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The Under-representation of Third World States in Customary International Law: can interpretation bridge the gap?

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Abstract:

Among scholars researching the position of the Third World in the formation and application of customary international law (CIL), there is consensus that States belonging to this category are significantly under-represented in the process. The scholarly criticism surrounding this under-representation is broadly organized along three lines of argument. Firstly, it is argued that the current CIL framework is undemocratic when it comes to the participation of the Third World. This lack of 'democratic legitimacy' does not only concern customary rules formed in the colonial period, but also customary rules formed in the late 20th and 21st century. Secondly, it is argued that since customary rules develop from a general practice of international society, CIL reflects and crystalizes past realities and not proposed reforms. Thus, CIL is biased towards the *status quo* and is not conducive to changes in the international legal system. Thirdly, it is argued that the formation and application of CIL is disproportionally influenced by powerful developed States, often neglecting the role or interests of the Third World. This line of criticism identifies several mechanisms within the CIL framework which maintain the imbalance, including the dominance of first world practice when analysing the 'State practice' requirement, the development of the persistent objector doctrine, and the appropriation of the specially affected States doctrine by powerful States of the Global North.

This paper explores the criticism towards CIL from the Third World perspective and examines whether the issues identified by scholars may be addressed through the identification, development, and application of uniform guidelines for the interpretation of CIL. In this sense, the paper examines how a consistent practice of CIL interpretation after the formation and identification of a CIL rule may offer an approach which addresses the lack of democratic legitimacy of CIL, CIL's bias towards the *status quo*, and the dominance by powerful States in the formation and application of CIL. The paper thus argues that interpretation may offer an answer to these critiques by: i) enhancing uniformity in the application of CIL; ii) offering a solution to the critique of dominance by laying out uniform guidelines for the interpretation and application of CIL; and iii) providing an opportunity for CIL rules to evolve through the process of interpretation.

Keywords: Customary International Law, Interpretation, Third World.

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1. Introduction

Among scholars researching the position of the Third World[1] in the formation and application of customary international law (CIL), there is consensus that states belonging to this category are significantly under-represented in the process.[2] In a recent paper on the topic, Galindo and Yip argue that "the current framework of CIL is based on an undemocratic law-making process, which has been shaped mostly by powerful States to the disadvantage of the interests of developing countries".[3]

1 It is relevant to point out that some scholars have criticized the category of "Third World" States, largely due to what they consider is its anachronistic nature. Nonetheless, it is maintained that for the purposes of the present discussion, the "Third World" category broadly encompasses the developing States of Latin America, Asia and Africa, and remains relevant when discussing the formation and operation of CIL. For a more detailed exploration of the Third World category see Joycelin C. Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' [2018] 7 Journal of Comparative Law 232, 236.

2 B. S. Chimni, 'Customary International Law: A Third World Perspective' [2018] 112(1) AJIL 1; Okubuiro (n1); George R. B. Gallindo and Cesar Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' [2017] Chinese JIL 251; J Patrick Kelly, 'Customary International Law in Historical Context: The Exercise of Power without General Acceptance' in Brian D. Lepard (ed.) *Reexamining Customary International Law* (CUP 2017) 47; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' [2001] 95 AJIL.

3 Gallindo and Yip, *supra note* 2, at 252.

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Moreover, "[d]espite being aware of this situation, the Third World has been unable to fundamentally question or change this scenario".[4]

The scholarly criticism of Third World States' under-representation in CIL is broadly organized along three lines of argument. Firstly, it is argued that the current CIL framework is undemocratic when it comes to the participation of the Third World, because recently independent States have to comply with legal norms in whose creation they have had no say.[5] Within this context, authors have pointed out a lack of 'democratic legitimacy' of CIL, evident in situations when a particular customary rule is formed without the participation of a significant number of States, and the interests and concerns of these States are neglected or ignored in the norm formation process.[6] This criticism does not only concern customary rules formed in the colonial period, but also customary rules formed in the late 20th and 21st century.[7] Secondly, it is argued that since customary rules develop from a general practice of international society, CIL reflects and crystalizes past realities and not proposed reforms.[8] In this argument, scholars have pointed out that due to its reliance on general state practice CIL is biased towards the *status quo* and is not conducive to changes in the international legal system.[9] Thirdly, it is argued that the formation and application of CIL is disproportionally influenced by powerful developed States,[10] often neglecting the role or interests of the Third World.[11] This line of criticism identifies several mechanisms within the CIL framework which maintain the imbalance, including the dominance of first world practice when analysing the 'state practice' requirement,[12] the development of the persistent objector doctrine,[13] and the appropriation of the specially affected States doctrine by powerful States of the Global North.[14]

This paper explores the criticism towards CIL from the Third World perspective and examines whether the issues identified by scholars may be addressed through the identification, development, and application of uniform guidelines for the interpretation of CIL. In this sense, the paper examines how a consistent practice of CIL interpretation after the formation and identification of a CIL rule may offer an approach which addresses the lack of democratic legitimacy of CIL, CIL's bias towards the *status quo*, and the dominance by powerful States in the formation and application of CIL. The paper thus argues that interpretation may offer an answer to these critiques by:

i) Enhancing uniformity in the application of CIL;
ii) Offering a solution to the critique of dominance by laying out uniform guidelines for the interpretation and application of CIL; and
iii) Providing an opportunity for CIL rules to evolve through the process of interpretation.

The analysis is structured in three sections. Section one deals with the criticism towards CIL from the Third World perspective, and expands on the three main lines of criticism identified above. Section two then turns to the interpretation of CIL and explores how it can address the criticism identified in Section one. It does so by firstly dealing with the interpretation of CIL more generally, by reference to interpretation in the practice of international courts and the corresponding scholarly analysis. It then

4 *Ibid.*
5 *Ibid*, 254.
6 Kelly, *supra note* 2, at 49.
7 *Ibid*, 71; Okubuiro, *supra note* 2, at 258-262; Chimni, *supra note* 2, at 13, expanding on a similar observation made by H.E. Mohammed Bedjaoui in his seminal work "Toward a New International Economic Order".
8 Gallindo and Yip, *supra note* 2, at 254.
9 *Ibid*.
10 Roberts, *supra note* 2, at 768.
11 Chimni, *supra note* 2; Okubuiro, *supra note* 2.
12 Galindo and Yip, *supra note* 2; Chimni, *supra note* 2; Roberts, *supra note* 2.
13 Chimni, *supra note* 2, at 6.
14 Kevin John Heller, 'Specially Affected States and the Formation of Custom' [2018] 112(2) AJIL 191.

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develops the argument that the criticism of the current system of CIL and its operation, developed from the Third World perspective, can be addressed with the development of uniform guidelines for CIL interpretation. Notably, this section forwards the view that uniform guidelines of interpretation carry the potential to democratize CIL, and provide the opportunity for customary rules to evolve through the process of interpretation. Finally, section three summarizes all the findings by way of conclusion.

2. Criticism

This section expands on the three lines of criticism levied against the current system of CIL from the perspective of Third World States. Before embarking on this analysis however, a small caveat is in order. With respect to the categories of criticism outlined above, it is important to note that this categorization does not represent a strict divide. Often the points raised by scholars relate to or even overlap with one another, and this will be duly recognized in the upcoming sections. The distinction offered in the paper is that of loose categorization and serves the purpose of laying out the current scholarly debate more clearly.

2.1 The Current System of CIL is Undemocratic

In a historical analysis of the development of CIL, J. Patrick Kelly persuasively illustrates the lack of democratic legitimacy of the current CIL system. Kelly defines democratic legitimacy as "the extent to which nations and societies are members of, participate in, and influence the political community determining norms".[15] In the context of CIL however, historically the practice and interests of non-Western nations and societies, as well as less powerful Western nations, were largely neglected or not considered for the purposes of CIL creation and identification.[16] This practice of exclusion continued in the post-colonial period as well, and has led nations such as Japan, Argentina and China to view themselves as recipients of international law rather than participants in the process.[17]

CIL's lack of democratic legitimacy comes from several aspects of the current CIL system. Primarily, and most explicitly, it stems from the fact that recently independent States were and continue to be bound by CIL rules in whose creation they did not participate. As a result, customary rules are biased in geographic, religious, economic, and political terms.[18] Early debates on this problem in CIL questioned whether new States were in fact bound by existing CIL.[19] This question was resolved by the project of the International Law Association (ILA) on the formation of customary international law, where in the commentary to Principle 14 it was found that "newly-independent States or those new to a particular activity are bound by existing rules of customary law".[20] While some authors have since

15 Kelly, *supra note* 2, at 49.
16 *Ibid*.
17 *See indicatively* Hanqin Xue 'Chinese Observations on International Law' [2007] CJIL 83(6) 84-85.
18 Gallindo and Yip, *supra note* 2, at 254.
19 Francisco Orrega Vicuña 'Customary International Law in a Global Community: Tailor Made?' [2005] Estudios Internacionales No. 148, Instituto de Estudios Internacionales Universidad de Chile 21.
20 International Law Association, London Conference 'Statement of Principles Applicable to the Formation of General Customary International Law' [2000] 24.

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contended that this is no longer an active debate,[21] many continue to raise this point to illustrate CIL's undemocratic character.[22]

The historical lack of democratic legitimacy indigenous to the current CIL system has led some authors to develop an ever more elaborate critique of CIL's undemocratic character which argues that the current CIL system is a form of hegemonic oppression. When found in scholarly work, the hegemony critique is most often based on Antonio Gramsci's notion of hegemony which equates hegemony with domination, and argues that it arises when the interests of the dominant few are presented as if they are universal.[23] Consequently, a social order which produces and reproduces the ideology of the dominant few is maintained through a network of institutions, social relations and ideas.[24] Extended to the international sphere and CIL, this argument maintains that powerful States do not sustain their domination in the international system through the exclusive use of power but also through the force of ideas and beliefs that come to be internalized by the subjects of domination.[25] In the context of CIL this critique targets the claim that CIL reflects universal values,[26] and its more historic counterpart which claims that CIL is based on common consent.[27]

One examples which aptly illustrates the issues raised by this line of criticism comes from the development of the international minimum standard of compensation for the expropriation of foreign property. In a historical analysis of the development of the standard, Kelly persuasively demonstrates that the standard was both developed from a decidedly Eurocentric body of scholarship, and pushed to universalization in spite of explicit opposition by Latin American States which had developed alternative regional doctrines.[28] One such regional approach was the Calvo doctrine, developed by the eponymous Argentine jurist. The Calvo doctrine maintained that foreign investors should settle disputes arising out of the investment under the national law of the home state, and that aliens are not entitled to rights and privileges not accorded to nationals.[29] This approach precluded the application of any international minimum standard of full compensation.[30] Furthermore, many Latin American States inserted so called Calvo clauses in their domestic statutes and constitutions,[31] thereby reiterating their stand on the matter. Nevertheless, this practice of Latin American States was largely neglected by their American and European counterparts and was not considered in arbitral cases of the time.[32]

2.2 CIL Reflects Past Realities

The second category of criticism revolves around the claim that CIL reflects and crystalizes past realities rather than opportunities to reform the international legal system. This line of criticism tends to be two-

21 Vicuña, *supra note* 21, at 27.
22 Kelly, *supra note* 2, at 56; Chimni, *supra note* 2, at 13; Gallindo and Yip, *supra note* 2, at 269; Roberts, *supra note* 2, at 769.
23 Okubuiro, *supra note* 2, at 237; Chimni, *supra note* 2, at 29.
24 Okubuiro, *supra note* 2, at 238.
25 Chimni, *supra note* 2, at 29.
26 Gallindo and Yip, *supra note* 2, at 264.
27 Kelly, *supra note* 2, at 56-59.
28 Kelly, *supra note* 2, at 59-73.
29 Patrick Juillard, 'Calvo Doctrine/Calvo Clause' (January 2007) MPEPIL < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689> accessed 15 May 2019.
30 Kelly, *supra note* 2, at 66.
31 *Ibid*, 65.
32 *Ibid*, 66-67.

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pronged. Firstly, authors claim that CIL reflects the past because it is the outcome of the colonial encounter between Western European powers and the Third World.[33] This arguments is based on the historical development of CIL as a source of international law, and traces the origins of CIL in the writings of Francisco de Vitoria who used the construct of universal reason to argue that non-European societies were bound by universal principles without their consent or participation. Thus, a survey of the origins of CIL reveals a universalization of European norms through legal rhetoric for the purpose of legitimizing the colonial enterprise, and later treating these norms as customary law binding on all.[34] As the reader may notice, this argument bears similarities with the above discussed criticism of CIL as a hegemonic structure, and in fact some authors have used CIL's colonial history as a constitutive element of the hegemony critique.[35] An interesting example supporting this line of criticism comes from Okubuiro's analysis of *uti possidetis* in the context of the decolonization of Africa.[36] While the principle of *uti possidetis* originates in Roman Law and was initially limited to the context of post-colonial boundary delimitation in Latin America, it re-surfaced in the 20th century to delimit boundaries in the decolonization of African States as well.[37] In this context, reliance on *uti possidetis* saw the gathering of different African entities into larger groups pursuant to the Western model of statehood, and this model of delimitation remained in place in the decolonization period. . This sort of boundary delimitation Okubuior argues, maintained colonial frontiers in the region, and neglected important elements of local culture and organization. Far from showing resistance, many of the post-colonial States accepted this model of delimitation, thereby maintaining a model of statehood which excluded the consideration of diverse local communities. [38] Moreover, this reliance on *uti possidetis* led to a number of border disputes in the post-colonial period, including the 1986 *Frontier Dispute* case brought before the International Court of Justice (ICJ) by Burkina Faso and Mali, as well as the 1994 *Land and Maritime Boundary* case brought before the ICJ by Cameroon and Nigeria. While one might argue that the acquiescence to this model of delimitation by post-colonial States lends it some legitimacy, Okubuiro's analysis of *uti posidetis* provides significant insight into the criticism that CIL reflects past realities. Her criticism of the application of *uti posidetis* in the context of African States traces back to the initial colonial delimitation of borders in the region, and stretches over the subsequent acquiescence to the principle by post-colonial state entities as well. Thus, her analysis offers a reading of the CIL rule which sheds light on the reasons why Third World scholars forward the criticism that CIL reflects past realities rather than more contemporary developments.

Secondly, authors develop this criticism as a claim that CIL is biased towards the *status quo* and does not allow for evolution of international law. Since CIL rules develop from a general practice of international society, CIL crystalizes past realities and not proposed reforms.[39] Even if a state disagrees with an existing CIL rule it is bound to comply with it, since deviations will be considered as an unlawful act unless and until they become accepted as a new custom. This process however is often long and uncertain, and judicial reasoning on this issue does not offer much clarity. In its *Nicaragua* judgment the ICJ alluded to the possibility of CIL modification by stating that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States,

33 Kelly, *supra note* 2, at 50; Anthony Angie "Imperialism, Sovereignty and the Making of International Law" (CUP 2007).
34 Kelly, *supra note* 2, at 51.
35 Okubuiro, *supra note* 2; Chimni, *supra note* 2.
36 Okubuiro, *supra note* 2, at 243-245.
37 Giuseppe Nesi, 'Uti possidetis Doctrine' (February 2018) MPEPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125?prd=EPIL> accessed 15 May 2019.
38 Okubuiro, *supra note* 2, at 243.
39 Gallindo and Yip, *supra note* 2, at 254-255.

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tend towards a modification of customary international law".[40] This pronouncement however, as the reader will likely note, does not shed much light on the matter.

2.3 The Formation and Application of CIL is Influenced by Powerful States

This final category of criticism concerns the dominance of powerful States of the Global North in the contemporary formation and application of CIL. The criticism presented here broadly revolves around three elements of the current CIL system, namely: i) the dominance of first world practice for the purpose of identification of CIL, ii) the development of the persistent objector doctrine, and iii) the appropriation of the specially affected States doctrine by States of the Global North.

The paper distinguishes this line of criticism from the one concerning CIL's lack of democratic legitimacy mostly because this critique concerns what is arguably still present in the current CIL system, whereas the previous one concerned itself with the historical development of CIL. Nonetheless, the reader will notice that often the points raised by both critiques relate to one another.

With respect to the dominance of first world practice for the purpose of CIL identification, in addition to the above-identified argument concerning CIL's undemocratic origins, authors maintain that even in the present practice of CIL formation and identification the practice of powerful western States predominates.[41] This is ascribed to several factors. Firstly, it is related to the different degree of publicity and availability of evidence of state practice. Both international courts and scholars can more easily obtain documents attesting to the practice of western States than to that of States of the Third World.[42] This leads to the identification of CIL rules based primarily or even exclusively on the practice of powerful western States.[43] Furthermore, authors forward the claim that beyond issues of availability, international courts consider state practice selectively, with a bias towards the practice of a few powerful States.[44] Here an example can be found in the analysis of state practice by the ICJ in the *Arrest Warrant* case, where the practice of only a couple of States was considered for the purpose of establishing whether there exists under CIL any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs.[45] While one of the parties to the dispute also pointed to the absence of practice of prosecution of incumbent ministers as a potential indication of state practice through abstention,[46] the Court did not evaluate this argument explicitly. This might be owed to the fact that it is difficult to infer evidence of state practice only from the absence of behaviour on the part of a state, and indeed the International Law Commission (ILC) has recently indicated that abstention may count towards practice only under certain circumstances.[47] In any event,

40 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits Judgment) [1986] ICJ Rep 14, para. 207.

41 Gallindo and Yip, *supra note* 2, at 258; Roberts, *supra note* 2, at 768.

42 Gallindo and Yip, *supra note* 2, at 258.

43 Chimni, *supra note* 2, at 20-22.

44 Roberts, *supra note* 2, at 768; Kelly, *supra note* 2, at 64; Niels Petersen 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' [2017] EJIL 28(2) 375, 377.

45 *Case concerning the Arrest Warrant of 1 April 2000* (Democratic Republic of the Congo v. Belgium) (Judgment) [2002] ICJ Rep. 3, para. 58.

46 *Case concerning the Arrest Warrant of 1 April 2000* (Democratic Republic of the Congo v. Belgium) Memorial of the Government of the Democratic Republic of the Congo, para. 67.

47 International Law Commission, *Draft conclusion on identification of customary international law, with commentaries* (Yearbook of the International Law Commission 2018, vol. II, Part Two) Conclusion 16.

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in this case the Court did not go into great detail when analysing the relevant CIL rule, and provided a rather brief analysis with respect to the relevant state practice.

The second criticism that emerges in this category is the one concerning the development of the persistent objector doctrine. While the 'persistent objector' has now been recognized as a part of the CIL system by both the ILC[48] and the ILA,[49] a historical survey shows that the doctrine only emerged in jurisprudence as early as the 1950s,[50] and was widely accepted in scholarly work in the 1970s and 1980s.[51] This has led authors to argue that rather than being a legally sound element of CIL theory, the persistent objector was developed as tool of western counter-reformation in response to the increasing participation of newly independent Third World States in international law.[52] Thus, while newly independent States were bound by existing CIL, developed States could, by resorting to persistent objection, opt out of any new or modified CIL rules.[53]

A final criticism in this category is what authors have characterized as an appropriation of the specially affected States doctrine by powerful States. Authors which view the doctrine of specially affected States with a critical eye, argue that in addition to the already identified dominance of developed States practice in CIL, the ability of Third World States to contribute to the formation or modification of CIL is further undermined by the specially affected States doctrine.[54] This is owed to the fact that while the doctrine itself does not proclaim any bias towards particular States, its application has largely contributed to furthering the grip of powerful States over CIL.[55] In a persuasive twist of the argument however, Kevin Jon Heller convincingly illustrates that while there has indeed been an appropriation of the specially affected States doctrine by powerful States (and in particular the US), this misuse of the doctrine is based on the erroneous views that engaging in a non-universal practice makes a state specially affected and that CIL cannot be formed over the objection of one specially affected state.[56] Thus, while the criticism on the application of the specially affected States doctrine still stands, this is an area of Third World States' grievance which can be particularly addressed with the development of guidelines for CIL interpretation.

3. What's Interpretation got to do with it?

The previous section explored the criticism that developed around the issue of under-representation of Third World States in the development and functioning of CIL. This following section turns to a discussion of the interpretation of CIL and develops the argument that the issues identified in the criticism can be addressed through the development of uniform guidelines for the interpretation of CIL. Notably, this section forwards the view that uniform guidelines of interpretation carry the potential to democratize CIL and provide the opportunity for customary rules to evolve through the process of interpretation.

48 *Ibid*. Conclusion 15.
49 ILA Report (n 20).
50 *Asylum case* (Colombia v. Peru) (Judgment of November 20th 1950) [1950] ICJ Rep 266; *Fisheries case* (United Kingdom v. Norway) (Judgment of December 18th 1951) ICJ Rep. 116.
51 Gallindo and Yip, *supra note* 2, at 267; Kelly, *supra note* 2, at 78-79.
52 Chimni, *supra note* 2, at 24; Gallindo and Yip, *supra note* 2, at 267-268.
53 Kelly, *supra note* 2, at 79.
54 Chimni, *supra note* 2, at 6.
55 *Ibid*. 22-23.
56 Heller, *supra note* 14, at 193.

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At this point it must be noted that the view that interpretation may address some, if not all, of the criticisms levied from the Third World perspective is not entirely unique to this paper. In her analysis of traditional and modern approaches to CIL, Anthea Roberts introduces the concept of a 'reflective interpretive approach' as a means of adequately dealing with the fluid nature of custom and reconciling traditional and modern approaches to its genesis and application.[57] Similarly, in his analysis of the specially affected States doctrine, Kevin Jon Heller argues that an appropriate interpretation of the doctrine has the potential to provide Third World States with more power over the formation of international custom.[58] The argument developed in the present paper builds on these observations, and takes the potential of CIL interpretation to address deficiencies in the current CIL theory even further. Moreover, unlike other authors dealing with CIL interpretation, the argument developed in this paper focuses on interpretation after a CIL norm has been formed and identified. In this sense, the argument does not attempt to propose new theories on the genesis and functioning of CIL, but rather attempts to address some of its deficiencies in the stage of CIL application.

Before developing this argument however, it is necessary to dedicate a few paragraphs on the possibility to interpret CIL and the current state of affairs with respect to that matter. For this reason, this section begins by elaborating on the current status of CIL interpretation and the model of interpretation proposed by this paper. The section then delves into the argument that a set of guidelines for the interpretation of CIL have the potential to bridge the proverbial gap currently existing in the field of CIL with respect to the Third World.

3.1 Can CIL be Interpreted?

In the current academic discourse on the application of CIL, there is as of yet an unresolved question asking whether customary law is open to interpretation. Unlike treaties, whose interpretation is guided by the Vienna Convention on the Law of Treaties (VCLT) and its customary counterparts, CIL's interpretation remains a mysterious process whose functioning is both questioned and unregulated.

The main reason authors question the interpretability of CIL is its unwritten nature. In an analysis of CIL as a source of international law, Judge Tulio Treves argues that the unwritten character of CIL excludes the need for its interpretation; thereinafter, when discussing the work of international courts, he differentiates between the process of ascertaining when it comes to CIL versus the process of interpreting when it comes to written sources.[59] Similarly, Maarten Bos argues that interpretation does not extend to unwritten sources like CIL because the mere process of identification of a CIL rule delineates its content as well.[60] This is problematic for two reasons. Firstly, as has been persuasively demonstrated by Panos Merkouris in his analysis of the interpretability of CIL, international jurisprudence negates this position by regularly engaging in the process of CIL interpretation separately from the process of identifying CIL through the 'state practice + *opinio juris*' formula.[61] This engagement varies from explicit recognition by judges that they are interpreting CIL,[62] to more implicit

57 Roberts, *supra note* 2, at 786-791.
58 Heller, *supra note* 14, at 241-243.
59 Tulio Treves "Customary International Law" (Max Planck Encyclopaedia of Public International Law 2010).
60 Maarten Bos "A Methodology of International Law" (Oxford: North Holland, 1984).
61 Panos Merkouris "Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave (Brill Nijhoff, 2015) 240-263.
62 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits Judgment) [1986] ICJ Rep 14, para.178; *North Sea Continental Shelf cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep. 172, Dissenting Opinion

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examples where although judges do not outright use the term 'interpretation' this is what is taking place.[63] Secondly, and more substantially, in the absence of an interpretative process for a CIL rule, there is no explanation about what happens to a CIL rule after it has been identified. Namely, once a CIL rule is identified for the first time through a judicial assessment of the two elements of state practice and *opinio juris*, it is reasonable to assume that in subsequent cases judges will not need to re-asses these elements in order to identify the rule once again, but will rather need to apply the rule to the case at hand and interpret it within the given legal and factual context. Arguing that CIL is not subject to interpretation thus fails to account for the continued existence and operation of a CIL rule after its first identification, and rather operates from the paradoxical premise that a rule of CIL should be identified each and every time anew. Furthermore, several authors have successfully illustrated that CIL is regularly interpreted by international courts and tribunals,[64] and that international legal theory more generally allows for this kind of interpretation.[65]

This paper accounts for the process of CIL interpretation through the illustrative tool of a 'CIL timeline' (Figure 1). The CIL timeline begins with the formation of a customary rule through the two constitutive elements of state practice and *opinio juris*. The rule is then identified by an inductive analysis of these two elements, usually by a relevant judicial authority. For the purposes of identification, evidence of state practice and *opinio juris* is considered, weighed, and evaluated in order to establish whether a customary rule has come into existence. It is important to note that a form of interpretation also takes place at this phase of identification. However, at this phase the relevant judicial authority does not interpret a customary rule (as this rule has not been identified yet) but rather interprets the evidence of state practice and *opinio juris* in order to ascertain whether a customary rule has been formed. This distinction is particularly important for the purposes of the present discussion, because, when speaking of interpretation, this paper refers not to the evaluation of state practice and *opinio juris* for the purpose of identification, but rather to the interpretation of an already identified CIL rule. In this context, interpretation of state practice may take two different forms: i) an evaluation of whether an instance of state behaviour may count for the purposes of CIL identification, or ii) a qualification of state practice when determining if it is consistent, uniform, widespread and representative. Interpretation of a CIL rule, on the other hand, is what this paper consider to be the 'true' question of interpretation, arising with regard to an already identified customary rule the content of which is unclear. Once it is established that a CIL rule has emerged, every subsequent invocation of that rule in following cases is not an exercise of re-identification (as shown above by reference to both jurisprudence and scholarly analysis) but rather of application and, where the content of the rule is unclear, interpretation. In this vein, it is important to note that the distinction between application and interpretations raised here differentiates the two by accounting for interpretation as the process of determining the meaning of a rule, and

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of Judge Tanaka; *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura* (Decision on Interlocutory Appeal challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003) Partial Dissenting Opinion of Judge Shahabuddeen paras 9-10. For an interesting example of CIL interpretation by national courts, see *Committee against Torture in Israel and Palestine v Israel*, Supreme Court of Justice of Israel (2006) para. 27.

63 *Case concerning the Arrest Warrant of 1 April 2000* (Democratic Republic of the Congo v. Belgium) (Judgment) [2002] ICJ Rep. 3, para. 53-54; WTO, *EC — Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R paras. 7.68-7.72; *Mondev International Ltd. v. United States of America* (Final Award, 2002) ICSID Case No. ARB(AF)/99/2 para. 113.

64 *See* A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) Chapter 15; Merkouris, *supra note* 61, at 231-298.

65 *See* S Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion (The European Journal of International Law Vol. 26(2), 2015) 417-443; P Merkouris, Interpreting the Customary Rules on Interpretation (International Community Law Review 19, 2017) 126-155.

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application as the process of determining the consequences which follow from the rule in a given situation. Thus, interpretation might not take place in instances where a CIL rule is sufficiently clear for the given circumstances. Nonetheless, where the content of a CIL rule is unclear, interpretation will need to take place before the legal consequences of the rule may be determined.

The current CIL timeline does not have explicit rules which guide the phase of interpretation. Nonetheless, in its 2016 Preliminary Report of the Study Group on Content and Evolution of the Rules of Interpretation, the ILA flagged CIL interpretation as a relevant topic of exploration.[66] Similarly, there is currently a large-scale project dedicated to the research and identification of the rules of CIL interpretation.[67] While an in-depth study of rules for CIL interpretation is beyond the scope of this paper, it is relevant to delineate this phase in the timeline of a CIL rule, before continuing to illustrate how the identification of such rules holds the potential to address the Third World criticism. A final phase depicted on the CIL timeline is the modification of a CIL rule. It is important to point out that this is not a necessary phase in the timeline of every CIL rule, and it may well happen that a CIL rule continues its existence without being subject to modification. Nonetheless, in case where a customary rule goes through a phase of modification, interpretation will play a role.

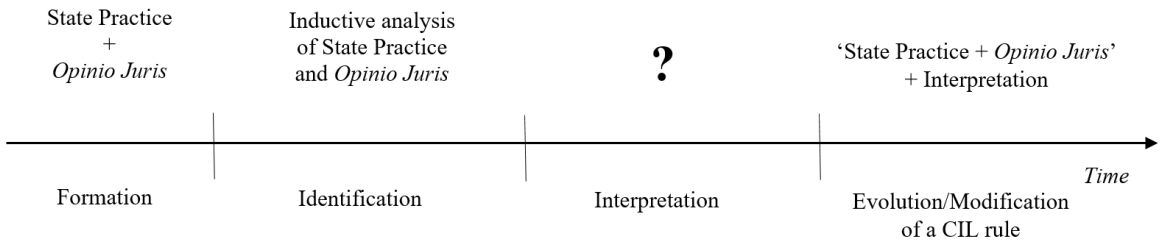

Figure 1: The CIL Timeline

Overall, while there are scholars who question or negate the interpretability of CIL, this is not the view that dominates the discourse.[68] In addition to authors who have engaged in a detailed demonstration of the interpretability of CIL, many authors have referenced the interpretation of custom passingly, seeming to accept that this is but a regular event in the application of CIL.[69] Moreover, as has already been indicated above, some authors have even looked to CIL interpretation as the process which may address the many issues that exist in the current CIL system with respect to the under-representation of Third World States' interests and practice.[70]

66 International Law Association Study Group on Content and Evolution of the Rules of Interpretation, 'Preliminary Report' (Johannesburg, 2016) 9

67 See the TRICI-Law project, of which the author is a member.

68 Merkouris, *supra note* 61, at 243-246. *See also* H. Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons Ltd., 1958) 381-384; Orakhelashvili, *supra note* 64, Chapter 15; Talmon, *supra note* 65, at 417-443.

69 See indicatively Lauterpacht, *supra note* 68, at 381-384 and Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (CUP 2005) 391.

70 Roberts, *supra note* 2, at 786-791; Heller, *supra note* 14, at 241-243.

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3.2 How does CIL Interpretation address the Third World critique?

Having explored the interpretability of CIL and the phase in a CIL timeline when we engage in interpretation, this paper now turns to the argument that the criticisms concerning the current position of Third World States in the CIL system may be addressed through the development of uniform guidelines for the interpretation of CIL. More specifically, the paper argues that a consistent practice of CIL interpretation after the formation and identification of a CIL rule may offer an approach which addresses the lack of democratic legitimacy of CIL, CIL's bias towards the *status quo*, and the dominance by powerful States in the formation and application of CIL. Interpretation may thus offer an answer to these critiques by:

i) Enhancing uniformity in the application of CIL;
ii) Offering a solution to the critique of dominance by laying out uniform guidelines for the interpretation and application of CIL; and
iii) Providing an opportunity for CIL rules to evolve through the process of interpretation.

Beginning with point (i), this paper argues that the development of guidelines for CIL interpretation will enhance uniformity in the application of CIL, by relying on an analogy to the interpretation of treaties after the adoption of the VCLT. In its 2018 interim report, the ILA Study Group on the Content and Evolution of the Rules of Interpretation provides an overview of interpretive practices of various international tribunals and judicial bodies, focusing on the reception and effect of the VCLT rules on the process of treaty interpretation. In the case of the International Court of Justice (ICJ), the report notes that the Court has developed a consistent tendency to refer to the VCLT rules when engaging in interpretation.[71] While the Court does on event also rely on interpretive principles not explicitly mentioned in the VCLT, in such instances it tends to stress the principles' supplementary nature or their subsumption by the VCLT rules.[72] A similar and even more explicit tendency is visible in the practice of the World Trade Organization Appellate Body (WTO AB), where the interpretive process is guided by Article 3.2 of the Dispute Settlement Understanding, which contains a reference to customary rules of interpretation of public international law. Article 3.2 has been interpreted as implicitly referencing VCLT rules, and the AB has indeed referred to the VCLT rules of interpretation both in its first decision and in subsequent decisions.[73] This continued reference to VCLT rules of interpretation has led commentators to observe that the WTO AB has developed a fairly consistent body of jurisprudence concerning interpretation.[74] Similar observations on the increase in consistency post-VCLT, albeit to a lesser degree, are made with respect to the interpretive practices of ad-hoc tribunals[75] and the International Tribunal for the Law of the Sea (ITLOS).[76] The relevance of these findings cannot be overstated. While the observations by the ILA on the consistency of interpretation post-VCLT pertains to the interpretation of treaties, these findings may be analogized to the interpretation of CIL post an identification and development of guidelines for CIL interpretation. Thus, the patterns of consistency identified by the ILA report in the case of treaties, may also be expected in the interpretation of CIL if relevant guidelines for its interpretation are identified and applied.

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71 ILA Study Group on the Content and Evolution of the Rules of Interpretation, 'Interim Report – 19-24 August 2018, Sudney' [2018] 5.
72 *Ibid*, 6.
73 *Ibid*.
74 Helen Ruiz Fabri and Joel Trachtman, 'Preliminary Report on the Jurisprudence of the WTO DSBS', prepared for the purposes of ILA Report 2018, *supra note* 71.
75 ILA Report 2018, *supra note* 71, at 6-7.
76 *Ibid*, 8-9.

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Before continuing with this argument, it is important to note that the paper does not argue that CIL should be interpreted by reliance on the VCLT rules of interpretation (Art. 31-33). To the contrary, the author is of the view that when it comes to CIL, as a distinct source of international law, a separate set of guidelines should be identified for the interpretive process. These guidelines may or may not resemble some of the interpretive approaches enshrined in the VCLT, but they would nonetheless be separate to CIL interpretation. The reference to treaty interpretation after the adoption of the VCLT is made with the aim of illustrating that the process of treaty interpretation became notably more consistent and uniform post-VCLT, and thus a similar development may be expected in the case of CIL if rules for its interpretation are identified and developed.

In an analysis of universality and fragmentation in international law, Judge Bruno Simma points out consistent interpretation as one of the methods to be used to counteract the negative effects of fragmentation.[77] Moreover, he flags the importance of consistent interpretation by both international and domestic courts; in the case of international courts because they act within an overarching framework of international law, and in the case of domestic courts because they play an increasingly relevant role in the formation and application of international law.[78] Here again we may draw an analogy to the interpretation of CIL after the identification and development of rules for its interpretation. As is illustrated by the ILA report with respect to treaties, the existence of guidelines for interpretation contributes to a consistency of interpretation and application across various tribunals. Analogizing this to the case of CIL, it may be expected that a similar consistency of interpretation and application across various tribunals will ensue if guidelines for CIL interpretation are identified and developed. Thus, a consistent approach in the interpretation of CIL, ensured by means of guidelines for its interpretation, carries the potential to provide greater uniformity in CIL's application. This in turn directly addresses the criticism levied from the Third World perspective that the application of CIL is still predominantly influenced by powerful States. While consistent rules for CIL interpretation do not automatically address all the aspects of the dominance critique, their existence offers assurance that the process of interpretation will become more uniform and transparent. Thus, by providing for uniformity in the interpretation of CIL, the rules of interpretation significantly enhance uniformity in how CIL is applied by international courts, as well as how it is seen to be applied by States involved in the proceedings.

Moreover, and leading into point (ii), the existence of rules for CIL interpretation which would be applied consistently by judicial authorities when engaging with CIL, enables a strong degree of legal certainty for States arguing cases on the basis of CIL. By knowing the rules of interpretation, States may have reasonable foresight into the interpretation and application of a CIL rule to the case they are arguing. This in turn levels the proverbial playing field, and holds the potential to address the negatively perceived dominance of powerful States over CIL. Looking back to the interpretive jurisprudence of the WTO, commentators have noted that in the post-VCLT period the AB developed a trend of describing its interpretive reasoning in detail by reference to the VCLT rules.[79] While this tendency of describing their interpretive reasoning is noticeable to a lesser degree in the jurisprudence of other judicial bodies (even after the adoption of the VCLT),[80] there is an argument to be made that the presence of clear rules of interpretation enables judicial bodies to provide a clearer and more explicit account of their interpretive reasoning. This allows for a great degree of transparency and clarity of the

77 Bruno Simma 'Universality of International Law from the Perspective of a Practitioner' [2009] 20(2) EJIL 265, 270-271.
78 *Ibid*, 271.
79 Fabri and Trachtman, *supra note* 74.
80 ILA Report 2018, *supra note* 71.

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interpretive process, which further strengthens the potential of interpretation to address the dominance critique.

Turning finally to point (iii), this paper argues that the development of uniform guidelines for the interpretation of CIL will provide the opportunity for CIL to evolve through interpretation, thereby addressing the criticism that CIL reflects only past realities and not proposed reforms. The process of custom evolution and modification is presently still quite obscure. The general approach seems to indicate that a CIL rule may evolve or be modified by a subsequent breach of that rule by a state, which, if met with agreement by other States, will be perceived as a move towards a new or modified rule rather than a breach.[81]

The role of interpretation and the rules for interpretation in this process is twofold. Firstly, interpretation enables a CIL rule to evolve or be modified through the medium of evolutive interpretation. Evolutive interpretation covers situations in which an interpretive authority interprets a term or a legal obligation as having a meaning or content capable of evolving,[82] and this type of interpretation can occur in instances of evolution of fact or evolution of law.[83] This form of interpretation is thus particularly sensitive to changes in the legal system, and enables rules to respond to the relevant changes accordingly. This directly addresses the criticism that CIL reflects past realities and is biased towards the *status quo*. Moreover, this form of interpretation enables Third World countries to actively contribute to the evolution of CIL through subsequent practice. Secondly, the rules of interpretation ensure that the evolution or modification of a CIL rule is kept within strictly delineated parameters and does not assume unreasonable directions. Relying on the analogy to treaty interpretation once again, while evolutive interpretation may lead to a broad spectrum of changes, the rules contained in the VCLT delineate the parameters in which it may take place. Thus, scholars maintain that evolutive interpretation may happen on the bases of the intention of the parties,[84] the object and purpose of the instrument being interpreted,[85] or the language used,[86] all of which reflect the parameters outlined in Art. 31 VCLT. In this sense, evolutive interpretation is not a *carte blanche* to interpret legal provisions unreasonably expansively, but is a process delineated by the relevant rules of interpretation. Similarly, the rules for CIL interpretation would serve the purpose of delineating the parameters in which a CIL rule may be considered to have evolved, once again ensuring consistency in the interpretive process. This would allow for CIL rules to evolve in response to changes of law or fact, while at the same time ensuring that no unreasonably expansive interpretation takes place.

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81 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits Judgment) [1986] ICJ Rep 14, para.202.

82 Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 1-2, reflecting on a working definition provided by the International Court of Justice in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213.

83 Panos Merkouris, '(Inter)Temporal Consideration in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' [2014] 45 *Netherlands Yearbook of International Law* 121, 139-140.

84 HughThirlway, 'The Law and Procedure of The International Court of Justice 1960-1989 Supplement, 2006: Part Three' [2006] 77 *British Yearbook of International Law* 1, 65-68; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation; Variations and Explanations Across International Tribunals' in Jeffrey L Dunoffand Mark A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 434-435; Panos Merkouris, *supra note* 73, at 121; Bjorge, *supra note* 72, at 3-4; *See also* Merkouris, *supra note* 81, at 139-141 for the argument that these indicators are all actually reflections of the intention of the parties.

85 Pauwelyn and Elsig, *supra note* 81, at 12; Merkouris, *supra note* 2, at 139.

86 Merkouris, *supra note* 81, at 124; Christian Djefall, *Static and Evolutive Treaty Interpretation: a Functional Reconstruction* (CUP 2016).

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4. Conclusion

This paper surveyed the scholarly criticism of the current system of CIL from the perspective of Third World States and examined how some of the points of criticism may be addressed through the development of uniform guidelines for the interpretation of CIL.

Section one illustrated that in the current academic discourse there exists a substantive amount of criticism towards the current CIL system from the perspective of Third World States. This criticism concerns both the origins of CIL and its continued operation. Section two then turned to a discussion of CIL interpretation, in an attempt to identify novel approaches which may address the criticism identified in section one. Here, the paper illustrated that in spite of some scholarly disagreement, CIL interpretation regularly takes place in different international adjudicatory *fora*. Unlike the interpretation of treaties however, the process is presently unregulated and therefore inherently unclear and obscure. In light of these findings, the paper advanced the argument that some of the criticism of the current CIL system may be addressed through the identification and development of guidelines for the interpretation of CIL.

The development of guidelines for the interpretation of CIL carries the potential to bring the CIL interpretive exercise out into the light, and address many of the issues of the present CIL system raised from the Third World perspective. While guidelines for interpretation may not be a "catch-all" solution, they offer the potential to address the criticism by enhancing uniformity and transparency in the way CIL is applied and interpreted, as well as by providing an opportunity for CIL to develop and respond to changes through the medium of evolutive interpretation. In this way, the development of uniform guidelines for interpretation has the potential to enable the meaningful participation of all States in the operation of CIL and bridge the proverbial gap currently existing in the field of CIL with respect to the Third World.

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