

A CRITIQUE OF THE MODERN INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

This paper is about the misinterpretation of customary international law. The identification of precise instances of misinterpretation in law is a challenging task due to the seemingly unresolvable disagreements in legal interpretation. Yet, if there is an objective criterion as to how a particular law should be interpreted, any interpretation which is in contradiction with such a criterion will in effect be a misinterpretation. With regard to customary international law, both the constituent elements of customary international law and the demarcation of different functions performed by the major actors in international legal system serve as standards that are capable of developing an objective theory of interpretation. Over the last few decades two approaches have emerged in relation to the interpretation of customary international law which can be termed traditional and modern. The core argument of the paper is that the modern interpretation of customary international law amounts to a form of misinterpretation due to its failure to comply with the said objective criteria. This is a result of the recent attempts by the international adjudicatory bodies to utilize the international law for extra-legal norms such as human rights, accountability and transparency. Accordingly, the aim of the following analysis is to draw the logical limits within which the customary international law can be used to advance such norms.

*“Most of what we perversely persist in calling customary international law is
not only not customary law:
it does not even faintly resemble a customary law.”*

Sir Robert Y. Jennings¹

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¹ Robert Jennings, ‘The Identification of International Law’ in Cheng, Bin (eds.) *International Law: Teaching and Practice* (Stevens, 1982) 5.

1. INTRODUCTION

Customary International Law (hereinafter referred to as 'CIL') is indispensable to the efficacy of the international legal system because CIL rules not only create substantive legal obligations but also perform a gap-filling function when the codified law contained in treaties runs out. Despite the reputation as one of the oldest sources of international law which was used to resolve disputes between states even in the 19th century in cases such as *Alabama Arbitration*,² the CIL has never been static and continues to widen its scope from the most basic principles in international law such as the prohibition of use of force to regulating the novel challenges to international peace like the right to send artificial satellites or rockets into space.³ This unchallenged significance of the CIL however comes at a cost. Although it is simply unthinkable to foresee a legal system at the international level without the influence of CIL, neither the understanding nor the application of CIL rules is an easy task. In addition to the inherent unpredictability of international law in the absence of a precise law maker, enforcer or adjudicator, CIL rules are particularly vague and abstract and thus, may not provide a categorical answer to a given legal issue. This fluidity in CIL has opened up the doors for its misuse in both the enforcement and interpretation, although the primary focus of this essay is on the latter.

Over the last few decades, two main approaches have emerged in the field of CIL interpretation. I term them traditional and modern on the basis of their origin though both of them operate simultaneously in the current international legal system. In the traditional approach, international courts and tribunals have followed a formalist path and strictly adhered to the accepted norms in the interpretation of the CIL regardless of whether that interpretation is compatible with any extra-legal considerations.⁴ By contrast, the interpreters who apply the modern approach have bended the core elements of CIL to suit the ethical, moral or political beliefs

² In *Alabama Arbitration*, the government of the United States sought a series of damages from the United Kingdom in 1869. See Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 Int'l & Comp LQ 1.

³ Michael Scharf, *Customary International Law in Times of Fundamental Change* (CUP 2013) 123.

⁴ David Fidler, 'Challenging the Classical Concept of Custom', (1996) 198 GER. Y.B. INT'L L 216, 221.

preferable to them.⁵ The core argument of this essay is that while the traditional approach provides the correct interpretation of CIL, modern approach is riddled with misinterpretations. Such misinterpretations produce consequences that affect both the just order of the international legal system as well as the legitimacy of the institutions who possess the authority to interpret CIL.

Accordingly, this essay is organized under two sections. In the first section, I argue that the misinterpretation of CIL can be identified only if there is an objective criterion to assess its merits. I consider the demarcations between different functions of the CIL and its core elements as falling under such an objective criterion. In the second section, a comparison between traditional and modern approaches has been made in relation to both the nature and methodology for the purpose of ascertaining how the correct interpretation and misinterpretation can be distinguished. Throughout the essay, I use the head of state immunity as a CIL rule to substantiate my claims.

2. OBJECTIVITY IN THE INTERPRETATION OF CIL

The identification of misinterpretation in law is an enormously challenging task due to the subjective nature of the legal interpretation.⁶ Therefore, when two persons with reasonable knowledge of law disagree on the interpretation of a law -unless one has made a manifestly grave error in law - it is normally termed as a mere disagreement rather than labelling one view as the correct interpretation and the other as a misrepresentation of law.⁷ This difficulty with drawing a clear line between the interpretation and misinterpretation is exacerbated in relation to the CIL as a result of the inherent complexity and dynamism associated with the elements of a CIL rule as well as the multiplicity of actors

⁵ Michael Reisman, 'The Cult of Custom in the Late 20th Century' (1987) 17 CAL. W. INT'L LJ. 1.

⁶ Richard Fallon, 'The Meaning of Legal 'Meaning' and Its Implications for Theories of Legal Interpretation' (1987) 82 University of Chicago Law Review 1235 1290.

⁷ Jeremy Waldron, *Law and Disagreement* (OUP 1999).

involved in its interpretation.⁸ As Noora Arajärvi argues,

Capturing the definition and examples of misinterpretation is like chasing a moving target – as with interpretation, the elements may be in flux, the circumstances and narratives changing, and the line between genuine and fake CIL – and correct interpretation and misinterpretation – often fluid.⁹

Nonetheless, despite this uncertainty, I suggest that there is still an acceptable path to identify a misinterpretation of law.¹⁰ This is possible if one can identify objective standards against which an interpretation of a law can be scrutinized.¹¹ Objectivity in this context means the consensus of all serious and reasonable stakeholders in a legal dispute about the suitable criteria to assess the interpretation of a particular law.¹² In such a situation, although the parties may disagree as to the particular outcome of a dispute, there is agreement about the standards that the interpreter must adhere to in resolving that dispute.¹³ This enables the external observers to determine whether the resulting outcome is the correct interpretation or simply a misinterpretation on the basis of its satisfaction with the said objective criteria that everyone agrees on.¹⁴ For instance, all the mainstream stakeholders in the international legal system agree that the use of force can be exercised in situations of self-defence in terms of Article 51 of the UN Charter.¹⁵ Therefore, when the International Court

⁸ Pierre-Hugues Verdier, and Erik Voeten, 'Precedent, Compliance, and Change In Customary International Law: An Explanatory Theory' (2014) 108 *The American Journal of International Law* 389.

⁹ Noora Arajärvi, 'Misinterpreting Customary International Law Corrupt Pedigree or Self-Fulfilling Prophecy?' in Panos Merkouris, Jörg Kammerhofer, and Germany, Noora Arajärvi (ed) *The Theory, Practice, and Interpretation of Customary International Law* (OUP 2022) 42.

¹⁰ Paul Grice, 'Utterer's Meaning, Sentence Meaning, and Word-Meaning', (1968) 4 *Foundations of Language* 225, 230.

¹¹ Mark Greenberg, 'The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content', (2010) UCLA School of Law Research Paper, No. 10-35.

¹² Anthony D'Amato, 'On Consensus' (1970) 8 *Can YB Int'l L* 104.

¹³ Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *Eur J Int'l L* 66, 72.

¹⁴ James Thuo Gathii, 'Rejoinder: Twailing International Law' (2000) 98 *Mich L Rev* 2066, 2063.

¹⁵ Article 51 of the UN Charter states,

of Justice (hereinafter referred to as the 'ICJ') held in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons¹⁶ that:

in view of the current state of international law and of the elements of fact at its disposal, [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹⁷

One could assess whether this statement was a correct interpretation of law on the basis of the said objective criterion although there was no uniform view as to the outcome of the decision.

The reason why the objective standards of this kind are capable of securing the consensus from all the stakeholders in a case is because they constitute the core elements of a law, the derogation of which will deprive the resulting interpretation of law any meaning at all.¹⁸ In other words, it is these core elements that make the law what it actually is and as a result, any interpretation which is in contradiction with them is nothing but a misinterpretation.¹⁹ With regard to CIL, two such objective criteria can be identified: a) constituent elements of a CIL rule and b) demarcation between identification, construction and interpretation of CIL.

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.

¹⁶ ICJ 3, ICJ Reports 1996.

¹⁷ *ibid* p 226.

¹⁸ See for instance, Bruce Cronin, 'International Legal Consensus and the Control of Excess State Violence' (2005) 11 Global Governance 311.

¹⁹ Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU J Int'l L & Pol 843, 851.

2.1 Constituent Elements of an International Custom

It is universally accepted that a CIL rule consists of both the state practice and *opinio juris*. As the ICJ noted in the *Libya/Malta* case,²⁰ the substance of customary law must be ‘*looked for primarily in the actual practice and opinio juris of states*’. The primary source for this view can be found in Article 38 (1) of the statute of ICJ which defines CIL as “*evidence of a general practice accepted as law*”.

The term ‘state practice’ in CIL means the actual practices undertaken by the states. But not all such practices can contribute to the development of the CIL. As the authorities on the matter show, for a state practice to be qualified as a constituent element of a CIL rule, it must be both consistent and general. Consistency requires that the isolated occurrences of state practices not be taken as elements of CIL. A practice by the states must be repetitive for the creation of a CIL rule. For instance, in the *Asylum case*²¹ the ICJ in refusing to recognize a regional practice pertaining only to Latin America as a customary rule declared that CIL must be ‘*in accordance with a constant and uniform usage practised by the States in question*’.²² Furthermore, such practices must also be general in that they should be acceptable to most if not all of the states concerned. A practice that was followed by only a few states, would not be recognized as a CIL rule. This was clearly manifest in the North Sea Continental Shelf cases,²³ where the ICJ noted that state practice, *including that of states whose interests are specially affected*, had to be ‘*both extensive and virtually uniform in the sense of the provision invoked*’.²⁴

Opinio juris is often described as the ‘*psychological element*’²⁵ of the CIL. It is commonly accepted that the states undertake obligations because of numerous reasons, and these can be political, moral as well as economic. However, for CIL to be formulated only the practices followed by states

²⁰ ICJ Reports, 1985, pp. 13, 29; 81 ILR, p. 239.

²¹ ICJ Reports, 1950, p. 266.

²² *ibid.*

²³ ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

²⁴ *ibid* 43.

²⁵ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 23.

as a matter of legal obligations are counted.²⁶ *Opinio juris* acts as a yardstick to distinguish such legal obligations from other non-legal obligations. For instance, in *Lotus* case,²⁷ France maintained that there existed a CIL rule to the effect that the flag state of the accused had exclusive jurisdiction in cases of collision on the high seas and that the national state of the victim was barred from trying him. To justify this, France referred to the absence of previous criminal prosecutions by the latter category of states and, a tacit consent was accordingly deduced to support the alleged CIL rule. The Court however rejected this argument and held that ‘*only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom*’.²⁸ Similarly, in *Germany v Italy*²⁹ (Greece intervening), where the central issue was about the state immunity as a CIL rule, the court held that:

“while it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court”.³⁰

The constituent elements of CIL and their characteristics are then well-settled and undisputed.

2.2 Identification, Construction and Interpretation of Customary International Law

Unlike in a domestic legal system, it is not easy or even in certain cases plausible to identify the precise instances of ‘interpreting’ the CIL.³¹ This is because of the close relationship between three functions that are

²⁶ Jo Lynn Slama, 'Opinio Juris in Customary International Law' (1990) 15 Okla City U L Rev 603.

²⁷ PCIJ, Series A, No. 10, 1927, p. 18.

²⁸ *ibid.*

²⁹ ICJ Reports, 2012, para. 55.

³⁰ *ibid.*

³¹ Orfeas Chasapis Tassinis, ‘Customary International Law : Interpretation from Beginning to End’ (2020) 31 European Journal of International Law 2020 235, 242.

essential to the operation of CIL namely identification, construction and interpretation.³² In simple terms, construction and identification mean the creation and recognition of a novel CIL rule respectively.³³ A closer look at the past precedents shows that these two functions are two different stages of the same process which leads to the genesis of CIL under the international legal system.³⁴ However, while the former is undertaken – or at least is supposed to be undertaken - solely by the states,³⁵ the latter can be attributed to several major actors of the international legal system although the most authoritative identification will be that of Courts and Tribunals.³⁶ This distinction between the identification and construction of CIL is perhaps inevitable. While the constituent elements of a CIL rule can only be established by the states,³⁷ the identification of a CIL rule by contrast depends on the observation of certain practices at the international stage and thereafter labelling them as CIL on the basis that the necessary elements of a CIL rule are manifestly evident in such practices.³⁸ An opinion of this kind will always be highly contentious not least because it is open to all the major actors at the international level to justify their actions or discredit the actions of others by clothing the disputed practice as a CIL rule.³⁹ For instance, when the International Criminal Court issued a warrant against President Putin in Russia, this

³² Alonepanos merkouris, 'Interpreting Customary International Law: You'll Never Walk' in Panos Merkouris, Jörg Kammerhofer, and Germany, Noora Arajärvi (ed) *The Theory, Practice, and Interpretation of Customary International Law* (OUP 2022) 351.

³³ Sean D. Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) 109 Am J Int'l L 822.

³⁴ Ernest A. Young, 'Sorting Out the Debate over Customary International Law' (2002) 42 Va J Int'l L 365.

³⁵ Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 Isr L Rev 86, 90.

³⁶ Nadia Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39 Mich J Int'l L 301, 327.

³⁷ Christian Dahlman, 'The Function of Opinio Juris in Customary International Law' (2012) 81 Nordic J Int'l L 327, 330.

³⁸ Ryan M. Scoville, 'Finding Customary International Law' (2016) 101 Iowa L Rev 1893, 1903.

³⁹ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 103

was opposed by the Russian government on the basis of head of state immunity.⁴⁰ Similarly, South Africa where President Putin was supposed to attend BRICS (Brazil, Russia, India, China, and South Africa) summit in August 2023 also refused to arrest him on the same basis despite being a state party to the Rome Statue.⁴¹ In essence, what both Russia and South Africa have done was to identify head of state immunity as an absolute CIL rule without any exception. This was, however, disputed by states as well as other international organizations such as Amnesty International making that very identification of the CIL rule quite contentious.⁴²

Interpretation of a CIL rule which is the main focus on this essay occurs subsequent to both the construction and identification of that rule and like the identification, several actors of the international arena can engage in the interpretation of CIL.⁴³ On a theoretical level, there is a clear distinction between construction and identification on one hand and interpretation on the other in that the first two functions are predominantly about either creating or recognizing the new CIL rules whereas the interpretation is about the development and consolidation of the exiting CIL rules.⁴⁴ This mainly occurs when the interpreter applies the abstract rules of international customs to the facts of a disputed case which cannot be resolved by a straightforward application of CIL rules as they stood at the time.⁴⁵ As a result, a new legal question arises as to the scope of the exiting CIL rules and in answering that question the interpreter is expected

⁴⁰ Miles Jackson, The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues (EJIL:Talk March 21, 2023) <<https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/>> accessed 21 September 2023.

⁴¹ Gabriele Steinhauser, Facing Possible Arrest, Putin Won't Attend Brics Summit in South Africa (The Wall Streets Journal July 19, 2023) <<https://www.wsj.com/articles/facing-possible-arrest-putin-wont-attend-brics-summit-in-south-africa-34e637e9>> accessed 21 September 2023.

⁴² <https://www.amnesty.org/en/latest/news/2023/07/south-africa-amnesty-international-joins-putin-arrest-warrant-case-as-an-amicus-curiae/> accessed 21 September 2023.

⁴³ Julian G. Ku, 'Structural Conflicts in the Interpretation of Customary International Law' (2005) 45 Santa Clara L Rev 857.

⁴⁴ Jean d'Aspremont, *The Discourse on Customary International Law* (OUP 2021) 112.

⁴⁵ A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 52.

to develop those rules without stepping into the territories of identification and consolidation.⁴⁶ For instance, when the International Criminal Court (hereinafter referred to as 'the ICC') had to decide whether the head of state immunity is extended to the *de facto* heads of states in *Prosecutor v Uhuru Muigai Kenyatta*,⁴⁷ a heavy emphasis was placed on the precedents of both the international and domestic jurisdictions on the head of state immunity instead of constructing new rules altogether.⁴⁸

Most importantly, if the disputed case is such that the direct application of the existing corpus of the CIL rules as they are sufficient for its resolution, it is merely an application of law rather than an interpretation.⁴⁹ Therefore, any act involving CIL can qualify as interpretation, if it moves from one stage where the rules in force are capable of giving an unequivocal answer to the legal question involved to another where there is uncertainty as to either the selection of the most relevant rule or - even when the relevant rule is clear- the application of that rule to the legal question.⁵⁰ In *US v Noriega*,⁵¹ it was held that the head of state immunity was grounded in CIL, but in order to assert such immunity, a government official must be recognized. The Court in this case was not 'interpreting' the CIL but simply applying it because the law on the matter was already well-settled. This distinction is important to understand that although the actors of international law may engage with CIL on a daily basis by citing, declaring or utilizing multiple rules, not all such actions can be categorized as interpretation.⁵² In most instances, they merely take the form of application and the interpretation is a function

⁴⁶ P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 (1) IntCLRev 126, 133.

⁴⁷ ICC-01/09-02/11.

⁴⁸ *ibid.*

⁴⁹ Lawrence B. Solum, 'The Interpretation-Construction Distinction' (2010) 27 Constitutional Commentary 95, 112.

⁵⁰ Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing 2005) 93.

⁵¹ 746 F.Supp. 1506, 1519 (1990); 99 ILR, pp. 143, 161.

⁵² Hilary Charlesworth, 'The Unbearable Lightness of Customary International Law' (1998) 92 Am Soc'y Int'l L Proc 44, 51.

often reserved for Courts as perhaps the only authoritative interpreter in the international legal system.⁵³

3. TRADITIONAL VS MODERN APPROACHES TO THE INTERPRETATION OF CIL

In the previous section I argued that there are two objective criteria that are indispensable to any correct interpretation of CIL. These are namely the constituent elements of an international custom and the demarcation between different functions that affect CIL. In this section, I build on this argument by comparing traditional and modern approaches to the interpretation of CIL that have emerged over the last few decades.⁵⁴ In doing so, the following analysis touches on two characteristics of interpretation, both of which - as I will argue - contribute on one hand to the correct interpretation of CIL by the traditional approach and the misinterpretation of it by the modern approach. These two characteristics are the methodology and substance of the interpretation.

3.1 Methodology of the Interpretation

In the traditional interpretation of CIL, a two-step process is followed by the international courts to interpret the CIL rules in a manner that ensured equal recognition for both the state practice and *opinio juris*.⁵⁵ Accordingly, in any dispute concerning CIL, the Courts first turned to state practice which should be general and consistent and thereafter, *opinio juris* was used to evaluate whether such practices were followed by the states as legal obligations.⁵⁶ This was essentially an inductive method in which a CIL rule which is universal in application was derived from specific instances of state practice.⁵⁷ The rationale behind this

⁵³ Eduardo Jimnez de Archaga, Custom, in Antonio Cassese & Joseph H. H. Weiler (eds) *Change and Stability in International Law-Making* (De Gruyter 2010) 3.

⁵⁴ Anthony A. D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 Am J Int'l L 211.

⁵⁵ Frederic L. Kirgis Jr., 'Custom on a Sliding Scale' (1987) 81 Am J Int'l L 146.

⁵⁶ John Tasioulas, 'Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox'' (2007) 26 Aust YBIL 199.

⁵⁷ Georg Schwarzenberger, *The Inductive Approach to International Law*, (1947) 60 HA Rv. L. REV. 539.

approach was to confine the interpretation of CIL to the actions of states which are the subjects of international law and thereby attempt to avoid any penetration of the personal views of the judges into the corpus of CIL.⁵⁸ This was crucial for preventing the interpretation which was the sole legitimate function assigned to the International Courts from transforming into construction of CIL by the judicial modification of state practice and *opinio juris*.⁵⁹ Therefore, although the French Cour de Cassation strongly condemned the gravity and seriousness of the acts done by President Ghaddafi in the *Ghaddafi case*,⁶⁰ it nonetheless came to the conclusion that his case should be dismissed since the CIL as developed by the states do not permit a head of state to be tried before a domestic court.⁶¹

The Courts which follow the modern approach however adopt a deductive method.⁶² Instead of interpreting the CIL from specific instances of state practice, under the deductive method, the Courts identify CIL with general statements of rules and thereafter apply them to all the states concerned.⁶³ This was made possible by the overemphasis of modern approach on the *opinio juris* with only a secondary place given to state practice.⁶⁴ The Courts used the statements made by a few states - as opposed to considering the actual practices of states - to argue that these statements in fact represent the correct interpretation of CIL.⁶⁵ The modern approach was manifestly evident in the Merits decision in

⁵⁸ Michael Akehurst, 'Custom as a Source of International Law' (1974-75) 1 BRIT. Y.B. INT'L L. 35.

⁵⁹ William A. Schabas, *The Customary International Law of Human Rights* (2021 OUP) 102.

⁶⁰ Arrêt no. 1414, 14 March 2001, Cass. Crim. 1.

⁶¹ *ibid.*

⁶² Bruno Simma & Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-89) AUSTL. Y.B. INT'L L. 82.

⁶³ Hiram Chodosh, 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1992) 26 TEX. INT'L LJ. 87, 102.

⁶⁴ Jo Lynn Slama, 'Opinio Juris in Customary International Law' (1990) 15 Okla City U L Rev 603.

⁶⁵ Fabian Augusto Cardenas Castaneda & Oscar Orlando Casallas Mendez, 'A Large Cup of Opinio Juris and State Practice to Taste: The Recipe of Contemporary Customary International Law' (2015) 8 ACDI 87.

Military and Paramilitary Activities in and Against Nicaragua⁶⁶ where the ICJ derived customs of non-use of force and nonintervention simply from statements such as General Assembly resolutions by expressly holding that it was sufficient for the conduct of states to be generally consistent with statements of rules.⁶⁷

This ruling shows how the modern approach can result in a misinterpretation of both the state practice and the *opinio juris*.⁶⁸ As stated in the previous section, in order to ascertain and subsequently to interpret a CIL rule, the state practice in question must be general in that a fair number of states - although not necessarily all of them - must follow the particular rule in question as a legal obligation.⁶⁹ This is precisely why the traditional approach employs an inductive method which looks at specific instances of state practice before arriving at a general conclusion.⁷⁰ In the modern approach however, the courts does exactly the opposite by first inferring a general rule - often by citing declaratory statements made by a few states - and then applying it to all the states without looking into whether the states, including even the few states who made those statements actually follow that rule in practice.⁷¹ For instance, the Special Court for Sierra Leone in *The Prosecutor v. Charles Ghankay Taylor*⁷² held that the immunity of a head of state does not bar the jurisdiction of an international 'criminal' court as distinct from the international courts in general under the CIL. Nonetheless, the Court cited no state practice whatsoever to support this conclusion and instead, its primary focus was on the statements made by the drafters of the Statute of the Special Court for Sierra Leone before the UNHRC regarding the

⁶⁶ (Nikar v. U.S.), Merits, 1986 ICJ REP. 14 (June 27).

⁶⁷ *ibid.*

⁶⁸ Carlos M. Vazquez, 'Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position' (2011) 86 Notre Dame L Rev 1495.

⁶⁹ Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Mich J Int'l L 115.

⁷⁰ William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Geo J Int'l L 445.

⁷¹ Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 ILSA J Int'l & Comp L 305.

⁷² SCSL-03-01-I-059 para. 57.

limitation of head of state immunity.⁷³ Judgments of this kind amount to misinterpretation of CIL in three ways.

First, it is undisputed that the CIL consists of both *opinio juris* and state practices as indispensable elements and thus, a correct interpretation of a CIL rule cannot solely - or even predominately - be based on 'statements' made by states but on actual 'practices' followed by them as legal obligations.⁷⁴ Second, it is also accepted without doubt that in order to form CIL rules, practices followed by states must be general and not be based on statements of a few states.⁷⁵ This is after all crucial for the very application of CIL as once crystallized, CIL applies to all the states without any exception as opposed to a treaty which only binds to its parties.⁷⁶ Therefore, a CIL rule that relies on a few acts of states does not acquire the legitimacy required for its universal application.⁷⁷

Thirdly and most importantly, the modern approach has enabled the courts to impose their own moral and political ideologies on states in the guise of interpretation.⁷⁸ As I argued before, when the CIL was interpreted on the basis of state practices which are followed as legal obligations, there was hardly any scope for the courts to intervene as it is the actions of the states which ultimately determined the interpretation of CIL.⁷⁹ This method is sound not only because the states are the subjects of international law but also it is they who are bound by the CIL after all. But when the modern approach emerged, the courts started interpreting

⁷³ Micaela Frulli, 'The Question of Charles Taylor's Immunity - Still in Search of a Balanced Application of Personal Immunities' (2004) 2 J Int'l Crim Just 1118.

⁷⁴ Raphael M. Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Isr L Rev 344.

⁷⁵ Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 Am J Int'l L 843.

⁷⁶ Arthur A. Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 VAND.J. TRANSNAT'L 1.

⁷⁷ William S. Dodge, 'Customary International Law and the Question of Legitimacy' (2006-2007) 120 Harv L Rev F 19, 24.

⁷⁸ Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 Isr L Rev 86, 90.

⁷⁹ Philip R. Trimble, 'A Revisionist View of Customary International Law' (1986) 33 UCLA L Rev 665, 672.

CIL with the use of statements made by a few states.⁸⁰ However, since there are countless number of such statements on the same issue, modern approach opened up the doors for the judiciary to select the that reflect their political and ethical beliefs and consequently to modify the CIL to suit those extra-legal considerations.⁸¹ This was particularly evident in the decision of the ICC in the *Al Bashir case*⁸² where the court paid no attention to the state practice but declared that Head of State immunity under customary international law cannot be invoked before an international court. The only reason cited by the court in this regard was that the head of state immunity would be in contradiction with human rights.

...Head of State immunity is not opposable under customary international law in relation to the atrocities that are international crimes, at least in regards to the crimes under the jurisdiction of the International Criminal Court. This is because international crimes and those atrocities always amount to grave violations of human rights.... It is thus clear that the international community as a whole has consistently rejected the invocation of Head of State immunity for the commission of international crimes. This is due to the specific nature of these crimes, which in essence are violations of international human rights. Under customary international law, immunity can never result in impunity for grave violations of the core values consolidated in international human rights law.⁸³

What the court has essentially done in this instance is to modify the unambiguous rule under the CIL that head of state must be given immunity by relying on so called liberal values such as human rights.

⁸⁰ Jo Lynn Slama, 'Opinio Juris in Customary International Law' (1990) 15 Okla City U L Rev 603, 621.

⁸¹ Jack L. Goldsmith & Eric A. Posner, 'Understanding the Resemblance between Modern and Traditional Customary International Law' (2000) 40 Va J Int'l L 639, 672.

⁸² *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Judgment in the Jordan Referral re AlBashir Appeal) ICC-02/05-01/09-397-Corr (6 May 2019) 1.

⁸³ *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa) ICC-02/05-01/09-397-Corr (6 May 2019) 8 This was however part of the obiter dictum of the judgment as Article 27(1) and (2) of the Rome Statute removes the immunity from Heads of State in cases before the ICC.

Certainly, violations of human rights are a major ethical concern for any actor in international law. Yet, one must draw a line between such ethical considerations and CIL. International customs as I have argued are solely determined by the states whereas the human rights only represent authorless and abstract values. Therefore, the latter cannot be used to modify the former unless they are accepted by the states themselves.

3.2 Substance of Interpretation

The two contrasting methodologies highlighted above have turned the very substance of the traditional and modern approaches equally contrasting.⁸⁴ Consequently, like the methodology, substance of those two approaches can also be taken as a yardstick to distinguish between the correct interpretation and misinterpretation of CIL.⁸⁵

In the traditional approach, the Courts interpret CIL by looking at how the states have followed the relevant practices as legal obligations. In other words, when a dispute arises at the international level concerning CIL, the Courts interpret the existing customary rules based on how the state practice has been on the matter.⁸⁶ Such an interpretation is descriptive in nature. It only points out and affirms the status quo without attempting to modify it.⁸⁷ This is of course the correct form of interpretation because there is universal consensus for the view that the duty of an interpreter is to apply the existing rules as they are to the case before him.⁸⁸ The descriptive nature of the traditional approach can be seen in the *South Africa Decision* in the *Al Bashir case*,⁸⁹ where the ICC Pre-Trial Chamber

⁸⁴ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2012) 142.

⁸⁵ Ernest A. Young, 'Sorting Out the Debate over Customary International Law' (2002) 42 Va J Int'l L 365.

⁸⁶ Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 Int'l & Comp LQ 535, 542.

⁸⁷ Samuel Estreicher, 'Rethinking the Binding Effect of Customary International Law' (2003) 44 Va J Int'l L 5, 9.

⁸⁸ David P. Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 German YB Int'l L 198, 204.

⁸⁹ The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the

II engaged in an extensive survey on the head of state immunity and held that:

‘[t]he Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another state, even when the arrest is sought on behalf of an international court’.⁹⁰

The modern approach however, produces a substance of starkly different nature. As it was pointed out in the last section, the Courts which follow this approach tend to take a general rule found in the statements of a few states and apply it to all the states concerned.⁹¹ This method of interpretation is prescriptive in nature. It does not merely lay down ‘*what the state practice has been*’ as a CIL rule.⁹² Rather it consolidates an abstract rule as a CIL rule which dictates ‘*what the state practice should be*’.⁹³ This is in fact the classic distinction between what the law is and what the law ought to be.⁹⁴ It is universally accepted - in both domestic or international legal systems- that the duty of an interpreters such as courts is to declare what the law is as opposed to what the law ought to be.⁹⁵ However, under the modern approach, the Courts resort to the latter for the purpose of modifying the CIL in accordance with their political, moral or ethical considerations.⁹⁶ In an international legal system which is primarily operated by the states with heavily divergent views, there

Court for the Arrest and Surrender of Omar Al-Bashir ICC-02/05-01/09-302 (6 July 2017).

⁹⁰ *ibid* 68.

⁹¹ Michael P. Scharf, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell Int'l LJ 439.

⁹² Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 Am J Int'l L 757.

⁹³ Myres S. McDougal & W. Michael Reisman, 'The Prescribing Function in World Constitutive Process: How International Law Is Made' (1980) 6 Yale Stud World Pub Ord 249, 251.

⁹⁴ H. L. A. Hart, *The Concept of Law* (OUP 1961) 183.

⁹⁵ Brian G. Slocum, *The Nature of Legal Interpretation* (University of Chicago Press 2017) 193.

⁹⁶ Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118 Mich L Rev 1487, 1490.

cannot be any justification for imposing the personal views of the judges on them.⁹⁷ In fact, the very purpose of *opinio juris* as a core element of the CIL is to distinguish legal obligations from other kinds of practices.⁹⁸ Yet, in the modern approach the courts engage in precisely the opposite course of action when they politicise the CIL and thereby misinterpret it. For instance, when the ICJ decided the *arrest warrant case*,⁹⁹ no state practice could be visible for the view that heads of states can be prosecuted for the crimes of any nature.¹⁰⁰ If anything, the state practices demonstrated quite the opposite.¹⁰¹ However, by holding that heads of states can be tried before certain international courts - despite the lack of support of the core elements of CIL- the court essentially declared what the state practices should be thereafter rather than ascertaining what those practices are in reality.¹⁰²

4. CONCLUSION

The interpretation of CIL - like the interpretation of any other law - is dominated by the subjective attitudes of the interpreters which makes it enormously difficult to ascertain a misinterpretation if and when it occurs. However, this difficulty is reduced to a great extent if an objective criterion against which such interpretations can be assessed is formulated. In the context of CIL, these objective criteria represent on one hand the demarcations between identification, construction and interpretation of CIL and on the other, state practices and *opinio juris* as the core elements of a CIL rule. Throughout this essay, I have applied the said two criteria to compare and contrast traditional and modern approaches to the interpretation of the CIL. This comparison was done with regard to both

⁹⁷ Jonathan I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 NYU J Int'l L & Pol 697, 672.

⁹⁸ Christian Dahlman, 'The Function of *Opinio Juris* in Customary International Law' (2012) 81 Nordic J Int'l L 327, 336.

⁹⁹ (Democratic Republic of the Congo v Belgium) [2002] ICJ 1.

¹⁰⁰ Jan Wouters, 'The Judgement of the International Court of Justice in the ' (2003) 16 LJIL 253, 260.

¹⁰¹ Neil Boister, 'The IDJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law' (2002) 7 J Conflict & Sec L 293, 336.

¹⁰² Sarah M. H. Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued' (2005) 18 LJIL 645, 672.

the methodology and the substance of interpretation. In the traditional approach, the courts employ an inductive method where they derive the customary rules from the states and as such it is descriptive in nature. By contrast, the modern approach adopts a deductive method which is used by courts to categorize the abstract rules found in the statements made by a few states as CIL and thereby applying it to the entire international community. This process allows the interpreters to select the rules that are preferable to their extra-legal considerations which makes the modern approach prescriptive in nature. On the basis of this comparison, I have argued that while the traditional approach which is inductive and descriptive forms the correct interpretation of CIL, the modern approach which is deductive and prescriptive represent misinterpretations of CIL as the former satisfies the two objective criteria in the CIL and the latter does not.

(The author submitted this paper for the Walter and Judith Pinto essay competition in November 2023 as a Fourth-year undergraduate. He no longer believes that it is possible to formulate an objective theory of legal interpretation and is at the moment skeptical of any attempt to theorise the law in light of the constant fluctuation of legal doctrines which makes it impossible to arrive at generalizations required by the legal theory.)