

# Two Shades of Impunity? Introducing The General Principle of Balancing of Sovereign Interests in Admitting Illegally Obtained Evidence

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## ABSTRACT

From as early as the *Corfu Channel* case in 1949, debates have persisted over whether there is a general principle of law that could exclude illegally obtained evidence from being used in interstate proceedings. On one hand, the fullest submission of evidence is treated as a manifestation of equality in dispute resolution. The opposite approach argues that States constrain this freedom to present evidence by committing to respect international legal obligations, and thus illegally obtained evidence should become inadmissible. This paper argues that both of these polar approaches are flawed. The first approach of free reign in presenting evidence would regress the modern conception of limited sovereignty. The second approach of absolutely gatekeeping such evidence entirely dismisses a claimant State's interest in proving the other's illegalities. This paper makes the renewed case that rather than an absolute exclusion or inclusion, there is a requirement of 'balancing' competing interests in each such case. Instead of making futile attempts at reconciling municipal approaches on this point, it argues that this general principle has arisen from within the international legal system itself, drawing from recent discourse on general principles arising in this manner.

*Keywords: illegally obtained evidence, dispute resolution, general principles of law, balancing*

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## I. INTRODUCTION

Certain scholars have argued that illegally obtained evidence ('IOE') is inadmissible, that is, cannot be taken notice of in inter-State proceedings.<sup>1</sup> To this branch of the debate, allowing the use of IOE could grant a license for impunity such that it could encourage States to reap benefits from violating their international obligations.<sup>2</sup> This position typically emphasises that the modern conception of sovereignty cannot tolerate free reign and requires maximal respect for the international legal system.<sup>3</sup> Such logic demonstrates what Koskenniemi identifies as 'descending' forms of international legal argumentation. The central premise in this logic is that the will of the international 'community' must bind each State *equally*.<sup>4</sup> The contrasting position generally takes a two-fold stance. First, the concept of sovereign equality in dispute resolution in fact entitles States to freely and fully present their case.<sup>5</sup> Second, an automatic restriction on this entitlement cannot be presumed when evidence is illegally obtained.<sup>6</sup> This is since there is allegedly no restriction to that effect under the sources of law mentioned in article 38(1) of the ICJ Statute.<sup>7</sup> Much of this perspective is informed by what Koskenniemi characterises as 'ascending' argumentation, given its emphasis on sovereign freedoms.<sup>8</sup>

There is more nuance to Koskenniemi's thesis in that it could be possible to re-articulate either of these positions in ascending or descending forms.<sup>9</sup> The critical point is, however, in its usual articulation, the position favouring 'free reign' is seemingly *apologetic*, given its unconditional defence of the State engaging in illegal 'self-help'.<sup>10</sup> Therefore, it becomes vulnerable to the aforementioned criticisms of potentially granting impunity for violations of international law. Such impunity would arise especially for more powerful States that could envision committing illegalities with greater ease than others. In contrast, the position automatically excluding IOE appears *utopian*. This is considering not only the

<sup>1</sup> William Michael Reisman and Eric E. Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 *American Journal of International Law* 737, 749; Peter Tomka, 'Speech to the Sixth Committee of the General Assembly' (International Court of Justice 31 October 2014) <<https://www.icj-cij.org/public/files/press-releases/8/18398.pdf>> accessed 3 June 2022.

<sup>2</sup> Reisman and Freedman (n 1).

<sup>3</sup> On this conception of sovereignty, see generally John H. Jackson, 'Sovereignty – Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782.

<sup>4</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 59.

<sup>5</sup> See generally Anne Peters, 'International Dispute Settlement: A Network of Co-operational Duties' (2003) 14 *European Journal of International Law* 1.

<sup>6</sup> Restrictions on state actions cannot be presumed, see *Case of the SS 'Lotus' (France v Turkey)* (1927) PCIJ Rep Series A No 10.

<sup>7</sup> William Thomas Worster, 'The Effect of Leaked Information on the Rules of International Law' (2013) 28 *American University International Law Review* 443, 464.

<sup>8</sup> Koskenniemi (n 4).

<sup>9</sup> David Scott and Ukri Soirila, 'The Politics of the Moot Court' (2021) 32 *European Journal of International Law* 1079, 1087.

<sup>10</sup> Reisman and Freedman (n 1) 747.

grandeur in its narrativization of equality in an inherently unequal legal system,<sup>11</sup> but also its wholesale dismissal of any factors that could otherwise justify the use of IOE.<sup>12</sup> Ultimately, Koskenniemi's view is that, owing to these argumentative dichotomies between equality (utopia) and autonomy (free reign), international law is largely 'indeterminate'.<sup>13</sup> Thus, among other things, he proposes that international lawyers should reflect on their role as advancing particular theories of justice, as opposed to pure legal doctrine.<sup>14</sup> Yet for courts and tribunals, bodies which are responsible for articulating legal doctrine, indeterminacy is an unsuitable recourse. Thus, D'Aspremont retorts that the imagination that the law has *some* 'coherent logic' cannot be entirely abandoned.<sup>15</sup>

This paper seeks to advance a case that in its backdrop remains inspired by these perspectives when examining the question of admitting IOE. However, its position does not concede that an answer to this question is indeterminate. I present a new argument for the existence of a 'general principle of law' ('GPL') as per article 38(1)(c) of the ICJ Statute addressing the issue. This is a principle of 'balancing' competing sovereign interests on a case-by-case basis with regard to excluding evidence that is illegally obtained. While introducing this third position to the existing binary of scholarship, my contention is also that a principle of this nature is the most appropriate means to address contentions around IOE. A balancing approach would allow the inquiry to become context-driven and thus to acknowledge varying moral contestations between sovereign States in each case. Such potential permutations of distinct stakes cannot be foreseen by absolute exclusionary or inclusionary rules.

To establish this renewed principled case, this paper makes the following contributions. I argue in Section II that no GPL in this context can arise from the traditional route of 'transposition' from municipal legal systems. Instead, a balancing GPL has arguably arisen in an alternative route: from *within* the international legal system itself, a possibility that Special Rapporteur Vázquez-Bermúdez has recently affirmed.<sup>16</sup> In Section III, I elaborate on my arguments for a balancing GPL, visiting the pertinent jurisprudence of the ICJ. This analysis focuses on the cases traditionally invoked in debates concerning IOE as well as some cases thus far omitted from this dialogue. Examining the case law, I argue that the Court's approach does not support either an inclusionary or exclusionary rule and can potentially be read as supporting the balancing GPL. Thereafter, to empirically cement the balancing GPL, I discuss the jurisprudence of other international fora from various regimes in Section IV. I also discuss how these

<sup>11</sup> Scott and Soirila (n 9).

<sup>12</sup> On the variety of possible approaches, see generally Gamini Lakshman Peiris, 'The Admissibility of Evidence Obtained Illegally: A Comparative Analysis' (1981) 13 *Ottawa Law Review* 309.

<sup>13</sup> Koskenniemi (n 4) 60.

<sup>14</sup> Jean d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia revisited' (2006) 19 *Revue Québécoise de Droit International* 353, 356.

<sup>15</sup> *ibid* 355.

<sup>16</sup> International Law Commission, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez' (2020) UN Doc A/CN.4/741 ('Second Report on General Principles').

authorities could show the threshold for a GPL to arise internationally having been met. Finally, in Section V, I reflect on both the normative and practical merits and risks of this GPL with a focus on its implications for State sovereignty. Section VI concludes, recalling the primary arguments of this paper.

## II. THE DIVERSITY OF MUNICIPAL PRACTICES

As per article 38(1)(c) of the ICJ Statute, a principle should be ‘recognized’ by ‘civilized nations’ to become a GPL. To begin with, this phrase is mired with colonial legacies, given its implication that certain nations are *uncivilized*, supposedly those apart from ‘European and North Atlantic’ States.<sup>17</sup> To be clear, the colonial and imperial features of the international legal system have already been foregrounded, inter alia, in Third World scholarship.<sup>18</sup> It should therefore be no surprise that far too often in constructions of legal argument, the practices of some States are intuitively given more weight than others.<sup>19</sup> In an attempt to shift from this legacy, Special Rapporteur Vázquez-Bermúdez supports the growing reference to the phrase ‘community of nations’.<sup>20</sup> The aim behind this is not purely symbolic. Indeed, he proposes that when attempting to locate generalities in municipal practices, a *diverse* comparative study must be adopted to avoid hegemonizing the practices of a handful of states.<sup>21</sup> This caution is crucial for the present debate since some authors have taken for granted that there *is* sufficient generality in municipal practices for an exclusionary rule to arise.<sup>22</sup> Such an assertion cannot be sustained in view of the practices discussed hereafter.

According to Special Rapporteur Vázquez-Bermúdez, the comparative analysis need not account for the practices of *all* states, but must account for practices from various legal ‘families’ existing across different regions to ensure a ‘wide and representative’ survey.<sup>23</sup> In respect of IOE, there is a tendency to exaggerate the importance of the practices of certain Anglo-American (‘common’) or Continental (‘civil’) legal jurisdictions.<sup>24</sup> Adopting a representative survey would eliminate regional bias and account for any differing legal or moral values in legal families apart from civil and common systems.<sup>25</sup> Furthermore, it would allow

<sup>17</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3; see also, Separate Opinion of Judge Ammoun [1969] ICJ Rep 101, 132.

<sup>18</sup> See generally Bhupinder Singh Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3.

<sup>19</sup> George Rodrigo Bandeira Galindo and César Yip, ‘Customary International Law and the Third World: Do Not Step on the Grass’ (2017) 16 *Chinese Journal of International Law* 251.

<sup>20</sup> International Law Commission, ‘First Report on General Principles of Law by Marcelo Vázquez-Bermúdez’ (2019) UN Doc A/CN.4/732 (‘First Report on General Principles’)

<sup>21</sup> *ibid* 55.

<sup>22</sup> Rüdiger Wolfrum and Mirka Möldner, ‘International Courts and Tribunals, Evidence’ in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 60.

<sup>23</sup> Second Report on General Principles (n 16) 7.

<sup>24</sup> For study of this vast literature, see Dimitrios Giannouloupoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Bloomsbury 2019).

<sup>25</sup> Second Report on General Principles (n 16).

acknowledging heterogenous practices *within* the same legal family.<sup>26</sup> In that vein, Sara Fallah's recent research highlights stark differences in the municipal practices of a select sample of common and civil law states from all five United Nations (UN) regional groups.<sup>27</sup> From this sample, some states prefer automatic exclusionary rules, some support free admissibility, and yet others conduct some form of a balancing exercise.<sup>28</sup> Many states which exclude IOE often do so *only* for violations of specific legal norms like the prohibition on torture.<sup>29</sup> Added to this is the difference in positions states may take on the issue in the municipal and the international stages respectively. For instance, the United States (US) is considered the most well-known candidate for an automatic exclusionary rule on the municipal level.<sup>30</sup> Nonetheless, it refuted the existence of such a rule in inter-state exchanges in the *Avena* case<sup>31</sup> (discussed further in Section III).

To be clear, there is a notable set of municipal practice across the five UN regional groups supporting variants of a 'balancing' exercise. This exercise could involve, for instance, weighing the importance of the concerned evidence in resolving a particular dispute against the seriousness of the illegalities in its obtainment. Consider, as examples, the practices of South Africa<sup>32</sup> and Nigeria<sup>33</sup> (African Group), India<sup>34</sup> (Asia and the Pacific Group), Hungary<sup>35</sup> (Eastern European Group), Jamaica<sup>36</sup> (Latin American and Caribbean Group), alongside France<sup>37</sup> and Canada<sup>38</sup> (Western States and Others Group). Thus, it is worth asking if a balancing principle could be extrapolated from all the foregoing domestic practices. Perhaps one could account for the instances supporting balancing directly. Supplementing this set, one could argue that a centrist position could be excavated in harmonising the remaining polar exclusionary or inclusionary approaches from other states. Yet the ICJ has stated that it cannot modify municipal practices as presented to it when assessing GPLs and can only

<sup>26</sup> Sué González Hauck, 'All Nations Must be Considered to be Civilized' (*Verfassungsblog*, 20 July 2020) <<https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/>> accessed 3 June 2022.

<sup>27</sup> For a discussion around the five-fold division, see Ingo Winkelmann, *A Concise Encyclopedia of the United Nations* (2nd edn, Brill 2010) 592.

<sup>28</sup> Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals' (2020) 19 *The Law and Practice of International Courts and Tribunals* 147.

<sup>29</sup> Center for Justice and International Law, *Torture in International Law: A Guide to Jurisprudence* (Association for the Prevention of Torture and Center for Justice and International Law 2008) 69.

<sup>30</sup> See generally Robert M Pilder, 'The Fruit of the Poisonous Tree Revisited and Shepardized' (1968) 53 *California Law Review* 579.

<sup>31</sup> Counter-Memorial of the United States of America in *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Counter-Memorial vol I, 3 November 2003) para 8.27 <<https://www.icj-cij.org/public/files/case-related/128/10837.pdf>> accessed 29 January 2023.

<sup>32</sup> *S v Tandava and Others* (538/06) (2007) ZASCA 34.

<sup>33</sup> *State v Musa Sadau* (1968) 1 All NLR 124; *State v Musa Sadau* [1968] NMLR 208.

<sup>34</sup> Paras Marya, 'A Relook at the Admissibility of Illegally or Improperly Obtained Evidence' (2019) 8 *National Law Institute University Law Review* 213.

<sup>35</sup> Act CXXX of 2016 on the Code of Civil Procedure (as in force on 1 April 2020), s 269.

<sup>36</sup> *Herman King v The Queen* (1968) 10 JLR 438.

<sup>37</sup> Giannouloupoulos (n 24) 89.

<sup>38</sup> *R v Grant* (2009) SCC 32.

apply any general consensus visible between available practices.<sup>39</sup> Therefore, any effort to disguise these municipal practices as reflecting a generality would be disingenuous. Indeed, even in a panel with speakers from only four states, the only consensus that could be reached regarding IOE was that there *was* no consensus.<sup>40</sup> This aside, the question of whether the practices on balancing referenced earlier differ within states from the same legal families requires further research. Another issue that complicates the comparative survey further is the position of some authors that domestic practices concerning ‘criminal’ proceedings are immaterial and should not be considered.<sup>41</sup> This view assumes that inter-state proceedings tend to resemble ‘civil’ proceedings more closely—though such assertions are also debatable.<sup>42</sup>

Consequently, it can at least be concluded that it is extremely onerous to attempt to argue that a GPL concerning IOE has emerged from the municipal level so to be transposed to the international legal system. In the subsequent parts of this paper, I discuss the case for a balancing GPL having instead arisen *within* the international legal system itself. Primarily, my analysis will attempt to excavate the principle from the jurisprudence of various international courts and tribunals in Section IV. Before this, I interrogate the case law of the ICJ, refuting possible claims of inclusionary or exclusionary rules arising from its decisions. Simultaneously, I show how reading these decisions contextually can indicate a support for, or at least compatibility with, the balancing principle.

### III. THE INTERNATIONAL COURT OF JUSTICE

Needless to mention, despite the emergence of many other international fora, the decisions of the ICJ continue to have the highest legitimacy and influence in shaping international legal discourse.<sup>43</sup> In fact, most scholars debating the admissibility of IOE focus on offering conflicting understandings of the ICJ’s earliest case—the 1949 *Corfu Channel* Merits decision.<sup>44</sup> There, the IOE was collected by the UK through ‘Operation Retail’, a unilateral minesweeping operation in Albanian waters. The UK collected this IOE in hopes of supporting its argument that Albania violated its obligation to notify the UK of the presence

<sup>39</sup> *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 38.

<sup>40</sup> UAA Ukraine Arbitration Association, ‘UAA Conference.Session 4.Use of Illegally Obtained Documents or Materials as Evidence in Arbitration’ (*YouTube*, 4 June 2021) <[www.youtube.com/watch?v=ybiCagsQaFk&t=3001s&ab\\_channel=UAAUkrainianArbitrationAssociation](http://www.youtube.com/watch?v=ybiCagsQaFk&t=3001s&ab_channel=UAAUkrainianArbitrationAssociation)> accessed 3 June 2022.

<sup>41</sup> Hugh Thirlway, ‘Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *American Journal of International Law* 622, 639.

<sup>42</sup> For a discussion, see Stacie Strong, ‘General Principles of Procedural Law and Procedural Jus Cogens’ (2018) 122 *Penn State Law Review* 347.

<sup>43</sup> Wolfgang Alschner and Damien Charlotin, ‘The Growing Complexity of the International Court of Justice’s Self-Citation Network’ (2018) 29 *European Journal of International Law* 83.

<sup>44</sup> Reisman and Freedman (n 1); Thirlway (n 41).

of mines in these waters.<sup>45</sup> In a judgment apparently supporting those favouring free admissibility, the Court did not declare the IOE inadmissible. Much later in 2014, in its provisional measures order in the *Timor-Leste v Australia* case, the Court dealt with a situation where Australia had seized attorney-client communications from Timor-Leste's counsels (pertaining to their pending maritime arbitration).<sup>46</sup> Here, the Court ordered Australia to keep these documents sealed and not to use it to Timor-Leste's disadvantage. Importantly, the case never reached the Merits stage and was settled privately.<sup>47</sup> In an order that seemingly supports the proponents of *excluding* IOE, some authors have lamented the missed opportunity for the Court to definitively address the issue of the admissibility of IOE.<sup>48</sup>

My analysis of both these cases hereafter will problematise this discourse and highlight the difficulties in extrapolating any rule favouring a wholesale inclusion or exclusion of IOE. Simultaneously, I will discuss the importance of accounting for their unique factual contexts so as to support a third vantage point, that of 'balancing' sovereign interests in admitting IOE. I will also focus on the ICJ's observations in the *Avena* case, which has astonishingly been hidden in plain sight in the discourse concerning IOE thus far. This is despite the fact that it is the *only* ICJ dispute where a state (Mexico) argued that the exclusion of IOE is a GPL.<sup>49</sup> I also discuss the Court's remarks in other contentions surrounding matters of evidence that highlight support for balancing when applying its discretion.

#### A. *CORFU CHANNEL* 1949 MERITS

In *Corfu Channel*, the ICJ held that the UK's minesweeping in Albanian territorial waters was in violation of Albanian sovereignty.<sup>50</sup> The UK sought to defend its actions by arguing that the minesweeping aimed at securing evidence that would be material to the Court's international adjudication of their dispute.<sup>51</sup> Responding, the Court in a provocative paragraph held that, after the World War II era, such a policy of 'self-help' cannot be sustained in international law since it could be abused by the 'most powerful States'.<sup>52</sup> This imagination strikes to the root of Koskenniemi's 'utopian' form of argumentation. In sum, the UK's illegal actions did not become justified on the ground that such actions were in the pursuit of gaining important evidence. The proponents of excluding IOE attempt

<sup>45</sup> *Corfu Channel Case (The United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 34–35.

<sup>46</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data, (Timor-Leste v Australia)* (Request for the Indication of Provisional Measures: Order) [2014] ICJ Rep 147, paras 27–28.

<sup>47</sup> Siyuan Chen, 'Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence' (2015) 13 *International Commentary on Evidence* 1, 24.

<sup>48</sup> Fallah (n 28) 165.

<sup>49</sup> Memorial of Mexico, '*Case Concerning Avena And Other Mexican Nationals (Mexico v United States of America)*' (20 June 2003), para 374 <<https://www.icj-cij.org/public/files/case-related/128/8272.pdf>> accessed 29 January 2023.

<sup>50</sup> *Corfu Channel Case* (n 45) 33.

<sup>51</sup> *ibid* 34.

<sup>52</sup> *ibid* 35.

to expand this dictum to argue that, by *implication*, the use of IOE must also be prohibited as it carries laden potential for abuse.<sup>53</sup>

The opponents of this view respond that, despite these strong remarks, the Court actually *retained* the IOE on its case record, going against the suggestion of any automatic exclusion of IOE.<sup>54</sup> However, the fact is that Albania never formally raised an objection to the admissibility of the IOE.<sup>55</sup> For that reason, perhaps the most sensible perspective is that *Corfu Channel* is irrelevant on the question of IOE, as it was never in issue in the case.<sup>56</sup> To argue otherwise, one would have to establish that the Court had the power to consider objections to the admissibility of evidence *proprio motu*—that is, on its own motion<sup>57</sup>—even in the absence of an Albanian objection. The argument would then be that, were there an arguable case for the existence of an exclusionary GPL, the Court *would* have chosen to address its merit as a matter of judicial responsibility. For example, the Court in *Nicaragua* undertook to examine whether the prohibition on inter-state force formed part of customary law, even though neither state had contested this point.<sup>58</sup>

However, this position would be fraught with two difficulties. *First*, there is no precedent for a *proprio motu* deliberation of this nature being exercised by the Court. Even in *Nicaragua* or other cases where the admissibility of *claims* was examined *proprio motu*,<sup>59</sup> such examinations connected directly to the prayers that were explicitly sought by the parties. Indeed, in *Nicaragua*, the Court was specifically asked to find that the use of force prohibition had been violated, necessitating its inquiry on its customary status.<sup>60</sup> *Second*, inspired by the logic behind the principles of acquiescence or waiver of rights,<sup>61</sup> which focus on the ‘failure to react’ when a state ought to,<sup>62</sup> one could argue that Albania’s failure to object perhaps indicated an implied consent to the use of the IOE. The merits of this aside, it should be clear that reliance on *Corfu Channel* cannot support either polar approach concerning IOE.

Yet if at all *Corfu Channel* is to have any bearing on this dialogue, a holistic reading of the judgment would reveal that it best supports a ‘balancing’ approach. Consider that the ICJ noted that it could have ‘liberal recourse’ to the UK’s

<sup>53</sup> Reisman and Freedman (n 1); Tomka (n 1).

<sup>54</sup> Peters (n 5); Worster (n 7).

<sup>55</sup> Judge Tomka and Vincent Joel Proulx, ‘The Evidentiary Practice of the World Court’ in Juan Carlos Sainz-Borgo (ed) *Liber Amicorum: In Honour of a Modern Renaissance Man: His Excellency Gudmundur Eiríksson* (Lexis Nexis 2017) 361.

<sup>56</sup> Thirlway (n 41) 635.

<sup>57</sup> See generally Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer 2014) 168.

<sup>58</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 184.

<sup>59</sup> *Nuclear Tests (Australia v France)* (Admissibility) [1974] ICJ Rep 253; *Nuclear Tests Case (New Zealand v France)* (Admissibility) [1973] ICJ 457.

<sup>60</sup> *Nicaragua* (n 58) para 15.

<sup>61</sup> See generally Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ (2010) 10 *Virginia Journal of International Law* 1, 2.

<sup>62</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 20.

circumstantial evidence, including the IOE, since any supposed direct evidence proving the UK's claims would be under Albania's 'exclusive' control.<sup>63</sup> Consider also that, despite this flexibility, the Court held that in using such evidence the UK would have to prove its allegations beyond 'reasonable doubt'<sup>64</sup> so as to ensure that Albania's interests were not prejudiced.<sup>65</sup> Subsequent ICJ case-law has confirmed that the principle of sovereign equality must be respected in dispute resolution.<sup>66</sup> Seen in this vein, one can appreciate the Court's acknowledgement of the *unequal* placement of the UK as regards its incapacity to collect direct evidence. This is alongside the Court's setting a high standard of proof to ensure that Albania is also not treated *unequally*. This approach is an attempt to balance the sovereign equality of the UK and Albania in their respective evidentiary interests.

Furthermore, Albania had asked the Court<sup>67</sup> to grant the relief of satisfaction,<sup>68</sup> i.e. a declaration that Operation Retail violated international law, which the Court heeded.<sup>69</sup> Thus, by in fact imposing the 'sanction' of satisfaction on the UK,<sup>70</sup> the Court did not give any legitimacy to the IOE submitted before it. Without this sanction, the Court would arguably have granted the UK impunity. Yet if the Court had excluded the IOE altogether, it would have treated the UK's illegalities as a *smokescreen* to conceal Albania's illegalities and thus granted Albania impunity. The ICJ's declaration of *both* States having distinctly violated international law struck the appropriate balance in the case and was consistent with the purposes of the law on state responsibility, which is to ensure 'maximal compliance with international law'.<sup>71</sup>

## B. THE *AVENA* 2004 JUDGMENT

Surprisingly, the only judgment where the ICJ was *in fact* explicitly asked to pronounce on the issue of an exclusionary GPL finds no mention in mainstream literature on the topic.<sup>72</sup> In *Avena*, the Court upheld Mexico's claim that the US had violated the Vienna Convention on Consular Relations ('VCCR'). This was because of the latter's two-fold failure to notify Mexico of the ongoing criminal trials of Mexican nationals and to facilitate consular access for them.<sup>73</sup> Citing the

<sup>63</sup> *Corfu Channel Case* (n 45) 18.

<sup>64</sup> *ibid.*

<sup>65</sup> Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chicago Journal of International Law* 123, 129.

<sup>66</sup> *Nicaragua* (n 58) para 31; *Timor-Leste* (n 46) paras 27–28.

<sup>67</sup> *Corfu Channel Case* (n 45) 6.

<sup>68</sup> UNGA, 'Responsibility of States for Internationally Wrongful Acts' Res 56/83 (2002) Annex Article 37 (ARSIWA).

<sup>69</sup> *Corfu Channel Case* (n 45) 35.

<sup>70</sup> Thirlway (n 41), 635.

<sup>71</sup> Abhijeet Shrivastava and Rudraksh Lakra, 'Strolling by The River Meuse: A Definitive Case Against the Clean Hands Doctrine' (*Opinio Juris*, 22 April 2022) <<https://opiniojuris.org/2022/04/22/strolling-by-the-river-meuse-a-definitive-case-against-the-clean-hands-doctrine/>> accessed 3 June 2022.

<sup>72</sup> See generally Reisman and Freedman (n 1); Tomka (n 1); Thirlway (n 41); Peters (n 5); Worster (n 7).

<sup>73</sup> *Avena and Other Mexican Nationals (Mexico v United States)* (Merits) [2004] ICJ Rep 12.

municipal practices of several ‘civil’ and ‘common’ law states, Mexico argued that illegally obtained confessions become inadmissible as evidence in criminal trials as a matter of a GPL.<sup>74</sup> Much of this argument was informed by Mexico’s perspective that the use of such confessions automatically *prejudiced* the trial against its accused nationals, making these trials unfair.<sup>75</sup> The US responded that Mexico exaggerated the extent of the generality of such practice and that, in fact, even in Mexico’s own domestic legal system, there was no rule of *automatic* exclusion of IOE.<sup>76</sup>

Despite holding that the US violated the VCCR in collecting the confessions, the Court held that their inadmissibility would not be an automatic result of such violations.<sup>77</sup> It held that the ‘legal consequences’ of such violations had been ‘sufficiently discussed’ in relation to Mexico’s previous prayers.<sup>78</sup> Against those prayers, the Court had held that the US need only provide a ‘review and reconsideration’ of the trials that occurred in breach of the VCCR.<sup>79</sup> Furthermore, without further explanation, the Court held that the question of whether to exclude the IOE would have to be assessed ‘under the concrete circumstances of each case’ by the appropriate US courts considering such review.<sup>80</sup> These domestic courts were tasked with finding whether there was a causal nexus between the illegalities (i.e. the violations of the VCCR) and the convictions and penalties finally imposed on Mexican nationals in the trials.<sup>81</sup>

Unlike *Corfu Channel*, there is no need here for a debate of whether the Court could consider exclusionary rules proprio motu given Mexico’s explicit submissions on the matter. Given this, the judgment at least goes against the proposal that *any* violation of international law would make corresponding IOE inadmissible automatically. Arguably, the observation that this question is more fit for US courts to decide in each case supports a ‘balancing’ approach, since the Court impliedly recognises that an examination of the alleged prejudice caused to the trial would have to be context-driven. What is unfortunate is the Court’s simultaneous remark that it did not consider it ‘necessary to enter into...the merits’ of Mexico’s contention regarding an exclusionary GPL under article 38(1)(c).<sup>82</sup> At best, this is constructive ambiguity<sup>83</sup> since, by enabling US courts to potentially admit the IOE, the Court *is* in effect negating the alleged GPL advanced by Mexico (a GPL that, if existent, would have precluded US Courts from admitting the confessions). At worst, this is an abdication of judicial responsibility without reason-

<sup>74</sup> Memorial of Mexico in *Avena* (n 73), para 374.

<sup>75</sup> *Avena* (n 73) para 124.

<sup>76</sup> United States Counter-Memorial (n 31) para 8.27.

<sup>77</sup> *Avena* (n 73) paras 126–127.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid* para 122.

<sup>82</sup> *ibid* para 127.

<sup>83</sup> See generally Valerie Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ (2014) 16 *International Feminist Journal of Politics* 563.

giving. If at all some logic *has* to be ascribed to the judgment, however, then it supports neither the apologist position of free reign nor the utopian suggestion of automatic exclusion but a context-driven balancing exercise.

### C. THE TIMOR-LESTE 2004 ORDER

As mentioned earlier, this case involved the seizure of Timor-Leste's attorney-client communications by Australia, including materials concerning their pending arbitration.<sup>84</sup> Concerned not only by the divulgence of confidential discussions as to its future positions in the arbitration but also the potential use of such materials in their pending delimitation arbitration, Timor-Leste argued that the attorney-client privilege is linked to sovereign equality.<sup>85</sup> This was because no state, *especially* less powerful ones, could present its cases meaningfully if left in the constant fear of external intervention in its legal preparation.<sup>86</sup> At the stage of provisional measures, the ICJ need not definitively examine the merits of a claim; finding the claim 'plausible' suffices if other requirements for the grant of such measures are met.<sup>87</sup> Accordingly, the Court found it 'plausible' that Timor-Leste's alleged right to confidential communications 'might be derived from...sovereign equality' and ordered Australia to seal the documents until the resolution of the ICJ dispute.<sup>88</sup> Subsequently, the case was withdrawn owing to a private settlement.

Let us set aside the fact that the order only ascribes *plausibility* to Timor-Leste's claim. In their best case, proponents of excluding IOE might extrapolate from the order that if a state uses IOE against another, especially when obtained in violation of the latter's own rights, it will automatically become inadmissible. Yet I argue that this would take for granted that *any* use of IOE would necessarily prejudice the equality of a state in proceedings, which is unsupported by the *Timor-Leste* order. Indeed, the Court's remarks appear highly tailored to the exceptional instance of attorney-client privilege breaches in that case, especially considering that the IOE seized appertained to a pending dispute between the states. Thus, to reconcile the order with the balancing approach, it is possible to consider that the preclusion of the IOE was appropriate in the context of the case. This is given that Australia's conduct prejudiced a protection so *serious* that Timor-Leste's equality as a sovereign state was disturbed. Furthermore, Australia's formal position before the ICJ was that it *never* intended to use the documents as crucial evidence in the arbitration in the first place. Instead, Australia submitted that the materials were necessary for domestic prosecutions of Timor-Leste's counsels for certain

<sup>84</sup> *Timor-Leste* (n 46) para 30.

<sup>85</sup> Memorial of the Democratic Republic of Timor-Leste in *Questions Relating to The Seizure and Detention of Certain Documents And Data (Timor-Leste v Australia)* (28 April 2014) para 6.5 <<https://www.icj-cij.org/public/files/case-related/156/18698.pdf>> accessed 29 January 2023.

<sup>86</sup> *ibid.*

<sup>87</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Request for the Indication of Provisional Measures: Order) [2011] ICJ Rep 6, para 53.

<sup>88</sup> *Timor-Leste* (n 46) paras 27 and 55.

offences.<sup>89</sup> One is therefore left wondering if the Court might have responded differently had Australia formally sought to defend its sovereign right to present evidence. In the least, it is clear that the order does not offer clear support to the position of automatically excluding IOE.

#### D. OTHER ICJ CASE-LAW

There are some important but scattered observations across other cases heard by the ICJ that reflect a broad approach of balancing sovereign interests in evidentiary questions. In the *Bosnian Genocide* case,<sup>90</sup> Bosnia and Herzegovina highlighted that Serbia and Montenegro was relying on redacted versions of military documents in arguing that the genocide was not attributable to it.<sup>91</sup> To this end, the former argued that the latter must be instructed by the ICJ to produce their ‘unredacted’ versions because otherwise the former would be placed unequally against the latter.<sup>92</sup> Not commenting on this facet of equality, the Court noted that the Applicant already had ‘extensive documentation and other evidence’ of which it made ‘ample use’, especially the records of the International Criminal Tribunal for the Former Yugoslavia.<sup>93</sup> Without further explanation, the Court rejected the Applicant’s requests for the unredacted documentation.

This appears to be informed by considerations of balancing in that, because of availability of extensive alternative evidence, the Applicant was *not* placed unequally against the Respondent in the first place. This suggestion can, however, be problematised since the Court later rejected<sup>94</sup> the Applicant’s claim of attribution on the ground that there was *insufficient* evidence to satisfy the stringent<sup>95</sup> test of ‘effective control’. Perhaps, the balance ought to have been struck in favour of introducing further evidence. Indeed, the Court had further held that it would apply a strict evidentiary scrutiny given the ‘exceptional’ nature

<sup>89</sup> Counter-Memorial of Australia in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Counter-Memorial vol I, 28 July 2014) para 3.47 <<https://www.icj-cij.org/public/files/case-related/156/18702.pdf>> accessed 29 January 2023.

<sup>90</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

<sup>91</sup> *ibid* para 44.

<sup>92</sup> *ibid* para 205.

<sup>93</sup> *ibid* para 206.

<sup>94</sup> *ibid* paras 413–15.

<sup>95</sup> On the stringency of this test, see Antonia Cassese, ‘The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649. Indeed, the difficulties in proving attribution of conduct has led to scholarship making assumptions of attribution without analysis or searching for norms that could attract responsibility for conduct in indirect ways. See Abhijeet Shrivastava and Rudraksh Lakra, ‘Revisiting Due Diligence in Cyberspace: Crafting International Law’s Arsenal Against Transboundary Botnets’ (2022) 20 *International Journal of Law and Information Technology* 1; also see Aarohi Chaudhari, ‘The Red Echo Cyberattack: Locating India’s Recourse in International Law’ (*Jindal Forum for International and Economic Laws*, July 30 2021), <<https://jindalforinteconlaws.in/2021/07/30/the-red-echo-cyberattack-locating-indias-recourse-in-international-law-aarohi-chaudhuri/>> accessed 9 June 2022.

of the charge of genocide.<sup>96</sup> This aside, in the case of non-appearance of a party such as in *Nicaragua*<sup>97</sup> or when parties sought to introduce further evidence after stipulated deadlines,<sup>98</sup> the Court has generally recalled the need for providing a ‘fair and equal opportunity’ to opposing states in evidentiary matters. Some authors also argue that the *Tehran Hostages* case<sup>99</sup> is relevant in respect of IOE as the Court ordered the return of US’ diplomatic archives from Iran.<sup>100</sup> However, the fact is that Iran never formally indicated an intention to use such documents as evidence in an inter-state dispute.<sup>101</sup> Thus, the case is irrelevant in assessing IOE perhaps apart from the observations of the Court about the unique significance of diplomatic law which makes its violations arguably particularly serious in a hypothetical balancing exercise.<sup>102</sup>

From all this, it can be concluded that the ICJ’s jurisprudence does not indicate a preference for either an apologist stance of free reign of producing IOE or a utopian vision of gatekeeping IOE altogether. If a coherent approach is to be derived from ICJ case law, it would be of balancing the interests of competing states to meaningfully respect sovereign equality in dispute resolution. Some emergent factors that would be relevant for the inquiry on admissibility are the seriousness of the allegations that the evidence could prove (against which, on balance, a higher standard of proof would be raised), the existing availability of alternative evidence (which goes to the value of the IOE to the case) and, by implication, the possibility of securing alternative evidence by legal means. These factors, among others, would show whether the interest in admitting the evidence outweighs competing interests in excluding it. In the next Section of this paper, I will now discuss the approaches of other international fora in the context of IOE, which upon close inspection support the balancing GPL. I also connect the findings from these studies to the threshold of a GPL arising within the international legal system as proposed by Special Rapporteur Vázquez-Bermúdez.

#### IV. GPL ARISING WITHIN THE INTERNATIONAL LEGAL SYSTEM

The Special Rapporteur has suggested three routes through which a GPL can arise from within the international legal system, while also acknowledging that these routes are not necessarily mutually exclusive.<sup>103</sup> The first is through the ‘wide

<sup>96</sup> *Bosnian Genocide* (n 90) para 208.

<sup>97</sup> *Nicaragua* (n 58) paras 31 and 59.

<sup>98</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep 168, para 58.

<sup>99</sup> *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Jurisdiction) [1980] ICJ Rep 3.

<sup>100</sup> Cherie Blair and Ema Vidak Gojkovic, ‘Wikileaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ (2018) 33 ICSID Review 235, 241.

<sup>101</sup> Thirlway (n 41) 636.

<sup>102</sup> See generally Jessica Ireton, ‘The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence’ (2015) 30 ICSID Review 231, 234.

<sup>103</sup> Second Report on General Principles (n 16) 38.

recognition' of a principle in treaties and other international instruments,<sup>104</sup> such as the derivation of the *Martens Clause* as a gap-filling principle in international humanitarian law, as emergent from its wide articulation in treaties.<sup>105</sup> The second is to discover principles that underlie general rules of 'conventional or customary' law. He argues that some Courts have treated the concept of 'due diligence' as one such principle underlying a plethora of different legal regimes like human rights, environmental law, and so forth.<sup>106</sup> Finally, he argues that some principles could be 'inherent' in the 'basic features and fundamental requirements' of the international system; for instance, the requirement of state consent to jurisdiction is considered a necessary consequence of sovereign equality, which is a creation of this system.<sup>107</sup>

My present research does not indicate that a balancing principle on IOE has arisen by inference from 'customary' legal regimes. To attempt to prove this, one would first have to meet the burden of identifying varying customary norms that implicate 'balancing' in similar ways as the 'due diligence' standard. This would be an onerous task and one that is beyond the scope of this paper. Instead, as regards my proposal of a potential balancing GPL regarding the admissibility of IOE, I seek recourse to a combination of the first and third routes highlighted above. I begin my analysis with the third route, since here, a GPL would be traced from the 'fundamental requirements' of international law. In other words, it would either derive directly from such requirements or arise from a conjunctive reading of different requirements. In this vein, recall that sovereign equality entitles states *both* to the right to meaningfully present their cases and to be treated as equals in respect of being compliant with international law. To elaborate on the latter point, it is indeed a GPL that a state must not be allowed to benefit from its wrongdoing.<sup>108</sup> Allowing such benefits would advantage the illegally acting states over other states, making room for abuse by powerful states. Yet it is also true that a fundamental requirement of sovereign equality is that every internationally wrongful act *must* entail the 'responsibility' of the state performing that act.<sup>109</sup> As previously discussed, to use the illegalities of one state as a smokescreen to conceal those of another would go against this requirement. Thus, it may often be appropriate that the illegalities of *both* states are articulated in a case, as was the approach of the ICJ in *Corfu Channel*. To this end, states against which IOE is invoked would also reserve the right to challenge the probative weight of such evidence.<sup>110</sup>

<sup>104</sup> *ibid* 59.

<sup>105</sup> *ibid* 42.

<sup>106</sup> *ibid* 45.

<sup>107</sup> *ibid* 47.

<sup>108</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, para 110.

<sup>109</sup> ARSIWA, art 1.

<sup>110</sup> For an account of the general evidentiary cross-questioning at the ICJ, see Keith Highet, 'Evidence, the Court, and the Nicaragua Case' (1987) 81 *American Journal of International Law* 1.

In Section I, when discussing the seemingly indeterminate nature of international law, I mentioned that the same argument can be re-articulated to fall in either branch of Koskenniemi's ascending-descending dichotomy. The foregoing discussion demonstrates this precisely. For example, the case *against* an exclusionary rule can defend sovereignty as a matter of one state's prerogative to present any evidence it deems fit (ascending). However, it could *also* be one of ensuring maximal compliance with international law by providing a full account of *all* illegalities (descending). I unite all these varied points to raise another: it is in the *nature* of sovereign equality to necessitate contestation as to its imports on the facts of each case. That is, automatic preference cannot be given to one of these several features of sovereign equality. Therefore, when faced with IOE in interstate proceedings, the particular context and values at stake ought to be considered in assessing to *what ends* of sovereign equality a need for balancing arises, as I have shown in respect of ICJ case law in Section III. Given these factors, there is a strong case for a balancing GPL with respect to IOE which arises organically from such normative requirements of sovereign equality and other principles.

Having discussed this route for a GPL to arise within the international legal system, I now turn to the final route of 'wide' recognition in international instruments. I concede the lack of relevant treaty provisions which explicitly provide for a balancing test as regards IOE specifically. However, reference can be made to the jurisprudence of international arbitral and criminal tribunals in their interpretations of treaties or instruments providing for their evidentiary discretions. For example, consider the investor-state dispute under the North American Free Trade Agreement in *Methanex v the US* where the tribunal chose to preclude the investor from invoking IOE. The basis for this decision was two-fold. *First*, the tribunal argued that neither party should be allowed to use unfair means against another; and *second*, it noted that the particular evidence would not likely materially affect the outcome of the case, even if admitted.<sup>111</sup> The reference to this second factor appears to reflect a balancing exercise given its attempt to weigh unfairness in introducing IOE against the limited evidentiary interest in introducing the IOE (as identified by the tribunal). Another tribunal formed following the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID') in *EDF v Romania* also excluded IOE. While similarly emphasising unfairness in the usage of IOE, it nonetheless noted that the admissibility of the IOE should be assessed in the 'particular circumstances of the case'.<sup>112</sup> A separate ICSID tribunal allowed the partial use of IOE, while excluding portions protected by attorney-client privilege.<sup>113</sup> This, again, contradicts an automatic bar and instead shows careful respect for particular norms (attorney-client privilege) as opposed to others. This is similar to the

<sup>111</sup> *Methanex v United States* (Final Award) 44 ILM 1345 (19 August 2005) para 56.

<sup>112</sup> *EDF v Romania* (Procedural Order 3) ICSID Case No ARB/05/13 (29 August 2008) paras 38, 47.

<sup>113</sup> *Caratube v Kazakhstan* (Award) ICSID Case No ARB/13/13 (27 September 2017) paras 156, 1261.

interpretation I offered in Section III of the ICJ's approach to *Timor-Leste*. Such considerations also reflect in the practice of international commercial arbitral tribunals.<sup>114</sup> Thus, the International Bar Association has recently affirmed the discretion of arbitral tribunals to decide the admissibility of IOE on balance.<sup>115</sup>

Further, the founding instruments of most international criminal tribunals enable a balancing exercise in this regard, weighing the interests of procedural fairness in the trial against the avoidance of impunity.<sup>116</sup> In practice, one Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia has explicitly rejected the possibility of an automatic bar against IOE.<sup>117</sup> Another Trial Chamber emphasised that automatic exclusion of IOE would hamper the tribunal's moral commitment to deter impunity against international crimes (where IOE does not cause intolerable prejudice to the accused).<sup>118</sup> Chambers of the International Criminal Court have also attempted balancing exercises, while arguing that *all* international crimes in its mandate are 'serious' and that the seriousness of the allegations proved by IOE would not be a relevant consideration in balancing.<sup>119</sup> This, again, shows the importance of a context-driven inquiry in relation to IOE. Moreover, the European Court of Human Rights has refrained to uphold an automatic bar against IOE, noting that such exclusion does not flow from its corresponding Convention.<sup>120</sup> This approach takes for granted that the prejudice caused in trials owing to IOE would have to be determined on the facts of each case, similar to the ICJ's approach in *Avena* as discussed in Section III.

Some might question the referencing of these authorities as guidance for a potentially appropriate approach in inter-state litigation, given the involvement of individual or non-state entities in these cases. Yet it is crucial that several factors emphasised in these authorities (such as 'seriousness' of a crime) could apply *equally* if the same subject matter were raised with reference to state responsibility (as evident from the *Bosnian Genocide* case).<sup>121</sup> Further, Special Rapporteur Vázquez-Bermúdez only argues for a 'wide recognition' by states of a principle in international instruments as a first route; an exacting uniformity in such recognition is not required.<sup>122</sup> Considering this wide support for a context-driven assessment in relation to the first route, especially when read *together* with the case

<sup>114</sup> Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (first published 2012, Informa Law 2019) paras 9.23, 9.127.

<sup>115</sup> International Bar Association, *Rules on the Taking of Evidence in International Arbitration* (2020) art 9.3.

<sup>116</sup> See generally Statute of the Special Tribunal for Lebanon (2007) Annex, UN Doc S/RES/1757, art 16(5); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence (2015) UN Doc IT/32/Rev 50, Rule 89(C).

<sup>117</sup> *Prosecutor v Kordić and Cerkez* (Oral Session) ICTY-13671-T (2 February 2000).

<sup>118</sup> *Prosecutor v Brđjanin* (Decision on the Defence 'Objection to Intercept Evidence') ICTY-99-36-T (3 October 2003) paras 53–54.

<sup>119</sup> *Prosecutor v Dyllo* (Decision on the Admission of Material from the 'bar table') CC-01/04-01/06-1981 (24 June 2009) para 30.

<sup>120</sup> *Schenk v Switzerland* App No 10862/84 (ECtHR, 12 July 1988) para 46; *P.G. and J.H v United Kingdom* App No 44787/98 (ECtHR, 25 September 2001) para 76.

<sup>121</sup> *Bosnian Genocide* (n 90) para 173.

<sup>122</sup> Second Report on General Principles (n 16) 8.

for a GPL through the third route discussed previously, it is certainly arguable that balancing is a requirement in addressing IOE. In the least, it is evident that the case for a balancing test is much more palatable than an entirely apologetic inclusionary or utopian exclusionary view towards IOE. Therefore, subsequent literature on IOE ought to address the balancing approach as a concept worth engaging with, even if future commentators disagree with its, arguably current, existence as a GPL.

## V. PRE-EMPTING CRITICISMS OF BALANCING

To reiterate my main argument, I have argued that an automatic exclusion or inclusion of IOE is neither legally tenable nor appropriate in inter-state proceedings. Instead, a GPL has arguably arisen from within the international legal system that requires a balancing of competing sovereign interests on the facts and context of *each* case. The benefit of this approach is that it recognises the multiple dimensions of sovereignty with respect to the presentation of IOE and enables tribunals to ensure that none of these dimensions is marginalized in a case. For example, taking account of the context would mean that the same treatment is not given to evidence proving a violation of transboundary harm obligations in comparison to evidence proving the commission of genocide, an international crime that has attained the status of a peremptory norm.<sup>123</sup> Similarly, a brief cross-border shooting may not be as ‘serious’ as a violent invasion of embassy premises, which enjoy the unique status of inviolability in diplomatic law.<sup>124</sup> Determining the extent to which sovereign equality in the non-use of IOE should be *counterbalanced* by the need to affirm sovereign equality in the use of IOE for certain ends is therefore a subjective exercise. Such a balancing analysis would also encourage higher public reason giving and give greater legitimacy to decisions that account for competing moral stakes meaningfully.<sup>125</sup>

However, such subjectivity necessarily carries several risks. I argued in Section I that a balancing principle could potentially help one seek some refuge from indeterminacy with respect to the admissibility of IOE. Nevertheless, it remains well-known even for other existing balancing tests (for example, in human rights law) that their criteria often presuppose various theories of justice which can often be inconsistent across tribunals.<sup>126</sup> One is thus brought back to Koskeniemi’s suggestion on being conscious of theories of justice in constructing

<sup>123</sup> See generally Jan Wouters and Sten Verhoeven, ‘The Prohibition of Genocide as a Norm of *Jus Cogens* and its Implications for the Enforcement of the Law of Genocide’ (2005) 5 *International Criminal Law Review* 401.

<sup>124</sup> Ireton (n 102); Jean Salmon, *Manuel De Droit Diplomatique* (Brulyant 1994) 210, 318.

<sup>125</sup> See generally Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709; Rudraksh Lakra, ‘Bridge to a Culture of Justification: Guidelines for Designing the Standard of Proportionality in India’ (2023) 8(1) *Cambridge Law Review* (forthcoming).

<sup>126</sup> Möller (n 125) 715; Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law and Ethics of Human Rights* 142.

arguments as elaborated in Section I. I have portrayed this flexibility as an advantage above in the illustration of differential treatment towards international crimes when compared to other norms; yet apart from that illustration itself being open to debate based on one's own theory of international justice, there could be cases where the exercise becomes even less straightforward. This could, for instance, arise from difficulties in weighing the seriousness of the illegalities in securing IOE against the seriousness of the claims alleged which is supported by that IOE. To offer a further example, consider a situation where a state unlawfully hacks data in the cyber infrastructure of another state to gain evidence for showing that the latter conducted similarly unlawful cyber operations previously.<sup>127</sup>

Much of such a balancing exercise would therefore become vulnerable to criticisms of indeterminacy. It would also invite hesitancy from scholars who are opponents of the pedestal on which adjudication-based developments of international law have been placed.<sup>128</sup> Considering that such reasonings would not exist in a social or political vacuum, immense caution would have to be exercised in the articulation of sovereign interests in each case. This is especially given the role that the judgments of impartial tribunals have in shaping political relationships between states and peoples. Any omission to articulate relevant moral stakes between sovereign states would be equally open to criticism. Yet in the least, such an exercise would enable a site for debating the various contestations of sovereign equality in the first place rather than cursory and evasive addressal of issues concerning IOE, as has been the practice of the ICJ thus far. I further contend that attempts to articulate and address the interests of all competing states or parties could increase the possibility of their compliance with the adjudicator's findings. Keeping all these considerations in mind, a test of balancing sovereign interests would remain the most persuasive and comprehensive, allowing the fullest avoidance of impunity in inter-state litigations with respect to IOE. In the case of arbitral awards, this could reduce the likelihood of their enforcement being challenged. Ultimately, it is also important to remember that GPLs were accepted as a source by states with the very rationale of performing a gap-filling function to avoid a situation of *non liquet*.<sup>129</sup> Neither a polar inclusionary nor exclusionary GPL shows any sign of emergence, nor balancing from domestic practices. Hence, only the present iteration of balancing arising from within the international legal system can ensure that international adjudications do not become impaired when faced with IOE.

<sup>127</sup> On the growing frequency of such unilateral cyberoperations, see Michael N Schmitt, 'Autonomous Cyber Capabilities and the International Law of Sovereignty and Intervention' (2020) 96 *International Law Studies* 549.

<sup>128</sup> Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32 *European Journal of International Law* 1139.

<sup>129</sup> Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 11–12; Mariana Clara De Andrade, 'Regional Principles of Law in the Works of the International Law Commission' (2021) 86 *Questions of International Law* 23, 40.

## VI. CONCLUSION

In this paper, I have argued that a general principle of ‘balancing’ competing interests has arisen in contexts of IOE, requiring international adjudicators to identify, articulate, and attempt to weigh the distinct stakes of all parties seeking to include or exclude the evidence. No GPL addressing IOE could arise by transposition from municipal practices owing to the absence of any general trend in that regard, among other reasons. The balancing GPL has instead emerged from two of the thresholds recently affirmed by Special Rapporteur Vázquez-Bermúdez as satisfying the route of a GPL arising from ‘within’ the international legal system. The first threshold drew by inference from reconciling some of the basic requirements of international law. In demonstrating the second threshold, I embarked upon an inquiry of the approaches taken by multiple international adjudicators from distinct legal regimes. This argument is also supported by reference to case law of the International Court of Justice. Albeit less direct and explicit in supporting balancing, contextually reading its pertinent decisions at least makes it clear that there is no automatic inclusion or exclusion of IOE. While a balancing principle necessarily entrusts adjudicators with the power to identify distinct stakes to balance in each case, this discretion can also be viewed as a responsibility. The obligation of articulating and weighing different stakes will allow states and other parties to demand reason-giving from adjudicators to whom IOE is introduced and will, hopefully, provide a site for reasoned debate between the parties on that count. Such a process could not only strengthen the legitimacy of the final findings but also encourage litigating states to actively participate in the reason-giving exercise. Amidst continuing disagreement and confusion on the topic, it is hoped that the arguments professed here find serious engagement by future litigators and adjudicators concerned with IOE.