACTICE

Unwritten European rules in international law: From Eurocentric to regional international law?

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Abstract

Treaties are the most visible, some would even say the ‘main source of international law’. This is true not only at the global level, but even more so in Europe. However, these treaties hardly explain the idiosyncratic, sometimes exceptionalist ways in which international law is identified, interpreted, and applied in this region. Still less do they explain the disproportionate normative influence of European legal rules outside Europe. Attributing these particularities and imbalances to ‘eurocentrism’ in international law is considered almost a truism these days. Yet, when examining how the European legal tradition translates into positive international law one category of rules has received little attention so far: the unwritten European rules that are resorted to within and beyond Europe. The idea of ‘unwritten’ European rules is not only historically charged but also conceptually vague. However, this article argues that a close analysis of their role is central to both understanding and overcoming the persistence of ‘eurocentrism’ in international law. To demonstrate this claim, the article introduces the term ‘unwritten’ European rules in international law. A historical section illustrates their ambivalent role since the beginning of the nineteenth century. It then analyses the continuing relevance of unwritten European rules in contemporary legal practice. The final section discusses how a common framework of secondary rules can help to distinguish between hegemonic and integrative uses of unwritten European rules, before concluding.

Keywords: International Court of Justice; International Law Commission; regional international law; sources of international law; unwritten international law

1. Introduction

Treaties are the most visible, some would even say the ‘main source of international law’.¹ This is true not only at the global level, but even more so in Europe.² At times highly technical, at times

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¹J. Wouters et al., *International Law: A European Perspective* (2019), 61.

²‘Europe’ is defined here by using both geographic and institutional criteria. Geographically, it refers to the region bordered by the Arctic Ocean to the north, the Atlantic Ocean to the west, and the Mediterranean Sea, Black Sea, Kuma-Manych Depression, and Caspian Sea to the south, with the eastern boundary running along the Ural Mountains and the Emba (Zhem) River to the northern Caspian coast (*Encyclopaedia Britannica*, available at www.britannica.com/place/Europe). While this

quasi-constitutional, treaties form a dense web of inter-state rights and obligations in this region. And yet these treaties, as ‘monumental’ as they may be,³ are nothing but the tip of the iceberg. They do not explain the idiosyncratic, sometimes exceptionalist, ways in which international law is identified, interpreted, and applied in Europe.⁴ Still less do they explain the disproportionate normative influence of European legal rules outside Europe.⁵

Attributing these particularities and imbalances to a certain ‘European tradition’⁶ and the ‘eurocentric’ character of international law⁷ is considered almost a truism these days. Yet, in examining how historical, sociological, and cultural influences from the European region translate into international law, one category of rules has received surprisingly little attention: the unwritten European rules that are relied upon within and beyond Europe.⁸

The idea of unwritten European rules is not only historically charged – oscillating between *kitsch* and colonialism⁹ – but also very vague. Still, to date, invocations of unwritten European rules remain *en vogue* in the day-to-day practice of international law.

This is exemplified by a recent statement delivered by the European Union (EU) in the Sixth Committee of the United Nations General Assembly, in which the EU emphasized the ‘legal traditions’ of its Member States as an important factor in identifying general principles of law (GPL) at the universal level and encouraged the ILC to draw inspiration from the EU’s own practice as a methodological template for comparative analysis. Yet, at the same time, the EU made sure to underline that EU principles of law stem from an ‘autonomous source of law’.¹⁰

It would be too easy to dismiss this practice as simply another instance of EU exceptionalism. The European Court of Human Rights (ECtHR), for example, frequently relies on concepts such as a ‘European public order’¹¹ or ‘European consensus’¹² to justify far-reaching interpretations of the European Convention on Human Rights (ECHR). Few, if any, legally non-binding regional agreements have been as influential in the International Court of Justice’s (ICJ) identification of

definition largely overlaps with the UN regional groups comprising the ‘Western European and other States’ and the ‘Eastern European States’, it is narrower and does not include Australia, Canada, Israel, New Zealand, and the United States of America. Despite including non-European members, organizations like the North Atlantic Treaty Organization (NATO) and the Organization for Security and Co-operation in Europe (OSCE) are generally considered European regional organizations, as most of their members are geographically European and, in the OSCE’s case, its mandate is explicitly focused on Europe.

³See A. Nussberger, *The European Court of Human Rights* (2020), at 1, comparing treaties to ‘monuments’.

⁴‘European exceptionalism’ refers to the projection of a European self-understanding onto the international legal order (see further G. Nolte and H. Aust, ‘European Exceptionalism’, (2013) 2 *Global Constitutionalism* 407).

⁵See, e.g., A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020); on the ‘Strasbourg effect’: B. Saul, ‘The Council of Europe’s Proposed Definition of Terrorism Infringes Human Rights’, *EJIL:Talk!*, 18 February 2025, available at www.ejiltalk.org/the-council-of-europes-proposed-definition-of-terrorism-infringes-human-rights/.

⁶L. Mälksoo, ‘Sources of International Law in the Nineteenth-Century European Tradition: Insights from Practice and Theory’, in J. d’Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (2017), 146.

⁷J.T. Gathii, ‘International Law and Eurocentricity’, (1998) 9 *European Journal of International Law* 184; A. Becker Lorca, ‘Eurocentrism in the History of International Law’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 1034.

⁸But see for a brief analysis ILC Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), Paras. 211–15.

⁹See M. Koskeniemi, ‘International Law in Europe: Between Tradition and Renewal’, (2005) 16 *European Journal of International Law* 113.

¹⁰Statement on behalf of the EU at the Sixth Committee, 78th Session of the UNGA (23 October 2023), available at www.eea.s.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-6th-committee-work-international-law-commission_en.

¹¹See K. Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (2021).

¹²See J. Theilen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (2021).

customary international law as the Helsinki Final Act of 1975.¹³ Writing separately in a recent judgment delivered by the ICJ deciding a territorial dispute between two African States, Judge Yusuf criticised the persistence of

legal concepts and rules attaining to it which were elaborated in the nineteenth century under the Public Law of Europe (*Jus Publicum Europaeum*), which some European scholars referred to as ‘international law’, but was a law applied only among a self-styled club of so-called ‘civilized nations’.¹⁴

But even outside the courtroom, unwritten European rules are increasingly invoked as a legal basis for measures adopted in response to external threats and violations of international law by third States. References to shared European values have played a key role in the initiative to establish a ‘Special Tribunal for the Crime of Aggression against Ukraine’,¹⁵ with some scholars alleging the emergence of an ‘under-explored regional rule of customary law’ in Europe as an exception to immunities for the crime of aggression.¹⁶ In a similar vein, a study requested by the European Parliamentary Research Service suggested ‘an evolution in regional practice – whether in Europe or the Americas’ might justify a breach of sovereign immunity from enforcement jurisdiction through the confiscation of Russian State assets.¹⁷ States from the Baltic region have emphasized the need to reinterpret the provisions regulating enforcement actions in the Exclusive Economic Zone as outlined in the 1982 Convention on the Law of the Sea (UNCLOS) to address sabotage and, alternatively, suggested resorting to concerted actions based on regional or domestic laws.¹⁸

All these examples share a common feature: the legal relevance of the European legal approaches is not (or, at least, not only) based on a binding international agreement, but on the alleged existence of common European methods, values, traditions, or sources of law. Against this background, this article argues that a close analysis of such recourse to ‘unwritten’ European rules is central to both understanding and overcoming the persistence of ‘eurocentrism’ in international

¹³*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 133, Para. 264; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 164, Para. 102; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, at 437, Para. 80. The Helsinki Final Act is considered ‘European’ given that most signatories are located in Europe and the Act, as per its title and text, concerns cooperation and security in the European region (see also P. van Dijk, ‘The Final Act of Helsinki–Basis for a Pan-European System?’, (1980) 11 *Netherlands Yearbook of International Law* 97, in particular at 104–6).

¹⁴*Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, Judgment of 19 May 2025 (not yet published), (Judge Yusuf, Separate Opinion, at para. 1).

¹⁵See Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine, CM Doc. CM(2025)104-final (2025).

¹⁶See, e.g., R. Stendel, ‘The Council of Europe as a Preferable and Viable Partner to Ukraine for Prosecuting the Crime of Aggression’, *Verfassungsblog*, 28 October 2024, available at <https://verfassungsblog.de/the-council-of-europe-as-a-preferable-andviable-partner-to-ukraine-for-prosecuting-the-crime-of-aggression/>; P. Grzebyk, ‘Crime of Aggression against Ukraine: The Role of Regional Customary Law’, (2023) 21 *Journal of International Criminal Justice* 435. See for a critical discussion of the various legal questions raised by the establishment of the special tribunal prior to the adoption of the agreement: O. Corten and V. Koutroulis, ‘Tribunal for the Crime of Aggression against Ukraine – A Legal Assessment’, requested by the European Parliament’s Subcommittee on Human Rights, December 2022, available at [www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf).

¹⁷See P. Webb, ‘Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine’, *European Parliament Research Service*, February 2024, at 14, available at [www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU\(2024\)759602_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf).

¹⁸See, e.g., ‘Baltic Sea Nations Eye New Powers to Seize Russia’s Shadow Fleet’, *Politico*, 7 February 2025, available at www.politico.eu/article/baltic-sea-russia-shadow-fleet-undersea-infrastructure-damage/.

law, understood here as the continuing dominance of European concepts in the creation, interpretation, and application of international law.¹⁹

To substantiate this claim, the article proceeds as follows: after introducing the term ‘unwritten’ European rules (Section 2), a brief historical section illustrates their ambivalent role since the beginning of the nineteenth century, oscillating between hegemonic and integrative uses (Section 3). The fourth section analyses the continuing relevance of unwritten European rules in contemporary practice (Section 4). The final section discusses how a common framework of secondary rules can help to translate unwritten European rules into unwritten regional international law. It argues that the legal category of unwritten regional international law responds to the inherent need of any legal community, including regionally defined communities, to protect and stabilize legitimate expectations, while avoiding European exceptionalism, normative fragmentation, and allegations of ‘double standards’ (Section 5). The article ends with some conclusions (Section 6).

2. The term ‘unwritten’ European rules: Beyond *kitsch* and colonialism?

The term ‘unwritten’ European rules in international law as used here describes normative claims which, though not necessarily based on a binding international agreement, are nonetheless articulated and accepted by subjects of international law as binding in their international relations, by virtue of being rooted in shared legal practices or common values within the European region. This understanding comes close to the classic definition of the ‘unwritten sources of international law’ reflected in Article 38(1)(b) and (c) of the ICJ Statute, i.e., as encompassing both customary international law and general principles of law.²⁰

However, the term ‘unwritten’ European rules extends beyond this definition in two respects.

Firstly, it encompasses unwritten European rules that do not fall squarely within the scope of Article 38 of the ICJ Statute; thus, normative claims that may – or may not – qualify as unwritten European rules of *international law*. This notably concerns the examples given for unwritten European rules in Section 3, but also somewhat idiosyncratic norms, such as ‘general principles of EU law’,²¹ ‘the common principles of the European constitutional heritage’,²² or ‘unwritten principles of EEA law’²³. Given that the distinctive feature of unwritten European rules is that their legal effect is based precisely on the existence of shared European values or legal practices, the difficulty inherent in unwritten European rules consists in understanding whether or not these can still be recognized as international law (rather than a *sui generis* source of law, domestic law, a regional legal tradition, or simply social practices), who decides so, and on the basis of which criteria.

Secondly, the partial overlap between this term and the classic definition of ‘unwritten sources’ of international law should not be misunderstood as limiting the concept of ‘unwritten’ European rules to primary rules; those rules that impose rights or obligations on states and other subjects of international law.²⁴ Rather, the ‘unwritten’ rules examined here also encompass unwritten secondary rules, which determine how legal rules are identified, interpreted, and applied.²⁵

¹⁹See also M.M. Mbengue and O.D. Akinkugbe, ‘The Criticism of Eurocentrism and International Law: Countering and Pluralizing the Research, Teaching, and Practice of Eurocentric International Law’, in A. van Aaken et al. (eds.), *The Oxford Handbook of International Law in Europe* (2024), 225 at 228.

²⁰See Statement of H.E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the 6th Committee of the UN General Assembly, New York, 1 November 2019, at Para. 5, available at [icj-cij.org/sites/default/files/press-releases/0/000-20191101-STA-01-00-EN.pdf](https://www.icj-cij.org/sites/default/files/press-releases/0/000-20191101-STA-01-00-EN.pdf).

²¹*Case C-817/21, Inspecția Judiciară*, Judgment of 11 May 2023, ECLI:EU:C:2023:391, at Para. 40.

²²*Davydov and others v. Russia*, Judgment of 13 November 2017, [2017] ECHR, Para. 285.

²³*Case E-14/15, Holship Norge AS and Norsk Transportarbeiderforbund*, Judgment of 19 April 2016, [2016] EFTA Court, Para. 123.

²⁴See H.L.A. Hart, *The Concept of Law* (1961: 3rd edition 2012), at 81 and 94.

²⁵*Ibid.*

Secondary rules are rooted in social rules constituted through official practice, i.e., the practice of members of legislative bodies, state officials and members of judicial institutions.²⁶ In recent years, various studies – and judges writing separately – have pointed to the impact of a ‘European’ orientation of legal thought or mindset of these practitioners on the discourse of international law without, however, explaining how this influence permeates the current body of positive international law.²⁷ Given that unwritten rules arise from such social practices and, in turn, regulate the way in which law is created and applied, the focus on unwritten rules is critical when tracing and explaining the persistent impact of unwritten European rules in international law.²⁸

3. The ambivalence of unwritten European rules: Between hegemony and emancipation?

The ubiquity of treaties in Europe today makes it easy to forget the crucial role played by unwritten regional rules in shaping the body of rules applicable to most states in Europe and beyond. Their impact since the beginning of the nineteenth century within and beyond the burgeoning web of treaties is as profound as it is ambivalent.

3.1 Unwritten European rules as a means of hegemony?

Much scepticism towards unwritten European rules is rooted in their use by powerful European countries as a tool to impose their domestic legal values upon their neighbours and on non-European states, calling into question their sovereign equality.²⁹

The most notorious example is the ‘doctrine of the standard of civilization’.³⁰ Ostensibly referring to the ‘maturity’ of a legal system, this term effectively provided a ‘language of a standard’ for excluding those nations from the international legal community that were considered ‘unwilling or unable’ by European States to play by European legal rules.³¹ This ‘doctrine’ did not only purport to determine the criteria for membership in the international legal community. It also served to justify a different legal treatment of nations whose legal systems differed from that of certain European states.³² Moreover, this doctrine informed the identification of rules of international law applicable in the relations between European states and to their relations with states outside Europe. Arbitral tribunals decided cases based on principles common to a handful of these allegedly ‘civilized’ European states – often without even taking the domestic law of one of the parties into account. In the *Russian Indemnities* case of 1912, for example, the tribunal decided a case between Russia and Turkey on the basis of general principles derived from the ‘great body of European legislation’ which consisted of ‘private legislation of the States forming the European concert’ (which included the Russian Empire, but not Turkey) and ‘Roman law’.³³ The formulation in Article 38(1)(c) of the ICJ Statute, which refers to general principles of law

²⁶*Ibid.*, at 101–8.

²⁷See, e.g., *Land and Maritime Delimitation and Sovereignty over Islands* (Judge Yusuf, Separate Opinion), *supra* note 14, Para. 17; A. Roberts, *Is International Law International?* (2017).

²⁸See Mälksoo, *supra* note 6.

²⁹See *Land and Maritime Delimitation and Sovereignty over Islands* (Judge Yusuf, Separate Opinion), *supra* note 14; on the abuses of unwritten European law in the context of treaty interpretation: Y. Onuma, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (2010), at 320–1.

³⁰See Mälksoo, *supra* note 6, at 150.

³¹M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 134–5.

³²See, e.g., Art. 6 of the General-Akte der Berliner Konferenz (adopted 26 February 1885); J.A. Kämmerer, ‘Das Völkerrecht des Kolonialismus: Genese, Bedeutung und Nachwirkungen’, (2006) 39 *Verfassung und Recht in Übersee* 397, at 422–3, who argues that only within Europe states were bound by a certain humanitarian minimum standard.

³³*Russian Claim for Interest on Indemnities (Russia/Turkey)*, PCA Case No. 1910-02, Award of 11 November 1912, at 442–3.

‘recognized by civilized nations’, is reminiscent of the ‘standard of civilization’ and may have led to the reluctance of the ICJ to refer to this source of law.³⁴ Indeed, both Article 38 of the ICJ Statute as well as the 1969 Vienna Convention on the Law of Treaties (VCLT), which are understood as reflecting the ‘secondary rules of international law’,³⁵ codified to a large extent European customary international law.³⁶

The ‘hegemonic’ use of unwritten rules in Europe did not recede with the progressive abolition of the ‘language of civilization’ after the Second World War. The Soviet Union, while frequently criticizing concepts like ‘civilized nations’ and custom as an unwritten source of international law as such, did not shy away from invoking unwritten regional rules to impose its own legal concepts on other states. During the Cold War, the invocation of the ‘Brezhnev doctrine’ based on ‘socialist principles’ served to justify interventions into neighbouring states.³⁷ Ironically, the ‘Brezhnev doctrine’ represented a striking parallel of the doctrine which had been proclaimed 150 years before by the US President Monroe to shield the Americas from Western European interventions and which later inspired the US intervention practice in Latin America.

After the Cold War and facing the dissolution of the Soviet Union and Yugoslavia, the European Community (EC) and its member states adopted the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union which made recognition of states conditional on a number of criteria which went beyond the traditional criteria for statehood.³⁸ Making recognition dependent on the new states having ‘constituted themselves on a democratic basis’ and showing ‘respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights’, was criticized as a ‘move[] away from the process of recognition as the formal acceptance of a fact to a process based on value judgments’.³⁹

3.2 Unwritten European rules as a means of integration and emancipation?

At the same time, recourse to unwritten European rules has also served as an important technique to further the legal integration and emancipation within the European region.

Indeed, an unwritten regional rule often simultaneously exhibits both ‘hegemonic’ and ‘integrative’ elements. The EC Guidelines, for example, might as well be interpreted as a contribution to the harmonization of legal standards within and beyond the EC. Moreover, the way in which arbitral tribunals have applied unwritten regional rules has not necessarily been hegemonic either. Only 18 years after the *Russian Indemnities* case, an arbitral tribunal in *Lena Goldfields v. USSR* established the existence of unjust enrichment as a general principle based on continental as well as Soviet law.⁴⁰ In contrast to the *Russian Indemnities* case, the distinct regional legal system of the respondent, Soviet law, was recognized and considered in the identification of the applicable law by the tribunal. Yet, *Goldfields* could also be understood as entrenching the principle of unjust enrichment (a relic of the capitalist European tradition) in Soviet law,

³⁴See Yusuf, *supra* note 20, at 8.

³⁵M. Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’, (2010) 21 *European Journal of International Law* 967.

³⁶See Mälksoo, *supra* note 6, at 147.

³⁷Speech of First Secretary of the Soviet Union L Brezhnev at the Fifth Congress of the Polish United Workers’ Party (13 November 1968), available at www.files.ethz.ch/isn/125400/1162_brezhnevdoctrine.pdf.

³⁸Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ (adopted by the European Communities on 16 December 1991).

³⁹R. Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, (1993) 4 *European Journal of International Law* 36, at 55–6.

⁴⁰*Lena Goldfields Co. Ltd. v. The Government of USSR*, Award of 2 September 1930, at Para. 23.

immunizing it from domestic attempts to overturn it. Again, this example illustrates that recourse to unwritten regional rules oscillates between hegemony and integration.

Much later, unwritten European rules played a significant role in integrating Eastern and Western Europe after the end of the Cold War.⁴¹ While some commentators feared a ‘dilution of Council of Europe standards and values’ by admitting Ukraine and Russia to the Council of Europe (CoE) in the mid-1990s,⁴² unwritten European principles ensured mutual trust both on a horizontal level between states as well as on a vertical level between European and national institutions. For example, the ‘margin of appreciation’ doctrine and the ‘principle of subsidiarity’ developed by the ECtHR can be understood as being rooted in mutual trust in the vertical relationship between European and national institutions.⁴³ Yet, perhaps the most prominent examples are the principles of mutual trust and mutual recognition within the EU. The principle of mutual trust is not mentioned in the EU Treaties. It has been developed by the Court of Justice of the European Union (CJEU) and is understood as being ‘implied and justified’ by the shared values of Member States enunciated in Article 2 of the Treaty on European Union (TEU).⁴⁴ Pursuant to this principle, Member States are considered equal under EU law and hence deserve to be treated equally by the EU and Member States. This principle prohibits double standards and obliges EU states not to discriminate based on the ostensibly insufficient domestic law of Member States.⁴⁵

Unwritten European rules have also served as a means of emancipation, i.e., as an instrument for overcoming outdated or oppressive structures. Again, the EC Guidelines could also be understood as a tool of emancipation for those parts of the respective populations which demanded democratic and institutional reforms. Moreover, the recourse by the ECtHR to what it termed ‘European consensus’ – others have called it regional custom – to adapt the ECHR to new social realities has often been accompanied by an expansion of guarantees ensuring individual freedoms.⁴⁶ Furthermore, some of the principles contained in the Helsinki Final Act, itself a non-binding document, have been understood to reflect regional custom and were relied on by individuals in Central and Eastern Europe in their struggle for political liberalization (Principle 7)⁴⁷ as well as by states fearing infringements of their territorial integrity and self-determination by powerful neighbours (Principle 8).⁴⁸

⁴¹W. Sadurski, *Constitutionalism and the Enlargement of Europe* (2012), xxiii.

⁴²See Nussberger, *supra* note 3, at 175 citing E. Bates, ‘Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenge Facing the Committee of Ministers’ in T. Christou and J.P. Raymond (eds), *European Court of Human Rights: Remedies and Execution of Judgment* (British Institute of International Law 2005) 49, at 54.

⁴³*Ibid.*, at 93–5.

⁴⁴*Case Opinion 2(13), Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, at Para. 168.

⁴⁵Based on the principle of mutual trust, the CJEU, for example, rejected a BIT between The Netherlands and Slovakia under which an investor was allowed to bring proceedings before an arbitral tribunal instead of Slovak domestic courts (*Case C-284/16, Slowakische Republik v Achmea BV*, Judgment of 6 March 2018, ECLI:EU:C:2018:158, Para. 58). The CJEU confirmed the high threshold for a rebuttal of the presumption underlying the principle of mutual trust in several cases concerning the refusal of a European Arrest Warrant issued by Polish authorities (See *Joined Cases C-562/21 PPU and C-563/21 PPU, X and Y v. Openbaar Ministerie*, Judgments of 22 February 2022, ECLI:EU:C:2022:100, at Paras. 40–66).

⁴⁶See, e.g., *Perinçek v. Switzerland*, Judgment of 15 October 2015, [2015] ECHR (Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris, Joint Dissenting Opinion), Para. 10; *Rohlena v. The Czech Republic*, Judgment of 27 January 2015, [2015] ECHR (Judge Ziemele, Concurring Opinion), Para. 2; *Lalmahomed v. The Netherlands*, Judgment of 22 February 2011, [2011] ECHR (Judge Ziemele, Concurring Opinion). See also for the view that ‘European consensus’ resembles European custom: See Nussberger, *supra* note 3, at 81; I. Ziemele, ‘European Consensus and International Law’, in A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (2018), 23.

⁴⁷U. Fastenrath and C. Fastenrath, ‘Organization for Security and Co-operation in Europe (OSCE)’, (2019) *Max Planck Encyclopedia of Public International Law*, Para. 39; see also M. Wood and D. Purisch, ‘Helsinki Final Act’, (2011) *Max Planck Encyclopedia of Public International Law*, Para. 24.

⁴⁸See van Dijk, *supra* note 13, at 113–14.

3.3 Conclusions

Two conclusions can be drawn from the above about the role played by unwritten European rules since the beginning of the nineteenth century.

Firstly, unwritten European concepts are ‘Janus-faced’ in the sense that they can be read as a continued use of unwritten regional law for asserting ‘civilizational hierarchies’ and as a tool for domination by powerful States.⁴⁹ At the same time, unwritten European rules have not only served hegemonic aims but also furthered legal integration and emancipation within the region. Yet, since they come in different guises, they carry a significant potential for abuse. While it would thus be premature to discard unwritten European rules as being inherently hegemonic, their unclear nature contributes to their ambivalent effect. A neat distinction between the different faces of unwritten European rules is often impossible. To respond to this ambivalence, it is thus necessary to identify a method that allows for distinguishing between invocations of European standards that qualify as law, on the one hand, and those that constitute merely a tradition, policy, comity, or morality, on the other.

Secondly, the identification of such a method that is fairly neutral is rather challenging. This is because even many of those rules that regulate the identification, interpretation, and application of international law originate in Europe. As demonstrated by the codification of the doctrine of sources and the law of treaties in the ICJ Statute and the VCLT, the dominance of unwritten European secondary rules beyond the European region persisted long after the universal importance of unwritten European primary rules declined (in relative terms) following the entry into force of the United Nations Charter.

4. The role of unwritten European rules in contemporary practice: Imperialistic or irrelevant?

Still, the practical relevance of unwritten European law might just be a relic of the past, largely replaced by regional treaties. However, a closer look suggests a more complex picture. In contemporary practice, unwritten European law oscillates between invisibility and idiosyncrasy.

4.1 The invisibility of regional custom in Europe

Explicit references to European customary international law are largely absent in the practice of states as well as of regional bodies within Europe.⁵⁰

Four explanations for the lack of explicit references are conceivable.

Perhaps European customary international law simply *does not exist*; possibly because the threshold for regional custom is too high for any European practice to qualify as custom.⁵¹ Yet, even if a high threshold is applied, there seem to be several rules that appear to be capable of meeting that threshold and of qualifying as custom limited to the European region, for example the prohibition of the death penalty⁵² and the right to property⁵³.

⁴⁹J. Theilen, ‘Civilizational Hierarchies and the Notion of “Europe” in the European Convention on Human Rights’, (2025) 36 *European Journal of International Law* 113, at 132–8; I. Aral, ‘Russia’s Expulsion: The Council of Europe as the Guardian of European Imperialism’, (2025) 38 *Leiden Journal of International Law* 113, at 115–17.

⁵⁰See also S. Besson, ‘General Principles and Customary Law in the EU Legal Order’, in S. Vogenauer and S. Weatherill (eds.), *General Principles of EU Law* (2017), 105 at 106–7; see on the reluctance by the ECtHR to refer to regional custom Section 4.1.3, *infra*.

⁵¹See: on the threshold and criteria for identifying particular customary international law: ILC Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018 YILC Vol. II (Part Two), Conclusion 16 and the commentaries thereto.

⁵²See in this direction: *Öcalan v. Turkey*, Judgment of 12 May 2005, [2005] ECHR, Paras. 162–4.

⁵³L. Mardikian, ‘The Right to Property as Regional Custom in Europe’, (2018) 9 *Transnational Legal Theory* 56.

Another explanation is that references to regional custom are *unwarranted* given that judicial bodies in Europe are only mandated to apply regional treaty law.⁵⁴ However, this would not prevent those bodies from considering regional custom when interpreting these regional treaties, notably as a ‘relevant rule’ under Article 31(3)(c) of the VCLT, which they readily do with respect to other international agreements and general international law.⁵⁵

Relatedly, one could argue that considering the density of treaty relations, references to regional custom are simply *unnecessary* because of the existence of more specific treaty provisions. Nonetheless, this does not explain why regional courts have still referred to general custom, where a treaty remained silent. It is arguably even easier to establish the existence of regional custom as compared to general custom given that the requisite amount of state practice would be confined to the European region, potentially more accessible and readily available.

Finally, the absence of explicit references to regional custom could be explained by the *invisibility* of such regional custom. The following three examples strongly suggest a potentially hidden, yet non-negligible role of regional custom in European legal practice.

4.1.1 Legal relevance of non-binding agreements through regional custom?

The first example concerns the conclusion of regional agreements. As reflected in Articles 11–17 and 24(2) of the VCLT, treaties are only binding if states express ‘consent to be bound’. As a result, non-binding or unratified written agreements do not have any immediate legal effect.⁵⁶ However, several cases suggest that unratified or non-binding agreements are attributed legal effects in Europe despite the absence of ‘consent to be bound’.

The first case concerns the Organization for Security and Co-operation in Europe (OSCE). The OSCE is an exceptional international organization because it is not based on a legally binding agreement.⁵⁷ This has given rise to a long-standing debate about whether the OSCE possesses legal personality.⁵⁸ According to the OSCE Secretariat, the OSCE’s legal personality can be established both based on functional necessity (relying on the ICJ’s Advisory Opinion in *Reparations for Injuries*) as well customary international law.⁵⁹ The OSCE Secretariat refers, in particular, to host state agreements with Poland and Austria and to the practice of international organizations.⁶⁰ However, such a recognition under (regional) custom is unclear given that only a few participating

⁵⁴See, e.g., (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953; as amended) 213 UNTS 221, Art. 32(1); see also Art. 19 of the Consolidated Version of the Treaty on European Union, (2016) 59 *Official Journal C* 202, 13, available at eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (TEU) and Arts. 256–81 of the Consolidated Version of the Treaty on the Functioning of the European Union, (2016) 59 *Official Journal C* 202, 47, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF (TFEU).

⁵⁵See, e.g., *Golder v. The United Kingdom*, Judgment of 21 February 1975, [1975] ECHR, at Paras. 29–30; *Joined cases C-779/21 P and C-799/21 P, Front Polisario v. Council*, Judgment of 4 October 2024, ECLI:EU:C:2024:835, Para. 131; see further on multiple examples for the somewhat strategic and selective recourse to general international law by the CJEU (P. Gragl, ‘Customary International Law in the European Union Legal System: The Substantive Rules Invoked and Applied by the Court of Justice of the European Union’, in F.L.Bordin, A. Th. Müller, and F. Pascual-Vives (eds.), *The European Union and Customary International Law* (2022), 240) and by the political institutions of the EU (C. Martínez-Capdevila, ‘Customary International Law as a Source of European Union Law’, in *ibid.*, 280).

⁵⁶See the current work of the ILC on ‘Non-legally binding international agreements’: on the relationship between non-binding instruments and custom: ILC First Report on Non-Legally Binding International Agreements, by Mathias Forteau, Special Rapporteur, UN Doc. A/CN.4/772 (2024), notably Para. 53.

⁵⁷Conference on Security and Cooperation in Europe, Budapest Document - 1994 Towards a Genuine Partnership in a New Era, (1995) 34 *International Legal Materials* 767, Para. 3; see Fastenrath and Fastenrath, *supra* note 47, at Para. 40.

⁵⁸See Fastenrath and Fastenrath, *supra* note 47, at Paras. 40–2.

⁵⁹OSCE Report to the Ministerial Council on Strengthening the Legal Framework of the OSCE in 2017, MC.GAL/7/17 (8 December 2017), Para. 9.

⁶⁰*Ibid.*, at Paras. 28–39.

states have recognized such legal personality, and Russia has repeatedly insisted on the necessity of a treaty to establish its legal status.⁶¹ While the legal status of the OSCE remains unclear, it is widely recognized as an international organization and the way in which the OSCE interacts with states and other IOs goes far beyond that of an inter-state forum despite the absence of a binding constituent instrument. Moreover, OSCE bodies have emphasized the ‘norm-setting nature’ of the OSCE commitments, pointing out that those have ‘been termed regional custom’.⁶²

Secondly, the adoption of a non-binding declaration affirming the applicability of state immunity to state-owned cultural property by Member States of the CoE and presented as ‘a legal document that, while non-binding, reflected a common understanding of *opinio juris*’ by the then Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI) to the ILC in 2016, led to a debate as to whether that position reflected regional custom.⁶³

The third case concerns the approach taken by the ECtHR with respect to legally non-binding instruments. In its *Demir and Baykara v. Turkey* Judgment, the ECtHR observed that

it is not necessary for the respondent State to have ratified the entire collection of instruments . . . It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.⁶⁴

The extent to which the Court’s approach in *Demir and Baykara v. Turkey* reflects a rule or an exception is contested.⁶⁵ For example, Nussberger considers this decision to be an outlier and has pointed out that the Court ‘does, as a rule, distinguish between obligations binding upon the Member States to the Convention and other norms of international law which are relevant, but not necessarily binding’.⁶⁶ The ECtHR has nonetheless reiterated the statement made in *Demir and Baykara v. Turkey* in more recent judgments.⁶⁷ Finally, it should be noted that *Demir and Baykara* only enunciated what the Court had been practicing since the 1970s.⁶⁸ It is difficult to explain the effect attributed to non-binding instruments in these cases based on the general law of treaties. The legal effects derive either from a specific regional custom that has emerged in those cases or, alternatively, from a (customary) European law of treaties which allows giving effect to non-binding and unratified agreements.

4.1.2 Exception to *pacta tertiis through regional custom?*

A second set of examples pointing to a possible recourse to regional custom in Europe concerns practices seemingly at odds with the principle of *res inter alios acta*, as reflected in Articles 34–7 of the VCLT and customary international law. According to this principle, treaties neither bind nor confer rights upon third states without their consent.

⁶¹See also M. Steinbrück Platise and A. Peters, ‘Transformation of the OSCE’s Legal Status’, in M. Steinbrück Platise, C. Moser, and A. Peters (eds.), *The Legal Framework of the OSCE* (2019), 333 at 352–3.

⁶²See, e.g., Report Submitted to the OSCE Ministerial Council by the ODIHR in Response to MC Decision No. 17/05 on Strengthening the Effectiveness of the OSCE (November 2006), Para. 99 citing E. Manton, ‘The OSCE Human Dimension Process and the Process of Customary International Law Formation’, in (2005) 11 *OSCE Yearbook* 195.

⁶³See ILC, Summary Record of the 3316th Meeting, UN Doc. A/CN.4/3316 (2016), Paras. 6, 27, 30, and 33.

⁶⁴*Demir and Baykara v. Turkey*, Judgment of 12 November 2008, [2008] ECHR, at Para. 86.

⁶⁵See also: G. Nolte, ‘Consent and Sources’, in S. Besson (ed.), *Consenting to International Law* (2023), 204.

⁶⁶See Nussberger, *supra* note 3, at 140, 143–4.

⁶⁷*Genovese v. Malta*, Judgment of 11 October 2011, [2011] ECHR, Para. 44; *Case of National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Judgment of 8 April 2014, [2014] ECHR, Para. 86. While Nussberger emphasizes that the ECHR, in the *National Union of Rail* case, modified the statement made in *Demir and Baykara* (‘may also be relevant’), the Court still referred to *Demir and Baykara* when making this statement.

⁶⁸Also cited in *Genovese v. Malta*, *ibid.*, Para. 44.

Arguably the most famous – yet dated – case of an exception to this principle has been the 1856 Convention between Great Britain, France, and Russia concerning the demilitarization of the Åland Islands. Even though Sweden was not a party to this Convention, the 1920 Committee of Jurists appointed by the League of Nations considered that Sweden could insist on compliance with its provisions since that Convention had created ‘true objective law’, was ‘a part of European Law’, and had ‘the character of a settlement regulating European interests’.⁶⁹

More recently, the ECtHR has, when interpreting a state party’s obligations under the ECHR, relied on international agreements to which that state is not a party.⁷⁰ Similarly, the establishment of a ‘Special Tribunal for the Crime of Aggression against Ukraine’ seeks to produce legal effects with respect to Russia, particularly concerning the immunities of Russian State officials, despite Russia not being a party to the agreement.⁷¹

One possible justification for the approach is considering certain types of treaties, such as regional human rights treaties and treaties concerning a geographic feature, as being ‘objective regimes’.⁷² However, this exception of ‘objective regimes’, which was introduced by the Special Rapporteur Sir Gerald Fitzmaurice during the ILC debates and at the Vienna Conference, was rejected by non-Western ILC-members and by states belonging to the Eastern bloc as they feared normative impositions by European states.⁷³

The compromise solution found expression in Article 38 of the VCLT, which affirms that the principle does not preclude the emergence and operation of parallel customary rules, including regional custom.⁷⁴ To the extent that a treaty reflects a rule of (regional) custom binding even on states not party to it, the ECtHR or any other body would not breach the principle of *res inter alios acta* by relying on that rule. Yet, the ECtHR has never done so explicitly and so far, the Member States to the agreement establishing the Special Tribunal have, in contrast to some scholars, not invoked regional custom either.

4.1.3 Overcoming the limits of treaty interpretation through regional custom?

The third example concerns the way in which European judicial bodies have tested the limits of treaty interpretation as contained in Articles 31 and 32 of the VCLT.

At times, they have explicitly excluded certain methods of treaty interpretation. For example, when interpreting the EU’s founding treaties, the CJEU does not consider any subsequent agreement or subsequent practice of the Parties in the sense of Article 31(3)(a) or (b), even though these constitute ‘authentic’ means of interpretation.⁷⁵

⁶⁹Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question, (1920) *League of Nations Official Journal, Special Supplement No. 3*, at 17 and 18; see also A. McNair, ‘The Functions and Differing Legal Character of Treaties’, (1930) 11 *British Year Book of International Law* 100, at 114.

⁷⁰*Marckx v. Belgium*, Judgment of 13 June 1979, [1979] ECHR, at Para. 41.

⁷¹See notes 15 and 16, *supra*, notably Corten and Koutroulis, *supra* note 16, discussing the implications of the principle of *res inter alios acta* (at 14 and 32) and the rules on immunity of state officials (at 38–40) for the establishment of the Special Tribunal.

⁷²B. Simma, ‘From Bilateralism to Community Interests’, (1994) 250 *Recueil des Cours* 217, at 373–6, elaborating on human rights law in Europe as ‘An emerging ‘objective’ régime for Europe?’.

⁷³ILC Draft Articles on the Law of Treaties, 1964 YILC, Vol. I, at 96–105.

⁷⁴G. Gaja, ‘Article 38’, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (2011), 949 at 952, Para. 7.

⁷⁵See ILC, Information Received by the EU, 67th Session of the International Law Commission (2015), available at legal.un.org/ilc/sessions/67/pdfs/english/sasp_eu.pdf, at 3, with references to the CJEU’s case law; ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, UN Doc. A/73/10 (30 April–1 June and 2 July–10 August 2018), Conclusion 12, at 105–6. The CJEU does, however, refer to Art. 31(3)(a) and (b) VCLT when interpreting international agreements other than the founding treaties (see, e.g., *Case C-431/22, Scuola europea di Varese*, Judgment of 21 December 2023, ECLI:EU:C:2023:1021, Paras. 75–82) which ‘may override the clear terms of that treaty’ (Cases C-464/13 and C-465/13, *Europäische Schule München v. Silvana Oberto and Barbara O’Leary*, Judgment of 11 March 2015, ECLI:EU:C:2015:163, Paras. 60–6).

In other cases, European treaties have been ‘interpreted’ in light of the subsequent practice of its Member States in a manner that comes close to or even represents a modification in the sense of Article 39 VCLT rather than an interpretation, for example, the NATO Treaty⁷⁶ or the ECHR⁷⁷. Recently, the ECtHR reiterated that

in defining the meaning of terms and notions in the text of the Convention, [the ECtHR] *can and must take into account* elements of international law other than the Convention, the interpretation of such elements by competent organs, *and the practice of European States reflecting their common values*. Any consensus emerging from specialised international instruments and from the practice of Contracting States *may constitute a relevant consideration* for the Court when it interprets the provisions of the Convention in specific cases⁷⁸

This pronouncement raises various questions about the precise role to be given to the ‘practice of European States reflecting their common values’. The ECtHR has so far not framed such practice as (regional) customary international law in the sense of Article 38(1)(b) of the ICJ Statute, even though the identification of a ‘European consensus’ is generally based on a detailed examination of the domestic and international practice of contracting states as well as of the positions taken by them in international fora.⁷⁹ However, it is not easy to fit its recourse to such practice into the canon of interpretive rules contained in Articles 31 and 32 of the VCLT. While Article 31(3)(b) requires the practice of all parties to a treaty, the ECtHR identifies a ‘European consensus’ even where more than one Member State does not share the majority’s practice. Article 31(3)(c), in turn, would require that the practice in question would amount to a ‘rule’ applicable to the party in the case before it. However, the ECtHR rarely qualifies the ‘practice of Member States’ as reflecting or constituting a ‘rule’ under international law, i.e., as one of the sources reflected in Article 38 of the ICJ Statute.⁸⁰

Yet, the weight attributed to such practice by the ECtHR goes beyond what is envisaged by Article 32 VCLT. Various judgments of the ECtHR illustrate that the existence – but also the absence – of a ‘European consensus’ played the decisive role in justifying particularly controversial interpretations of the ECHR. This includes, on the one hand, decisions resulting in an expansive interpretation of the ECHR, such as the obligation to legally recognize same-sex relationships,⁸¹ and the right to conscientious objection,⁸² based on a practice which is not necessarily unanimous within Europe.⁸³ On the other hand, the absence of a ‘European consensus’ has served to buttress more conservative decisions, e.g., with respect to *burqa* bans,⁸⁴ which run against more progressive interpretations offered by universal treaty bodies.⁸⁵

Both commentators and judges in their individual opinions have criticized the inconsistent recourse to the doctrine of ‘European consensus’, urging the ECtHR to base its approach on regional custom instead.⁸⁶ Notably, a judge and former president of the ECtHR has noted that

⁷⁶NATO Strategic Concept Case, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99, English translation available at www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html, at Para. 148.

⁷⁷See, e.g., *Bayatyan v. Armenia*, Judgment of 7 July 2011, [2011] ECHR, at Paras. 102–8.

⁷⁸*Humpert and others v. Germany*, Judgment of 14 December 2023, [2023] ECHR, at Para. 101 (emphasis added).

⁷⁹See Theilen, *supra* note 12, at 19–31.

⁸⁰See also *Lalmahomed* (Judge Ziemele, Concurring Opinion), *supra* note 46.

⁸¹*Fedotova and Others v. Russia*, Judgment of 17 January 2023, [2023] ECHR, Paras. 166–90.

⁸²See *Bayatan v. Armenia*, *supra* note 77, at Paras. 103–8.

⁸³See *Fedotova v. Russia*, *supra* note 81, at Paras. 65–7, 178.

⁸⁴*S.A.S. v. France*, Judgment of 1 July 2014, [2014] ECHR, Para. 156.

⁸⁵See, e.g., *Hebbadj v. France*, Communication No. 2807/2016, Views of 17 July 2018, UN Doc. CCPR/C/123/D/2807/2016; *Yaker v. France*, Communication No. 2747/2016, Views of 17 July 2018, UN Doc. CCPR/C/123/D/2807/2016.

⁸⁶See *Lalmahomed* (Judge Ziemele, Concurring Opinion), *supra* note 46.

‘[s]uch a consensus would indicate a common acceptance of the interpretation in question, or even the existence of a regional custom at the time of delivery of the judgment’.⁸⁷

There are good reasons for the ECtHR to consider such an approach in two scenarios. Firstly, in cases in which the interpretation put forward by the Court comes close to a modification of the treaty text and, in the absence of subsequent practice by all parties, requires a particularly solid legal basis to convince all states within the region of that interpretation (including those which have not participated in the practice). In particular, this may help responding to allegations that the ECtHR ‘has extended the scope of the Convention too far as compared with the original intentions behind the Convention’.⁸⁸ Secondly, in cases in which the ECtHR deviates from an approach taken by competent organs at the universal level, the reliance on regional custom could increase the acceptance of the ECtHR’s approach by third states and international organizations.

Yet, two questions remain to be answered. For one, the distinction between European consensus and European customary law remains fuzzy. As pointed out by another judge, ‘[s]ometimes what the Court considers as European consensus might indeed coincide with a norm accepted by European States but sometimes . . . it only refers to likeminded practices which have not generated a specific binding rule’.⁸⁹ Furthermore, it remains unclear to what extent states within and beyond the region are willing to accept a claim to regional customary international law in the absence of a unanimous practice within that region.

4.2 The idiosyncrasy of general principles of law in Europe

While explicit references to regional custom are rare, the same cannot be said for invocations of ‘principles’ with a regional scope of application. However, it is unclear whether GPL with a regional scope of application are covered by Article 38(1)(c) of the ICJ Statute, encompassed by any other source reflected in the ICJ Statute, notably a regional treaty, or even constitute a distinct source of European regional law.

4.2.1 ‘General principles of EU law’: Too detached from international law?

This is particularly true for the so-called ‘general principles of EU law’. As early as 1957, in *Algera et al.*, the Court of Justice of the European Communities was confronted with the question of whether administrative measures that had created individual rights could be revoked. Noting that the ‘Treaty does not contain any rules’, the Court conducted ‘a comparative study’ of the laws of the then six Member States and declared that it was ‘obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries’. This decision gave a foretaste of what became a complex line of cases in which the Court of Justice developed ‘general principles of EU law’.⁹⁰

Since the 1992 Treaty of Maastricht, some categories of general principles of EU law have a specific legal basis in the EU treaties, notably regarding the liability of the EU⁹¹ and EU fundamental rights.⁹² However, the CJEU continues to identify general principles of EU law other

⁸⁷L.-A. Sicilianos, Judge and former President of the ECtHR, ‘Interpretation of the European Convention on Human Rights: Remarks on the Court’s Approach’, Seminar on the Margins of the 59th CAHDI Meeting in Prague 23 September 2020, at 5, available at rm.coe.int/interpretation-of-the-european-convention-on-human-rights-remarks-on-t/1680a05732.

⁸⁸Danish-Italian Public Letter to the European Court of Human Rights (ECtHR) (22 May 2025), at 2, available at www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf.

⁸⁹I. Ziemele, ‘Customary International Law in the Case Law of the European Court of Human Rights’, in L. Lijnzaad and the Council of Europe (eds.), *The Judge and International Custom* (2012), 73 at 75.

⁹⁰See Joined cases Nos. 7/56, 3/57 to 7/57, *Algera et al v Common Assembly of the European Coal and Steel Community*, Judgment of 12 July 1957, ECLI:EU:C:1957:7, at 55, see further, e.g., *Case no. 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Judgment of 15 May 1986, ECLI:EU:C:1986:206, Paras. 18–19.

⁹¹See TFEU, *supra* note 54, Art. 340(2).

⁹²See TEU, *supra* note 54, Art. 6(3).

than fundamental rights based on the common legal orders of the Member States, e.g., the principle of protection of legitimate expectations held by individuals,⁹³ whose existence at the universal level was rejected by the ICJ in 2018.⁹⁴

Given certain terminological, methodological, and functional similarities between GPL and general principles of EU law, some public international law scholars take the view that general principles of EU law fall within the scope of Article 38(1)(c) of the ICJ Statute.⁹⁵ However, two aspects give rise to doubts. For one, since *Algera et al.*, the CJEU – more often than not – refrains from including a comprehensive comparative analysis in the reasoning of the decisions and asserts, rather than demonstrates, the existence of a principle within the various domestic legal orders.⁹⁶ Indeed, the opinions of advocate generals indicate that the comparative element plays a less significant role in the identification of general principles of EU law than a ‘functional’ element. In the words of advocate general Juliane Kokott in *Akzo Nobel Chemicals/Commission*:

it is by no means inconceivable that even a legal principle which is recognised or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle is of particular significance, or where it constitutes a growing trend.⁹⁷

Moreover, the Court itself has never referred to Article 38(1)(c) as a basis for general principles of EU law. EU representatives in the Sixth Committee and scholars emphasize that principles of EU law represent an ‘autonomous source’ of law; thus, either explicitly or implicitly rejecting that it falls within the scope of Article 38(1)(c).⁹⁸

4.2.2 ‘Common principles of European constitutional heritage’: Too attached to treaty law?

The EU Court of Justice is not the only European institution relying on regionally confined legal principles. Several examples from the ECtHR’s case law reveal certain terminological, methodological, and functional similarities to those attributed to GPL under Article 38(1)(c).⁹⁹ The difficulty in determining the legal nature of such principles here does not so much stem from the alleged autonomous nature of the principles. Rather, the opposite is the case. According to the ECtHR, these principles are all derived from the regional treaty, the ECHR.

It is true that the concept of a ‘European consensus’ has been compared to regional GPL since it is preceded by a comprehensive comparative analysis undertaken by the ECtHR.¹⁰⁰ However, it

⁹³See *Case T-115/94, Opel Austria v Council*, Judgment of 22 January 1997, ECLI:EU:T:1997:3, para. 93.

⁹⁴*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, Judgment of 1 October 2018, ICJ Rep. 507, at 559, Para. 162.

⁹⁵See ILA, ‘Report of the Study Group on the Use of Domestic Law Principles in the Development of International Law’, Report of the Seventy-Eighth Conference (Sydney 2018), at Para. 216; B. Bonafé and P. Palchetti, ‘Relying on General Principles in International Law’, in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (2016), 160 at 165–7. See, however, I. Saunders, *General Principles as a Source of International Law* (2021), at 207.

⁹⁶See Besson, *supra* note 50, at 111–12.

⁹⁷*Case C-550/07 P, Akzo Nobel Chemicals*, Opinion of Advocate General Kokott, 29 April 2010, ECLI:EU:C:2010:229, Para. 95.

⁹⁸For example, B. de Witte states that EU GPL ‘is not a sub-category of the GPIL, but an EU-specific source’. (B. de Witte, ‘Sources and the Subjects of International Law: The European Union’s Semi-Autonomous System of Sources’, in J. d’Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (2017), 769 at 775).

⁹⁹See ILC, General Principles of Law, Draft Conclusions Adopted by the Drafting Committee on Second Reading UN Doc. A/CN.4/L.1018 (2025).

¹⁰⁰A. von Arnould, ‘Harmonisation Through General Principles of Law’, in K.S. Ziegler et al. (eds.), *Research Handbook on General Principles in EU Law* (2022), 40 at 54; G. Nolte, ‘The European Court of Human Rights and the Sources of

remains doubtful whether this methodological similarity extends to a functional equivalence with GPL in the sense of Article 38(1)(c). Rather than identifying a legal principle, the comparative analysis primarily serves to assess the margin of appreciation granted to Member States in applying rights under the ECHR and in support of evolutive interpretation.

Another category of such principles is derived by the ECtHR from the notion of the ‘European public order’ and the reference in the preamble of the ECHR to the Contracting parties’ ‘common heritage of political traditions, ideals, freedom and the rule of law’. In *M.L. v. Poland*, for example, the ECtHR stated that ‘[o]ne of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle’.¹⁰¹ It went on by observing that ‘the rule of law is inherent in all the Articles of the Convention . . . and the whole Convention draws its inspiration from that principle . . .’.¹⁰² Still, it is not entirely clear to what extent the ECtHR considers these principles as deriving from an autonomous source of law. Notably in its earlier jurisprudence, it has based such recourse to the preamble on treaty interpretation in accordance with the VCLT, notably its Article 31(2).¹⁰³

However, its more recent case law reveals an interesting emancipation from this treaty-based approach. In two cases regarding an alleged violation of the right to free elections enshrined in Article 3 of the Protocol 1, the ECtHR refers to ‘common principles of the European constitutional heritage’ which it derives from a detailed comparative study of the Member States constitutions undertaken by the Venice Commission.¹⁰⁴ The ECtHR observes that

It is true that Article 3 of Protocol No. 1 to the Convention was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process However, the Court has already confirmed that the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, enshrine within themselves the right to vote in terms of the opportunity to cast a vote in universal, equal, free, secret and direct elections held at regular intervals (see the Code of Good Practice in Electoral Matters, paragraph 196 above).¹⁰⁵

Here, the use of such principles neither serves to confirm one or the other possible interpretation of a treaty term pursuant to the VCLT, nor does it merely prevent a *non liquet*. Rather, recourse to these, in its own words, ‘detailed recommendations’ designated as ‘common principles’ comes close to using them as a supplementary source of legal rights and obligations.

4.3 Conclusions

The distinctive treaty practice observed in Europe suggests the continued legal relevance of unwritten European rules. This practice, typically accompanied by references to a shared set of European values, the consistent practice of European states, or a combination of both, can be explained in two ways. Firstly, it may reflect the implicit application of unwritten European law, notably in the form of regional custom or regional principles of law, which serves as an independent legal basis that complements or modifies regional treaty obligations in specific cases. Secondly and alternatively, such practice may derive from unwritten secondary rules specific to the European region that allow for more attenuated forms of state consent than the general law of treaties reflected in the VCLT, notably by attributing legal force to formally non-binding

International Law’, Seminar Organized by the Ministry of Foreign Affairs of the Czech Republic in connection with the 59th Meeting of CAHDI, Prague, 23 September 2020, at 4.

¹⁰¹*M.L. v. Poland*, Judgment of 14 December 2023, [2023] ECHR, Para. 166.

¹⁰²*Ibid.*, Para. 167.

¹⁰³See *Golder v. UK*, *supra* note 55, at Para. 34.

¹⁰⁴See *Davydov v. Russia*, *supra* note 22, at Paras. 196 and 285.

¹⁰⁵*Ibid.*, at Para. 285.

agreements, allowing for exceptions to the *pacta tertiis* rule, and by modifying regional agreements through treaty interpretation rather than formal amendment.

Still, this practice also carries the risk of estranging states which do not feel represented in the way in which European law develops. This notably concerns cases in which the application of treaty provisions is significantly expanded *ratione materiae* or *ratione personae* even though the respondent State – or a significant part of Europe, be it in the East or in the West – has not participated in practice to this effect.¹⁰⁶ Moreover, the use of idiosyncratic forms of unwritten regional law in Europe poses a significant risk of normative fragmentation across regions. To the extent that states and regional bodies in Europe insist on maintaining this practice, there is no compelling reason to deny other regions the same right to develop, apply and prioritize their own unwritten primary and secondary rules.¹⁰⁷ This raises the question of how such diverse regional rules can be evaluated against a common denominator that prevents fragmentation and enables a meaningful distinction between constructive and abusive uses of unwritten law.

5. The future of unwritten European rules: From Eurocentric to regional international law?

The ‘eurocentric’ thrust of unwritten European rules is mitigated if their claim to legal validity is tied not to their ‘exceptional’ nature, but to their quality as regional international law.

5.1 Regional sources of law or Article 38 of the ICJ Statute?

Article 38(1) of the ICJ Statute is generally understood as a reflection of the sources of international law.¹⁰⁸ This is far from self-evident given its roots in European customary international law¹⁰⁹ and its originally much more limited purpose, namely to set out the law to be applied by the PCIJ to settle international disputes¹¹⁰. Yet, nowadays states from virtually all regions refer to this provision as an authoritative and common point of reference when it comes to the identification of the sources of international law.¹¹¹

However, Article 38(1) is only of limited guidance with respect to the identification of unwritten regional international law. While Article 38(1)(a) refers to ‘particular’ conventions (i.e., also regional treaties) in addition to ‘general conventions’, this provision does not even mention unwritten regional sources of law in Articles 38(1)(b) or (c). Instead, the word ‘general’, used both in Article 38(1)(b) and (c), is often understood to describe ‘rules and obligations which, by their very nature, must have equal force for all members of the international community’, i.e. as referring to universal law.¹¹² Such a quantitative understanding of the term ‘general’ effectively excludes unwritten regional international law. However, this narrow understanding is at odds with

¹⁰⁶See Nussberger, *supra* note 3, at 86.

¹⁰⁷See for potential examples in non-European practice: 1981 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (‘in conformity to the principles of Islamic Sharia’), Art. 15; *Gomes Lund v. Brazil*, Judgment of 24 November 2010, [2010] IACHR, Para. 198, noting ‘the existence of a regional consensus of States that comprise the Organization of American States on the importance of access to public information’; *Maya Leader’s Alliance v. Belize*, Judgment of 30 October 2015, [2015] CCIJ 15 (AJ), Para. 8: ‘international jurisprudential prescriptions must be mediated through the peculiar legal traditions and constitutional arrangements’.

¹⁰⁸See S. Besson, ‘State Consent and Disagreement in International Law-Making: *Dissolving the Paradox*’, (2016) 29 *Leiden Journal of International Law* 289, at 293. But see Ōnuma, *supra* note 29, at 222–40.

¹⁰⁹See Mälksoo, *supra* note 6, at 147.

¹¹⁰H. Thirlway, *The Sources of International Law* (2019), 3.

¹¹¹See, e.g., ILC Report 2018 (CIL), *supra* note 51, at 92; Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Seventy-Fourth Session, Prepared by the Secretariat, UN Doc. A/CN.4/734 (2019), Paras. 32–4.

¹¹²*North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 39, Para. 63; see also ILC Report 2018 (CIL), *supra* note 51, Conclusion 16, at 155, Para. 3.

the fact that both the ICJ and the ILC have recognized regional custom as falling within the scope of Article 38(1)(b) despite the use of the term ‘general’.¹¹³ It also fails to provide a sound explanation of the idiosyncratic regional practice of the sort described above. Three explanations could be advanced to rationalize such practice under a quantitative understanding of the term ‘general’. None of those is ultimately convincing.

The first would be to recognize such regional practice as international law only if it can be traced back to the regional treaty. The problem with this approach is that it inevitably leads to an overly expansive treaty interpretation undermining legal certainty.

Secondly, idiosyncratic regional practice could be seen as evidence for or building blocks leading to the emergence of general custom or a GPL. However, this does not correspond to reality in state practice where states adopt different legal approaches to various subject-matters and seem to accept a certain degree of regional variance, for example with respect to the prohibition of the death penalty.

Finally, it could be said that such idiosyncratic regional practice does not need to be traced back to the sources reflected in Article 38(1) but stems from autonomous regional sources of law. In that case, it is difficult to see what would remain of the regulatory function of general international law. Apart from the fact that this would open the floodgates to regional fragmentation and irresolvable normative conflicts before any dispute settlement mechanism, regional hegemony would be given *carte blanche* to impose their political preferences and values on their neighbours and, at worst, to cloak coercive measures in the language of regional law.

Therefore, the term ‘general’ could be understood in qualitative sense, i.e., as referring to the ‘consistent’ and ‘representative’ character of a practice.¹¹⁴ On this view, ‘general’ does not prescribe the size of that legal community, but characterizes the type of practice. This understanding is based on the idea that a constant and uniform practice of states within a regionally defined group can give rise to the legitimate expectation of similar conduct in the future by states within the same region.¹¹⁵

Such a qualitative understanding further allows for the recognition of distinct secondary rules of regional law without giving up on a common framework. The only condition for this is that a ‘normative chain’¹¹⁶ between the specific regional rules on treaty interpretation or even specific sources of law applicable in the region concerned and Article 38(1) can be shown to exist that allows translating such regional secondary rules to general international law (e.g., as an exception to the general secondary rules based on regional custom).

There are, therefore, good reasons to assume, as a point of departure, that Article 38(1) does not only encompass regional treaties, but also unwritten regional international law.

5.2 Overcoming invisibility: Unwritten European rules as regional custom

Even though regional customary international law is nowadays recognized both by the ICJ and by the ILC as falling within the scope of Article 38(1)(b) of the ICJ Statute,¹¹⁷ the criteria for its identification remain unclear.¹¹⁸

¹¹³See *Asylum (Colombia/Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266, at 276–7; see ILC Report 2018 (CIL), *supra* note 51, Conclusion 16.

¹¹⁴See ILC Report 2018 (CIL), *supra* note 51, Conclusion 8, at 136, Para. 2 and Conclusion 16, at 156, Para. 7.

¹¹⁵See on ‘legitimate expectations’: M.H. Mendelson, ‘The Formation of Customary International Law’, (1998) 272 *Recueil des Cours* 155, at 188.

¹¹⁶See for this term: P. d’Argent, ‘The European Union: Using International Law to Replace It’, in A. van Aaken et al. (eds.), *The Oxford Handbook of International Law in Europe* (2024), 207 at 210–11.

¹¹⁷See *Asylum*, *supra* note 113, 276–7; see ILC Report 2018 (CIL), *supra* note 51, Conclusion 16.

¹¹⁸See J.R.G. Álvarez, ‘A Melting Snowball – Difficulties in Identifying Particular Customary International Law’, (2024) 73 *International and Comparative Law Quarterly* 1083; G.R.B. Galindo, ‘Particular Customary International Law and the International Law Commission: Mapping Presences and Absences’, (2021) 86 *Questions of International Law, Zoom-in* 3.

5.2.1 Criteria for identifying regional custom in the work of the ILC and doctrine

This unclarity is partly rooted in controversies about the legal nature of regional custom. Regional custom, so it is often said, differs from general custom in that it resembles a tacit agreement between a particular group of states¹¹⁹ and thus requires a higher threshold for the identification of regional custom as compared to general custom.¹²⁰

In that vein, Conclusion 16 ('Particular customary international law') of the ILC Conclusions on 'Identification of customary international law' seems to suggest – even if not endorsing the analogy with tacit agreements – that a higher threshold for the identification of all forms of 'non-general' – particular – customary international law applies.¹²¹ However, the debates within the ILC show that the question about the adequate threshold for identifying regional customary international law remains controversial and open.¹²²

A possible explanation for the uncertainty surrounding the relevant threshold may lie in the diverse forms that regional customary law can take. As will be shown in the following sections, state practice and case law indicate that three different variants of regional custom exist: regional custom *stricto sensu*, local custom, and regional secondary rules. These categories differ in the extent to which their scope of application is specific to a particular group of states. The greater the degree of concretization, the easier it becomes for third states and potentially bound states within the region to identify the rule and, if necessary, protest against it to prevent normative 'spill-over' effects. Additionally, depending on the subject matter of the rule, state expectations regarding its scope of application – that is, who is bound and who is not – can vary significantly. This variability suggests that 'one size fits all' approach to identifying regional customary law may be insufficient.

5.2.2 European customary law *stricto sensu*

Regional custom *stricto sensu* protects mutual expectations arising from 'legal homogeneity' within a region that is identifiable from both within and outside that region. Such legal homogeneity typically derives from a shared political or constitutional identity, a common institutional framework, or from a combination of the two.

Potential candidates for this type of custom in Europe include certain human rights, such as the prohibition of the death penalty, the right to property, and certain reproductive rights.¹²³ Beyond the area of human rights, and much more controversially, exceptions to state immunity and immunity of state officials *ratione materiae* and/or *ratione personae* for the crime of aggression have been based on regional custom.¹²⁴ Yet, the question is if these potential candidates would qualify as regional custom in light of the test developed for this type of custom in the jurisprudence of the ICJ.

The ICJ's 1950 judgment in the *Asylum (Colombia v. Peru)* case, which concerned the scope of diplomatic asylum in Latin America, is the leading case regarding regional *custom stricto sensu*. Importantly, it has been relied on by supporters of a stricter standard for the identification of regional custom more generally.¹²⁵ In this case, the Court developed the following test:

¹¹⁹See, e.g., K. Guliyev, 'Local Custom in International Law - Something in between General Custom and Treaty', (2017) 19 *International Community Law Review* 47, at 55; A. Pellet and D. Müller, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019), 819 at 921, Para. 247.

¹²⁰See, e.g., M. Shaw, *International Law* (2017), at 68; J. Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (2013), at 57 and 247; but see Mendelson, *supra* note 115, at 216–17 and footnote 152; see also H. Thirlway, *International Customary Law and Codification* (1972), at 135–41.

¹²¹See ILC Report 2018 (CIL), *supra* note 51, at 154.

¹²²See also 'International Customary Law in the Context of the American Continent', Annual Report of the Inter-American Juridical Committee to the General Assembly, OEA/Ser.Q CJI/doc. 707/23 (2023), 50–2.

¹²³See notes 52 and 53, *supra*. On abortion, see Ziemele, *supra* note 89.

¹²⁴See notes 16 and 17, *supra*.

¹²⁵See ILC Report 2018 (CIL), *supra* note 51, at 156; see Crawford, *supra* note 120, at 56, 247.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party . . . [it] must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.¹²⁶

The Court concluded that Colombia had neither proved that such custom existed between certain Latin American states only, nor that such a custom – even if it existed – was opposable to Peru ‘which, far from having by its attitude adhered to it, has, on the contrary, repudiated it’.¹²⁷

In contrast to the approach the ICJ later affirmed in its later decisions in *North Sea Continental Shelf* for general custom, the burden of proof establishing such regional custom lies on the state alleging it. Moreover, the Court insists on a ‘uniform’ (as opposed to ‘virtually uniform’) practice, and undertakes a separate examination of the opposability towards Peru.

This restrictive approach with respect to such ‘ideological’ custom persists until today.¹²⁸ Three considerations justify such a higher threshold for identifying regional custom *stricto sensu*.

For one, its scope *ratione personae* is not easily identifiable since the concept of a ‘region’ is rather vague. Conversely, the more definite the scope *ratione personae* or the region concerned can be defined, e.g., based on the membership in a regional institution dedicated to the implementation of a certain normative approach, the more likely it is for states within and beyond the region to accept the possibility of regional custom arising from such state practice.

Secondly, its scope *ratione materiae* is potentially generalizable, i.e., it creates the danger of normative ‘spill-over’ effects for states which wish to remain unbound by the rule. Only uniformity of practice within the region can contribute to the creation of mutual expectations and justify a duty to react for states if they wish to remain outside the scope of the rule.

Finally, the broad scope *ratione materiae* also increases the risk of conflict with rules under general international law and thus of fragmentation. The ICJ’s decision in the *Asylum* case indicates that the threshold for an alleged rule under regional custom that deviates from general international law is higher than for those regional rules which do not do so.

Accordingly, these considerations inform the relevant criteria that are to be examined with respect to the potential candidates of European custom mentioned above.

5.2.3 Local custom in Europe

Local custom protects expectations arising from the conduct of states concerning a clearly identifiable territory or geographic feature.

Examples in Europe include rights regarding the administration and use of rivers and other shared resources and have, in fact, featured in the jurisprudence of the PCIJ and ICJ. Both have been more willing to accept the existence of a rule under local custom as opposed to regional custom *stricto sensu*. Local custom in Europe was recognized as early as 1927 by the PCIJ in its Advisory Opinion regarding the powers of the European Commission of the Danube, where it held that those powers were not derived from the treaty in question

because that clause was not amongst those in force before 1914, but by usage having juridical force simply because it has grown up and been consistently applied with the unanimous consent of all the States concerned. . . . In this usage the Roumanian delegate tacitly but formally acquiesced, in the sense that a *modus vivendi* was observed on both sides according

¹²⁶See *Asylum*, *supra* note 113, at 276–7.

¹²⁷*Ibid.*, at 277–8.

¹²⁸*The Institution of Asylum, and its Recognition as a Human Right in the Inter-American Protection System*, Advisory Opinion of 30 May 2018, [2018] IACHR, Paras. 157–63; *Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System*, Advisory Opinion of 7 June 2021, [2021] IACHR, Paras. 96–9.

to which the sphere of action of the Commission in fact extended in all respects as far as above Braila.¹²⁹

Later, the ICJ readily accepted Norway's use of straight baselines 'imposed by the peculiar geography of the Norwegian coast [and] consolidated by a constant and sufficiently long practice' in its 1951 Judgment in the *Anglo-Norwegian Fisheries* case.¹³⁰

The ICJ's case law suggests that the test for identifying local custom differs from the standard established for regional custom *stricto sensu* in three aspects: firstly, the allocation of the burden of proof is either not explicitly put on the state alleging the local custom (as in the cases cited above) or coupled with a more lenient standard of proof.¹³¹ Secondly, the duration as opposed to the uniformity of the practice seems to play a more important role.¹³² Thirdly, acceptance of such practice is inferred from inaction or silence.¹³³ These differences have at times been explained by the entirely distinct legal nature of the rights in question, i.e. as tacit agreements, acquiescence, or as the application of general international law to an idiosyncratic geographic feature.¹³⁴ However, the different standard could also be explained by the different degree of concretization and, accordingly, a lower risk of normative 'spill-over effects' *vis-à-vis* third parties. Moreover, given that the subject-matter of local custom concerns the use of a specified territory, its potential for fragmentation of the international legal rules for the use of territory is barely existent.

5.2.4 European secondary rules

Regional secondary rules include rules regarding the interpretation, identification, application and enforcement of international law.

The analysis in Section 4 discussed several examples where regional institutions have occasionally adopted distinct concepts of treaty interpretation, such as the 'European consensus', applied rules of interpretation in an arguably different way than envisaged by the VCLT, or even postulated autonomous sources of regional law. To the extent that these approaches cannot be based on the law of treaties, they might be grounded in regional secondary rules. That secondary rules may diverge at the regional level has been implicitly confirmed by the ICJ in its 1951 *Advisory Opinion on Reservations to the Convention on Genocide*. When discussing the permissibility of reservations to the Genocide Convention, the Court observed that

there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States.¹³⁵

With respect to the Genocide Convention, the Court partly followed this practice but adopted a more restrictive view according to which a reserving state would only become a party to it if that reservation were compatible with its object and purpose of the treaty. Yet, it can be assumed that with respect to regional treaties nothing would have prevented Latin American states to continue

¹²⁹*European Commission of the Danube Between Galatz and Braila*, Advisory Opinion of 8 December 1927, PCIJ Rep Series B No 14, 6, at 17.

¹³⁰*Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, at 133, 138–9.

¹³¹See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, [2022] ICJ Rep. 266, at Paras. 218 and 221.

¹³²See *Fisheries (United Kingdom v. Norway)*, *supra* note 130, at 139; *Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 39–40.

¹³³See *Fisheries (United Kingdom v. Norway)*, *supra* note 130, 139; see *Right of Passage*, *supra* note 132, at 40.

¹³⁴See Crawford, *supra* note 120, at 248. But see K. Wolfke, *Custom in Present International Law* (1993), at 90.

¹³⁵*Advisory Opinion on Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, at 25.

following the even more flexible Pan-American approach. Indeed, the example of reservations illustrates a significant regional divergence. A third approach was taken by the ECtHR in 1995 in *Loizidou*, in which it found that reservations which restrict its jurisdiction are impermissible while the treaty continues to be binding on the Member State due to ‘the existence of a practice of unconditional acceptance under Articles 25 and 46’.¹³⁶

This case law suggests a high degree of regulatory autonomy with respect to regional secondary rules provided that these are applied only within the region and not towards third parties.¹³⁷ The rationale for such autonomy is that the risk of normative ‘spill-over’ effects on third parties is extremely low given that these are not party to the regional instrument. Moreover, the immediate effect on the freedom to act of Member States within the organization is relatively low given that such secondary rules do not impose directly enforceable rights and obligations on states but rather determine how such primary rules are to be determined. Accordingly, the standard for identifying such regional secondary rules is met if the alleged secondary rules in question has been consistently applied for a considerable period without meeting with protest by Member States.

5.3 Overcoming idiosyncrasy: Unwritten European rules as regional GPL

It is unclear whether a qualitative understanding of the term ‘general’, as it is effectively assumed in the context of custom, also allows for recognizing GPL with a regional scope of application as falling within the scope of Article 38(1)(c). In contrast to regional custom, the ICJ has so far not given any indication if it considers regional GPL to be covered by Article 38(1)(c). Since the ILC has begun its work on ‘General principles of law’ in 2018, ILC members have been taking different views as to whether Article 38(1)(c) covers regionally limited GPL,¹³⁸ resulting in a compromise in the form of a ‘without prejudice’ clause in 2025.¹³⁹

It is entirely possible to reject the proposition that regional principles of law fall within the scope of Article 38(1)(c) without depriving them of their legal force. After all, such principles may originate in another source, notably a regional treaty or custom. What then justifies recognizing them as a distinct third source of regional international law under Article 38(1)(c)? This article posits that a good case could be made if sufficient evidence exists that states recognize the existence of regional principles as a distinct source of international law (Section 5.3.1), and (Section 5.3.2) that their function within the respective regional legal order and the method for their identification (Section 5.3.3) is equivalent to that commonly associated with GPL under Article 38(1)(c). Recognizing certain regional principles as falling under Article 38(1)(c) can both rationalize their legal relevance in Europe and realize their full potential (Section 5.3.4).

5.3.1 Evidence for regional GPL

State practice indicates that the term ‘general’ used in this context does not necessarily imply that GPL need to be universally recognized. Rather, several regional treaties and judicial bodies refer to ‘general principles of law’ recognized by a regionally limited group of states.

For instance, Article 61 of the African Charter on Human and Peoples’ Rights lists ‘general principles of law recognized by African States’.¹⁴⁰ Article 29 of the 1997 Rules of Procedure by the

¹³⁶*Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, [1995] ECHR, at Paras. 83–5.

¹³⁷An example for regional practice on secondary rules that might produce spill-over effects and where thus a high threshold seems apposite: Venice Commission, Report on the Domestic Procedures of Ratification and Denunciation of International Treaties, Opinion No. 1045/2021 (Strasbourg, 25 March 2022), 287, available at [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2022\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)001-e).

¹³⁸M. de Andrade, ‘Regional Principles of Law in the Works of the International Law Commission’, (2021) 86 *Questions of International Law, Zoom-in* 23.

¹³⁹ILC Report, UN Doc. A/80/10 (2025), Ch. VI, Draft Conclusion 12, Paras. 262–6.

¹⁴⁰1981 African Charter on Human and Peoples’ Rights, 1520 UNTS 217.

Economic Court of the Commonwealth of Independent States provides that the Court applies ‘general principles of law recognized in member states of the Commonwealth’.¹⁴¹ Within the EU, Article 6(3) TEU ‘Fundamental rights ... as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’ and Article 340 TEU refers to ‘general principles common to the laws of the Member States’.

Furthermore, what has also been largely overlooked in the debate on regional GPL is that the CJEU (referring to ‘general principles of EU law’) and the ECtHR (relying on ‘common principles of European constitutional heritage’) are not the only regional courts that rely on such principles. Perhaps the most compelling example for regional GPL stems from a non-European court, namely the CARICOM court, which in several of its decisions referred to ‘general principles of law recognized by the Member States of the Community’. The Court derived these principles through a comparative analysis of the legal orders of the Member States and even explicitly equated such principles with Article 38(1)(c).¹⁴² The CARICOM court’s jurisprudence also underlines that reliance of principles of law with a regional scope of application is not limited to the context of human rights protection, but is truly general *ratione materiae*, including procedural principles of law, such as the principle of judicial review and the right to grant interim relief.

Beyond the procedural context, Judge Yusuf characterized the ‘OAU/AU principle’ of the intangibility of borders as ‘specific to the African continent where it is considered as part of the public law of Africa applicable to all African States’ implying its status as a regional principle of law.¹⁴³ Therefore, state practice beyond the European region confirms that ‘general’ in Article 38(1)(c) does not require a universal recognition of a GPL, but rather suggests a regulatory need for such GPL at the regional level across various subject-matters.

5.3.2 Function of regional GPL

The principal function of GPL in the sense of Article 38(1)(c) consists in the prevention of a *non liquet*.¹⁴⁴ Yet, the need to avoid such a *non liquet* is not limited to the universal level. It arises in every legal order that has achieved a certain degree of systematicity or maturity, be it at the universal or at the regional level. This is made explicit in Article 217(2) of the 2001 Revised Treaty of Chaguaramas establishing CARICOM, which states that ‘[t]he Court may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law’. The case law of the ECtHR further indicates that the Court refers to such regional GPL to safeguard legitimate expectations in the protection afforded by law within that regional legal space when referring to principles arising from the ‘common heritage of political traditions, ideals, freedom and the rule of law’ as an unwritten limitation of Member States’ freedom to act, for example in cases concerning the extradition of persons, exceptions to the principle of non-retroactivity, or the adoption of electoral systems.¹⁴⁵

Therefore, like regional custom, which also responds to a regulatory need existent both at the universal and at the regional level, it does not make sense to interpret the term ‘general’ or even ‘recognized by [civilised] nations’ as limiting that source of law to the universal level.

¹⁴¹G. Danilenko, ‘The Economic Court of the Commonwealth of Independent States’, (1999) 31 *New York University Journal of International Law and Politics* 893, at 910.

¹⁴²*Trinidad Cement Limited v. Caribbean Community*, Judgment of 5 February 2009, [2009] CCJ 2 (OJ), at 41; *Trinidad Cement Limited and Arawak Cement Limited v. State of Barbados*, Ruling of 17 July 2018, [2018] CCJ 1 (OJ) 1, para. 25. These decisions were included in the fourth report of the ILC Special Rapporteur on General Principles of Law in 2025 (ILC, ‘Fourth report on General Principles of Law’ (2025) UN Doc A/CN.4/785, para. 60).

¹⁴³*Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44 (Judge Yusuf, Separate Opinion), at 134–48.

¹⁴⁴See ILC, *supra* note 99, Draft Conclusion 10(2).

¹⁴⁵See *Russian Conservative Party of Entrepreneurs and others v. Russia*, Judgment of 11 January 2007, [2007] ECHR, Para. 70; *Ilaşcu and others v. Moldova and Russia*, Judgment of 8 July 2004, [2004] ECHR, Para. 317; *K.H.W. v. Germany*, Judgment of 22 March 2001, [2001] ECHR, Para. 86.

5.3.3 Method to identify regional GPL

Regional principles have been identified by judicial bodies on the basis of a comparative analysis of the domestic law of the Member States within a certain region and an assessment if a principle is compatible with the legal framework at the regional level.

A good example is offered by the CARICOM court, according to which such a regional GPL exists '[i]f the general principle is widely accepted throughout the Community and relevant'.¹⁴⁶ Concretely applied in a later case with respect to the scope of the right to request interim relief, the court stated, in a first step, that 'it is not necessary for the principles to be expressed identically in all Member States; it is sufficient if they are widely accepted'. It eventually found that this was not the case with respect to interim relief.¹⁴⁷ With respect to the second step, it stated that 'whilst Public International Law on interim/provisional measures is relevant under the treaty mandate for this Court . . . the situation under the RTC [Revised Treaty of Chaguaramas] is fundamentally and dramatically different in several relevant respects from that under general International Law' and thus did not consider it 'relevant'.¹⁴⁸ As discussed in Section 4, a similar two-step exercise is undertaken by the CJEU that compares the domestic legal orders of Member States before considering the extent to which a principle is compatible at the EU level.¹⁴⁹ Similarly, the ECtHR undertakes a comprehensive comparative analysis when identifying 'common principles of European constitutions' referring to the work by the Venice Commission to this effect before implicitly confirming their application at the regional level due to the individual right to free elections guaranteed under Article 3 of Protocol No. 1 to the Convention.¹⁵⁰

This method of identification corresponds to the one largely uncontroversial method for identifying GPL proposed by the ILC in Draft Conclusion 4 on 'General principles of law' adopted on second reading that proposes a 'two-step analysis' for the identification of GPL derived from national legal systems;¹⁵¹ a method that is distinct both from the identification of custom and treaty interpretation.

5.3.4 Practical relevance of European GPL

Recognizing certain European principles as falling under Article 38(1)(c) ICJ Statute, provided that they meet the requirements set out above, would have added legal value in two respects.

For one, it allows for greater normative differentiation. In times of withdrawal from regional treaties, the identification of a minimum standard of constitutional guarantees common to all legal orders within a given regional community, notably with respect to the principle of democracy or the rule of law, that is regionally, but not universally shared, has become even more relevant. Beyond the area of constitutional law, principles such as the polluter-pays-principle find recognition in Europe yet not universally, as has recently emerged in the ICJ advisory proceedings on *Obligations of States in respect of Climate Change*.¹⁵² Similarly, the content of some principles, such as the precautionary principle, may differ across regions.

Secondly, the variation in the existence and content of certain principles across legal systems presents an obstacle to their application in judicial proceedings. However, if these principles are

¹⁴⁶See *TCL v. Caribbean Community*, *supra* note 142, at 41.

¹⁴⁷See *TCL v. State of Barbados*, *supra* note 142, Para. 25.

¹⁴⁸*Ibid.*, at Para. 26.

¹⁴⁹See, e.g., *Case C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970, EU:C:1970:114, Para. 4.

¹⁵⁰See *Davydov v. Russia*, *supra* note 22, Paras. 196 and 285.

¹⁵¹See ILC, 'General principles of law: texts and titles of the draft conclusions adopted by the Drafting Committee on second reading' (2025) UN Doc A/CN.4/L.1018, Conclusion 4.

¹⁵²See, e.g., *Case Concerning Obligations of States in Respect of Climate Change*, Written Statement of the French Republic of 22 March 2024, at 245–50, available at www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-29-00-en.pdf; Written Comments of the United States of America of 15 August 2024, at 4.33, available at www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-09-00-en.pdf.

recognized as regional GPL, domestic, regional, and international courts could apply them in cases involving states from the same region. By subjecting such principles to the requirements set out in Article 38(1)(c), their legal effect can be rationalized, providing more legal certainty for both states subject to these principles and third states.

5.4. The transformation of Eurocentric international law: Three proposals

The preceding analysis showed that the problem with unwritten European rules is not so much their relevance in practice. The problem is rather that the legal weight attributed to them is not explained based on a common set of secondary rules. The risks arising from this approach, notably those of exceptionalism and normative impositions, could be mitigated by making the recognition of unwritten European rules as international law conditional on their quality as unwritten regional international law. Three proposals are made regarding how this could be put into practice.

First, the ILC could engage more in-depth with distinct regional sources and rules of interpretation. It is doubtful whether the problem of regional fragmentation is avoided simply by postulating high thresholds, restrictive criteria or ‘without prejudice’ clauses for unwritten regional law. Instead, the Commission should develop clear criteria which demarcate the permissible range of regional idiosyncrasy. These criteria would provide guidance as to which regional practices can be accommodated within the common framework of secondary rules.

Second, regional bodies that apply distinct secondary rules should carefully explain their approach based on the ‘general’ practice of states within the European region as opposed to merely referring to values or to the practice of an unrepresentative group of states. To the extent that these regional institutions claim to rely on distinct regional sources, they should consider doing so in a way that can be translated by reference to (universal) secondary rules. These secondary rules, as they are reflected in the ICJ Statute and in the VCLT, arguably tolerate a wide range of idiosyncrasy. To help ‘measuring’ the permissible range of regional idiosyncrasy, regional institutions should contribute their views and practices pursuant to the procedural avenues available for consideration by the ILC and the ICJ.

Finally, should states and regional IOs invoke unwritten European law in support of their legal claim? This arguably depends on the non-generalizability of the subject matter. The more the applicability of the rule in question is limited to the region in question, the more likely states within and outside that region will be inclined to accept the validity of the unwritten regional rule. The reason for this is simple: when an emerging rule is closely tied to regional specificities, such as geographic features, a shared political or constitutional identity, or a common institutional framework, states within that region can reasonably be expected to recognize and respond to its emergence if they wish to avoid its binding effect. Third parties, in turn, do not need to fear ‘normative spill-over’ effects from a rule that is scarcely generalizable beyond the region and, in any event, distinguishable due to its close connection to regional specificities.

6. Conclusion

The persistence of eurocentrism in international law can, in part, be attributed to the continued reliance on unwritten European rules, both within and beyond the European region. Having defined this category of rules and examined their ambivalent role since the early nineteenth century, the article’s analysis of contemporary practice showed that such rules still shape international legal reasoning – often in subtle, invisible, and highly idiosyncratic ways. The risk inherent in such exceptionalist recourse to unwritten European law is evident. It creates normative impositions, imbalances, and incentives for free riders from other regions. Indeed, it is difficult to imagine how a credible critique – i.e., a critique that does not invite accusations of double standards – of normative exceptionalism practised in other regions can be sustained while at the same time claiming a special, yet undefined role for unwritten European rules. Therefore, their

claim to legal validity in international law should be conditional upon their status as unwritten regional international law, identified through a universally shared framework of secondary rules.

It is the shared responsibility of the ILC, states, and regional institutions to elaborate and cultivate such a set of common secondary rules of international law, which will allow unwritten regional law to develop its integrative effect while limiting its imperialist potential. As references to unwritten rules, purportedly grounded in values shared by a group of states, gain geopolitical traction,¹⁵³ the need to discharge this responsibility becomes increasingly acute.

¹⁵³J. Dugard, 'The Choice Before Us: International Law or a "Rules-Based International Order"?' (2023) 36 *Leiden Journal of International Law* 223.