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An Examination of the International Court of Justice's Approach to Customary International Law

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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ABSTRACT AND KEYWORDS

Article 38(1) of the Statute of the International Court of Justice (ICJ) is regarded as the pre-eminent authority on the sources of public international law. Of the sources in this Article, none has been questioned as much as international custom, also referred to as customary international law. The ICJ has ruled that customary international law crystallizes when there is a conjugation of state practice and *opinio juris*, the subjective feeling by states that they must undertake the state practice. However, that seemingly simple definition leads to several questions: what amounts to state practice? How is *opinio juris* measured? Are state practice and *opinio juris* qualitatively different? Through an examination of ICJ cases, this thesis examines how that Court has – and has not - answered these questions when defining and identifying customary international law.

Keywords: Customary International Law, International Court of Justice, State Practice, *Opinio Juris*.

SUMMARY FOR LAY AUDIENCE

The International Court of Justice (ICJ) – the United Nations court which considers state-to-state disputes – considers three types of international law when it judges cases: treaties, customary international law, and general principles of law. This thesis focuses on customary international law because it is the most critiqued source of the three. The ICJ defines customary international law as consisting of state practice and the acceptance of practice as law (known as *opinio juris*). This two-component principle has generated many questions: what amounts to state practice? How is *opinio juris* measured? Are state practice and *opinio juris* different? This thesis examines how the ICJ has defined and identified customary international law, particularly how it has decided that state practice and *opinio juris* exist when concluding that a rule has reached the level of custom.

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CHAPTER 1: INTRODUCTION TO THE THESIS

1.1 Why Focus on Customary International Law?

Customary international law (CIL), as one of the central sources of public international law,¹ plays an increasingly prominent and important role in the international legal system. Some argue that CIL is the most important source of international law, even more important than treaties.² The International Court of Justice (ICJ) – also known as the World Court and the main judicial body of the United Nations (UN) system - has held that various norms of global significance, including key human right rules, have become CIL.³ For instance, the ICJ has established in a number of its decisions that genocide is prohibited by CIL.⁴ The Court has also suggested that basic rights of the human person are part of CIL.⁵ Additionally, the ICJ has concluded that CIL contains a prohibition on the use of non-defensive force by States against other States,⁶ that States can use force in self-defence in response to attacks by other States;⁷ and that any use by States of force in self-defence is necessary and proportional.⁸ Moreover, many crimes under international law are primarily

¹ *Statute of the International Court of Justice*, 26 June 1945, Can TS No 7 (entered into force 26 October 1945) at Article 38(1)(b). Treaties are another central source (in *ibid*, Article 38(1)(a)). The ICJ's role is largely focused on adjudicating disputes over treaty interpretation and the existence (or not) of CIL. The Statute lists one other source, general principles of law: *ibid* at Article 38(1)(c). It also lists one subsidiary source, "judicial decisions and the teachings of the most highly qualified publicists of the various nations": *ibid*, Article 38(1)(d).

² Brigitte Stern, "Custom at the Heart of International Law" (2001) 11 *Duke J Comp & Intl L* 89 at 89 citing to Paul Reuter, *Introduction Au Droit Des Traités* (1972) at 38.

³ See, for example, the prohibitions on slavery and racial discrimination, *Barcelona Traction Case (Belgium v Spain)*, [1970] ICJ Rep 3 at para 34, and the right to self-determination, *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90 at para 29.

⁴ *Armed Activities Case (Democratic Republic of the Congo v Rwanda)*, [2006] ICJ Rep 6 at para 64.

⁵ *Barcelona Traction Case*, *supra* note 3 at para 34.

⁶ *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14 at paras 187-190.

⁷ *Ibid* at para 176.

⁸ *Ibid*; *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 66 at para 41; *Case Concerning Oil Platforms (Iran v United States)*, [2003] ICJ Rep 161 at para 51.

defined by CIL. The statutes of international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia,⁹ and the International Criminal Court¹⁰ refer to CIL in defining the crimes over which the tribunals have jurisdiction. The Court's consideration of CIL will continue to be central to global issues affecting the human condition: on March 29, 2023, the UN General Assembly requested an advisory opinion from the ICJ on this pressing question: "[w]hat are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gasses (GHG) for States and for present and future generations?"¹¹ It is highly likely that, in its resulting advisory opinion, the ICJ will be required to consider the CIL nature of environmental obligations such as the principle of prevention of transboundary harm.¹²

Despite the importance of CIL as a central source of public international law, it is considered the most controversial of all of the sources in that field.¹³ The controversies stem from the way it is formed, defined, and identified. Unlike treaties, CIL is not negotiated between states, nor is it written. It is an unwritten form of law that binds all

⁹ *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 13 October 2005), 8 November 1994, Resolution 955/1994, at Article 3.

¹⁰ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS No 90 (entered into force 1 July 2002) at Article 8(2)(b).

¹¹ *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change*, GA Res 77/276, UNGAOR, 77th Sess, UN Doc A/77/L.58 (2023) at para (a). There was one other question also asked: "(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?", *ibid*.

¹² The ICJ has commented on the CIL status of this principle in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep 156 at para 101.

¹³ These controversies are examined in Chapters 3, 4, and 5 of this thesis.

states. Given the fact that it is unwritten, it can be challenging to identify norms that have crystallized into CIL, and to find clear statements of the content of those norms. Thus, an enduring critique of the ICJ's consideration of CIL is that it is unclear, haphazard, unpredictable, or methodologically unsound.¹⁴ These criticisms arise from the manner in which the ICJ has defined and determined State practice and *opinio juris* (the ostensible building blocks of CIL, as explained below) within and between cases, and over time. It is due to these concerns that this thesis analyzes how the ICJ could bring more consistency and a denser methodological foundation to its evaluations of CIL, particularly since the ICJ is increasingly becoming a court in which “wicked problems”¹⁵ like climate change, genocide, and torture are being litigated.¹⁶

¹⁴ Alberto Alvarez-Jiménez, “Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000-2009” (2011) 60:3 ICLQ 681 at 709 (on the ICJ’s avoidance of assessing state practice and *opinio juris*); Anthony D’Amato, “Trashing Customary International Law” (1987) 81:1 AJIL 101 at 102 (“the judges have little idea of what they are doing”) and 103-105; Anthea Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95:1 AJIL 757 at 768 (on lack of clarity on the ICJ’s methodology in *Nicaragua*); Stefan Talmon, “Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion” (2015) 26:2 Eur J Intl L 417 at 418, 441-443.

¹⁵ The term “wicked problems” was introduced by Horst Rittel & Melvin Webber in “Dilemmas in a General Theory of Planning” (1973) 4:2 Policy Sciences 155-169. The term refers to complex social problems with an unknown number of potential solutions, such as sustainability, climate change, and discrimination. The phrase uses “wicked” to mean tricky, as opposed to evil: *ibid* at 160.

¹⁶ On climate change, see *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change*, *supra* note 11. On genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, [2022], Judgment on Preliminary Objections, ICJ Rep 1, online (pdf): <<https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>> . See also, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)*, Order on Provisional Measures 16 March 2022, [2022] ICJ Rep 211, online (pdf): <<https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf>> On torture, see *Joint Application Instituting Proceedings Concerning a Dispute Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada & The Kingdom of the Netherlands v The Syrian Arab Republic)*, Request for the Indication of Provisional Measures 8 June 2023, online(pdf): <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-APP-01-00-EN.pdf>.

This chapter aims to provide a brief introduction to CIL, describe the central question examined in this thesis, and explain the methodology used throughout. It will then describe the structure of the thesis and provide a sense of its scholarly contribution. Finally, it will conclude by setting the stage for the next chapter.

1.2 Brief Background: Definition of Customary International Law and Enduring Questions

The definition of CIL appears straightforward at first glance. Article 38(1) of the Statute of the ICJ lists “international custom, as evidence of a general practice accepted as law” as a source of international law.¹⁷ This description of international custom indicates that there are two elements, state practice (“general practice”) and *opinio juris* (“accepted as law”), the combination of which leads to the formation of a rule of CIL.¹⁸ The element of state practice requires that a norm must be universally and consistently practised, while the element of *opinio juris* expects that a general practice of States must be accepted as law by those same States.¹⁹ The ICJ’s case law has both reaffirmed this definition,²⁰ and added more nuance. For example, the Court has clarified that complete uniformity of state practice is not required; only substantial uniformity is needed.²¹ Commentators “generally agree with this basic definition” of CIL.²² They also agree that CIL binds all States, even

¹⁷ *Statute of the International Court of Justice*, *supra* note 1, at Article 38(1)(b).

¹⁸ Though, as will be discussed in Chapters 4 and 5, exactly whether and how they work together is a matter of debate.

¹⁹ James Crawford, *Brownlie’s Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) 22 – 23; Ademola Abass, *International Law: Text, Cases, and Materials*, 2nd ed (New York: Oxford University Press, 2014) 39 – 40.

²⁰ *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13 at para 27.

²¹ *Military and Paramilitary Activities in Nicaragua*, *supra* note 6 at para 286; James Crawford, *supra* note 19 at 22.

²² Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010) 6.

those which have not consented to it, unless they fulfill the requirements of being a persistent objector.²³ There is also widespread agreement that a small subset of CIL norms may be termed *jus cogens* norms, from which no deviations are permitted.²⁴ Despite both the ICJ's definition of CIL and the general agreement among scholars on the broad outlines of CIL, many characterize CIL as an enigma.²⁵

One example of the enigmatic nature of CIL is that the two-element requirement raises many questions on which the ICJ has not definitely ruled. For instance, with respect to State practice, what level of general practice is required before a rule of CIL is established? How long must States follow a particular practice before it becomes a legally binding norm? Questions about *opinio juris* include: how does a sense of legal obligation arise in the first place, and what evidences it? If a customary norm by definition requires a sense of legal obligation, how do customary norms evolve since to depart from a rule would violate it?²⁶ Attempts to know whether a practice or behaviour has been accepted as law have led scholars to describe the second requirement of the ICJ Statute's definition as the psychological element.²⁷ This requires dissecting the feelings of States over a particular practice in order to conclude whether such practice has been accepted as law, but this raises more questions, including: how can a psychological state of a State be determined? How many States must be considered to illustrate a widely held psychological feeling? Some of

²³ James Crawford, *supra* note 19 at 26.

²⁴ Ademola Abass, *supra* note 19 at 48.

²⁵ Hilary Charlesworth, "Customary International Law and the *Nicaragua* Case" (1984-85) *Austl YB Intl L* 1 at 1; Brian D. Leppard, *supra* note 22 at 8.

²⁶ Mark Chien, "Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner" (2001) 23:1 *Mich J Intl L* 143 at 146.

²⁷ Brigitte Stern, *supra* note 2 at 95; Jack L. Goldsmith & Eric A. Posner "A Theory of Customary International Law" (1999) 66 *Chi L. Rev* 1113 at 1116. This time paradox is examined in Chapter 4.

these questions, and the academic discussion around how the ICJ has or has not handled them, will be considered in the following chapters.

This brief description of the ICJ's and scholars' high-level understanding of CIL will be developed and deepened in subsequent chapters of this thesis, when specific aspects of, for example, state practice and *opinio juris* are examined.

1.3 Problem Statement and Research Questions

Every court, whether domestic or international, primarily exists to solve a dispute before it. These courts use law applicable to the litigants. The ICJ adjudicates state-to-state disputes and one of the sources of law used by Court is CIL. This source is listed in Article 38(1) of the Statute of the ICJ, and this list is widely accepted by international lawyers as definitive and applicable well beyond the ICJ itself.²⁸ Considering the importance of CIL as an unwritten yet central source of international law, it is proper to engage in discussions on how the ICJ has identified and applied the law. This thesis steps away from how States themselves act to create CIL and examines how the ICJ, which is the principal judicial organ of the United Nations, determines when States have created CIL.

This thesis examines the role of the ICJ in the identification of customary international law, the methods adopted by the Court over the years and in recent times to identify this source of law, and the uniformity (or lack thereof) in these methods. In doing so, it aims to answer these questions: **How has the International Court of Justice developed CIL? Is there consistency, predictability and/or coherence in the methods used by the Court to**

²⁸ James Crawford, *supra* note 19 at 18; John H. Currie et al, *International Law: Doctrine, Practice and Theory*, 3rd ed (Toronto: Irwin Law Inc, 2022) at 46.

establish CIL? If not, what factors have contributed to the inconsistency, unpredictability, and/or incoherence and how might this state of affairs be resolved?

The underlying assumption of this thesis – and much of the literature discussed in it²⁹ – is that consistency, predictability, and coherence within the ICJ’s methodology are better than inconsistency, unpredictability, and incoherence as they create a denser, more predictive jurisprudence that contributes to the rule of law.³⁰

1.4 Research Methodology

This thesis uses legal doctrinal methodology. This methodology is the leading methodology in legal academic analysis.³¹ Legal doctrinal research is defined as research which “provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments”.³² It utilizes primary and secondary legal sources to undertake “critical analysis and synthesis of the law”,³³ including through textual analysis, practical argumentation, and principled or structured reasoning and interpretation.³⁴ It also develops “chains of argument that refer back to formal legal sources of international law”.³⁵ It is a

²⁹ See, for example, Brian D. Lepard, *supra* note 22 at 371-374.

³⁰ This assumption is not one limited to CIL or international law. It is one that many legal philosophers have considered. See, for example, Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 39.

³¹ Hutchinson describes it as the “core of legal scholarship”: Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law” (2015) 8:3 *Erasmus Law Review* 130 at 130.

³² Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17:1 *Deakin Law Review* 83 at 101.

³³ Terry Hutchinson, *supra* note 31 at 130.

³⁴ Andria Naude Fourie, “Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research” (2015) 8:3 *Erasmus Law Review* (2015) 95 at 96, citing to J. Vranken, ‘Exciting Times for Legal Scholarship’ (2012) 2 *Recht en Methode in Onderzoek en Onderwijs* 42 at 43.

³⁵ Martti Koskeniemi, “Methodology of International Law” in Anne Peters and Rüdiger Wolfrum eds, *Max Planck Encyclopedias of International Law* (November 2007), online: <<https://opil-ouplaw->

fitting methodology for this thesis because its subject matter focuses on the jurisprudential practice of a leading court, considers how that court identifies legal rules, identifies areas of inconsistency in that court's analysis, and predicts future developments.

This thesis uses primary sources, particularly (and most importantly) judgments and advisory opinions of the ICJ and, to some extent, the jurisprudence of its predecessor, the Permanent Court of International Justice. The decisions that have emanated from the ICJ have changed the landscape of international law with respect to CIL.³⁶ There are over 175 cases and advisory opinions that the Court has decided on CIL to date. The author has reviewed these judgments and advisory opinions and has selected for analysis those judgments and advisory opinions in which the Court made consequential pronouncements on the content of CIL.³⁷ Where relevant, this thesis also considers other primary sources, such as the ICJ Statute, treaties, and UN General Assembly resolutions.

This thesis also examines secondary sources such as books and journal articles on the ICJ's approach to CIL, in order to understand which aspects of the definition of customary international law are most critiqued, and why. By analyzing both the Court's practice and the academic analysis of that practice, this thesis identifies lessons learned on the identification of custom. The secondary source descriptions of how the ICJ has identified and applied CIL are particularly useful for evaluating the uniformity (or lack thereof) of methods amongst the Court's cases. By adopting an expository approach to this literature,

com.proxy1.lib.uwo.ca/search?sfam=&q=Methodology+of+International+Law&prd=MPIL&searchBtn=Search> at para 7.

³⁶ *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States)*, *supra* note 6, for example.

³⁷ Judgments have been excluded where they simply repeated a CIL finding from another case without developing any new analysis or demonstrating any different modes of reasoning. Such cases were largely considering "facilitative custom" as defined by Roberts: not involving "strong issues of principle" or "substantive moral issues", such as boundary delimitation cases: Anthea Roberts, *supra* note 14 at 781-782.

this thesis gains a useful assessment of the theories, history, and facts that inform the Court's identification and application of CIL.

In sum, by utilizing legal doctrinal analysis – the main methodology used in legal academia – this thesis engages with a valid and well-accepted form of inquiry. The primary and secondary sources are the basis on which this inquiry is built, and they reveal an interesting picture of the unpredictability of the ICJ's approach to CIL and potential ways forward.

1.5 Thesis Structure and Organization of the Chapters

This thesis is divided into five chapters, each with a specific purpose. The present chapter provides the context that informs the subject matter of this thesis, background information on CIL, the problem statement and research questions, a description of how the thesis is organized, and a consideration of how this thesis contributes to the literature and its limitations.

Chapter 2 describes the main cases decided by the ICJ on customary international law since its inception in 1945 to 2023. Specifically, the chapter considers the history of the ICJ and CIL, the Court's consideration of CIL in the 20th and 21st Centuries, and common themes and differences. It identifies two types of interlinked themes: a trend toward increased dynamism within the ICJ in how it considers and interprets CIL (coupled with unpredictability), and a recent trend in the types of cases coming before the Court. While there are still many traditional “facilitative custom” cases coming before the ICJ (such as

land or water border delimitation disputes),³⁸ there are ever-increasing numbers of “moral custom” issues being submitted to the ICJ for adjudication.³⁹

Chapter 3 carries the themes of unpredictability and trends forward by examining the role of state practice in the ICJ’s methodology in determining CIL. It begins by discussing inductive and deductive methodologies of the Court. The inductive approach focuses on state practice, while the spotlight of the deductive approach is *opinio juris*. The chapter’s analysis reveals that the Court uses both methodologies, sometimes mixing the two (with different emphasis on state practice and *opinio juris*), and that their use is inconsistent from case to case. Additionally, the chapter explores the claim by one prominent scholar that the Court sometimes employs neither approach and simply asserts rules of CIL as it deems fit. It finds, however, that while assertion may be used, it is mixed in with the other forms of reasoning, thereby adding to the methodological inconsistency.

While Chapter 3 discussed how state practice has been highlighted or ignored depending on the form of the ICJ’s reasoning, Chapter 4 turns its attention to *opinio juris*, the subjective or psychological element of CIL under which the custom is viewed by States as binding. The method by which the ICJ determines *opinio juris* is not straightforward, prompting some publicists to question whether it should even be a requirement for the establishment of CIL, while others have argued that it should be the *only* element for the establishment of CIL. This chapter introduces the legal theories underlying the nature of

³⁸ Two examples of such pending cases are: *Case Concerning Guatemala’s Territorial, Insular and Maritime Claim (Guatemala v Belize)*, online: <<https://www.icj-cij.org/case/177>>; and *Case Concerning Sovereignty over the Sapodilla Cayes (Belize v Honduras)*, online: <<https://www.icj-cij.org/case/185>>

³⁹ See the cases mentioned in notes 11 and 16, *supra*. The distinction between “facilitative” and “moral” custom is from Anthea Roberts, *supra* note 14 at 178.

opinio juris – particularly the consent-based and belief-based approaches - and then explains how the ICJ has approached evidence of *opinio juris* in its judgments and advisory opinions on CIL. The chapter then delves into the forms of evidence that might be used by the ICJ to determine *opinio juris*, to examine whether new forms of evidence might assist in clarifying the conceptual underpinnings of this requirement of CIL. Finally, the chapter concludes that a new definition of *opinio juris* is not only helpful, it is warranted, given the opaque nature of this aspect of CIL today.

The conclusion of the thesis, Chapter 5, begins by noting the three types of inconsistencies that were drawn out in the earlier chapters: the ICJ's inconsistency in when and how it refers to each element, and in the weight it gives to each of the elements, in its judgments and opinions; its inconsistency and lack of predictability in the mode of reasoning in the cases, ranging from inductive to deductive to a mix of the two, or no methodology at all; and finally, in its lack of a coherent theory to conceptualize *opinio juris*. It then turns to a discussion of 'traditional' and 'modern' approaches to CIL. It does so because these approaches – particularly the 'modern' approach – may be useful building blocks toward increased consistency, predictability, and coherence and may provide useful explanations of the approaches that might be expected of the ICJ in the increasing number of "moral custom" cases. The chapter ends with a consideration of how an adapted 'modern' form of CIL determination is the most likely to assist in bringing certainty to the ICJ's determination of CIL, and future areas of research in this field.

1.6 Contributions to Existing Literature and Limitations

This thesis stems from the context of a deep and contested literature on the nature of custom generally, and CIL specifically.⁴⁰ Therefore, there are many past and current scholars who have discussed various methods and approaches perceived to be adopted by the ICJ in the identification of CIL. This thesis refers to many of them, including Philip Alston, Alberto Alvarez-Jimenez, Hilary Charlesworth, Anthony D'Amato, Frederic L. Kirgis, Brian D. Lepard, Anthea Roberts, Bruno Simma, Stefan Talmon, John Tasioulas, and many others.⁴¹ Given the crowded field, it is therefore not easy to add to the literature, even if one is passionate about the topic. However, this thesis aims to do so in two main ways. First, while there was a great deal of discussion stretching from the 1980s to the early 2000s of the nature of the ICJ's analysis of CIL as a result of the issuance of the 1986 judgment in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*,⁴² there has been less attention since that time, with some exceptions considered in this thesis.⁴³ Additionally, some key ICJ rulings on CIL have come out since the majority of the publications mentioned above, such as *Case Concerning the Jurisdictional Immunities of the State* in 2012, *Legal Consequences of the Separation of the Chagos Archipelago*

⁴⁰ For a sense of this literature, see this research review: Pierre-Marie Dupuy, ed, *Customary International Law*, (Northampton: Edward Elgar Publishing, 2021).

⁴¹ See, for example, Bruno Simma & Philip Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles" (1988-89) 12:1 *Austl YB Intl L* 82; Alberto Alvarez-Jiménez, *supra* note 14; Hilary Charlesworth, *supra* note 25; Anthony D'Amato, *The Concept of Custom in International Law* (New York: Cornell University Press, 1971); Frederic L. Kirgis, "Custom on a Sliding Scale" (1987) 81:1 *AJIL* 146; Brian D. Lepard, *supra* note 22 at 6; Anthea Roberts, *supra* 14 note 10 ; Stefan Talmon, *supra* note 14; and John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case" (1996) 16:1 *Oxford J Leg Stud* 85. There are yet others not explored in any depth in this thesis (due to the focus of their analysis), including Jack L. Goldsmith & Eric A. Posner's postulation of game theory in CIL, *supra* note 27 at 1113.

⁴² *Military and Paramilitary Activities in Nicaragua*, *supra* note 6.

⁴³ Brian D. Lepard, *supra* note 22 at 42, and Talmon, *supra* note 14 at 42.

from Mauritius in 1965 in 2019, and *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* in 2023.⁴⁴ This thesis therefore considers both the older and newer literature on the ICJ's approach to CIL, and applies both older and recent ICJ case law to those approaches. Observations about the recent cases are used to either reinforce or challenge what the authors mentioned above have concluded. This exploration attempts to add additional layers of depth and complexity to the consideration of how the ICJ determines CIL by bringing the conversation into 2023.

This thesis also has limitations, the largest of which is that this is a Master's and not a doctoral thesis and therefore has certain space and time restrictions. This means that certain issues that arise in the literature on the ICJ's consideration of CIL could not be explored in any detail. For example, this thesis only touches on the link between ethical principles, CIL and the ICJ, which others examine in more detail.⁴⁵ As well, over the last three decades, a great deal of development on CIL has happened at international courts other than the ICJ, such as international criminal courts and tribunals, and this thesis did not have the space to examine the potential interactions between the ICJ's and those tribunals' conceptualizations of state practice and *opinio juris*.⁴⁶ Finally, there has been a great deal of recent scholarship on CIL in specific realms such as international human rights, criminal,

⁴⁴ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [2012] ICJ Rep 99; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, [2023] ICJ Rep 1.

⁴⁵ Brian D. Lepard, *supra* note 22 at 77-94, 140-150; Anthea Roberts, *supra* note 14 at 764-766; John Tasioulas, *supra* note 41 at 113-115.

⁴⁶ Birgit Schlütter, *Developments in Customary International Law: Theory and Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff Publishers, 2010). See also Brian D. Lepard, *supra* note 22 at 180-185.

and environmental law.⁴⁷ While some of that literature has been considered where it also discusses the ICJ, it was beyond the scope of this thesis to consider if it had no focus on the ICJ.

1.7 Conclusion

The central themes of this thesis are binaries: consistency/inconsistency, coherence/incoherence, and predictability/unpredictability in how the ICJ addresses CIL. However, as will be seen in the discussions in Chapters 3, 4, and 5, potential solutions that could bring more consistency, coherence, and predictability fall on a spectrum. There is no single ‘magic bullet’ the ICJ can adopt to suddenly become more methodologically sound or transparent when deciding on CIL: the potential solutions may need to be layered. This thesis will introduce some potential solutions, but will also end with observations on where more research is required to consider the way forward for the ICJ.

⁴⁷ Mariana Clara de Andrade, “Identification of and Resort to Customary International Law by the WTO Appellate Body” in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi, eds, *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge: Cambridge University Press, 2022) 277.

CHAPTER 2: HISTORY AND TRENDS IN THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE

2.1 Introduction

Article 38(1) of the Statute of the International Court of Justice (ICJ) lists the following as sources of public international law: treaties; international custom; general principles of law; and, as secondary sources, judicial decisions and the writings of the most highly qualified publicists.⁴⁸ Out of all the sources listed by the Statute, none has generated more controversy as international custom (known today as customary international law or CIL). The controversies stem from the manner in which CIL is identified. Unlike treaties, CIL is not negotiated and written down. It is unwritten law, like common law at the domestic level. The ICJ has defined CIL as being composed of state practice and *opinio juris*.⁴⁹ When a significant number of countries engage in a particular behaviour consistently, that is referred to as state practice.⁵⁰ *Opinio juris* is the ‘psychological’ understanding by countries that an obligation must be followed.⁵¹ As mentioned in Chapter 1, while this definition of CIL appears to be straightforward, scholars ask key questions: which States’ acts count as evidence of custom, and how broad or consistent must state practice be to be designated as CIL? How can a court gauge whether countries ‘feel’ obligated to follow a particular legal norm? If proof of this ‘feeling’ comes from evidence of widespread or systematic state

⁴⁸ *Statute of the International Court of Justice*, *supra* note 1 at Article 38(1).

⁴⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at para 77.

⁵⁰ *Asylum Case (Colombia v Peru)*, [1950] ICJ Rep 266 at 276-277.

⁵¹ Olufemi Elias, “The Nature of the Subjective Element in Customary International Law” (1995) 44:3 ICLQ 1; Ademola Abass, *supra* note 19 at 38.

practice, why is *opinio juris* an element of CIL? Why not make consistent state practice the only measuring instrument for determining CIL?

The ICJ settles, in accordance with international law, legal disputes submitted to it by States and gives advisory opinions on legal questions referred to it by authorized United Nations (UN) organs and specialized agencies.⁵² Decisions from the ICJ are regarded as persuasive and cited by other authorities, and have even changed the landscape of international law. However, the ICJ has not necessarily been consistent in its identification of CIL. For example, to give a preview of the chapter, cases decided in the 20th Century revealed the tendency of the Court to demand compliance with the requirements of state practice and *opinio juris*; though to varying degrees. In the *S.S. Lotus Case*,⁵³ *Asylum Case*,⁵⁴ and *Rights of Nationals of the United States of America in Morocco*,⁵⁵ the Court focused on both state practice and *opinio juris* with more emphasis on the latter. In the *North Sea Continental Shelf cases*, the Court particularly emphasized the importance of *opinio juris*. However, in the *Fisheries Case*,⁵⁶ also decided in the 20th Century, the Court found that there was no adequate state practice, so it did not address *opinio juris*.

In the 21st Century, the Court has shifted more toward state practice being used to also prove *opinio juris*, as reflected in the judgments and advisory opinion emanating from the Court. For instance, in *Case Concerning Right of Passage over Indian Territory*⁵⁷ and

⁵² "International Court of Justice" (last visited 15 December 2022), online: *The Court* <icj-cij.org/en/court>

⁵³ *The Case of the S.S. Lotus (France v Turkey)* (1927), PCIJ (Ser A) No. 10 at 28.

⁵⁴ *Asylum Case*, *supra* note 50.

⁵⁵ *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, [1952] ICJ Rep 176 at 200.

⁵⁶ *Fisheries (United Kingdom v Norway)*, [1951] ICJ Rep 116.

⁵⁷ *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, [1960] ICJ Rep 6.

Dispute Regarding Navigational and Related Rights,⁵⁸ the Court decided that CIL (both regional cases) had been formed by an unchallenged age-long practice without a separate finding of *opinio juris*. Other cases and advisory opinions of the Court in this period reveal a situation where a singular act is used to establish state practice and also determine *opinio juris*. A unique way the Court does this is assigning evidence of national court judgments in respect of a particular norm as demonstration of *opinio juris*.

As the central judicial organ of the UN, the ICJ has an important role in identifying and defining legal norms. Therefore, this chapter considers how the ICJ has identified CIL to date. It examines key selected ICJ judgments in which CIL is discussed, the ICJ's methodology, and secondary literature on CIL. Such academic analysis in the secondary literature tends to underscore the inadequacy of the ICJ's approach to CIL and provides recommendations for bringing more coherence to its approach.⁵⁹

This chapter is divided into six parts. Part two discusses the history of CIL and its culmination as one of the sources of public international law in the ICJ Statute. Part three and four examine key decisions of the Court on CIL in its founding years, and analyze ICJ's consideration of custom in the 20th and 21st Centuries.⁶⁰ Part five explores and analyzes trends in the judgments and advisory opinions of the Court in the course of both Centuries. Part six summarizes and concludes the chapter.

⁵⁸ *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, [2009] ICJ Rep 213.

⁵⁹ Rein Mullerson, "On the Nature and Scope of Customary International Law" (1997) 2:3 *Austrian Rev Int'l & Eur L* 341; Jack L. Goldsmith & Eric A. Posner, *supra* note 27; Andrew T. Guzman, "Saving Customary International Law" (2005) 27:1 *Mich J Intl L* 115.

⁶⁰ As explained in Chapter 1, these cases were selected after a review by the author of more than 175 ICJ judgments and advisory opinions. The most relevant of these were selected for inclusion in this and the subsequent chapters.

2.2 History of the International Court of Justice and Customary International Law

The ICJ was established in June 1945 by the Charter of the UN⁶¹ and began work in April 1946.⁶² In accordance with international law, the Court settles disputes submitted to it by States and gives advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies.⁶³

The Statute of the ICJ was based, in part, on that of its predecessor, the Permanent Court of International Justice (PCIJ) which was established by the Covenant of the League of Nations.⁶⁴ The PCIJ held its first sitting in 1922 and was disbanded in 1946⁶⁵ as a result of the creation of its successor. The Statute of the PCIJ listed international custom as one of the sources of public international law.⁶⁶ This shows that international custom has been formally recognized as a source of public international law as far back as December 1920, which was when the Protocol concerning the adoption of the League of Nations was ratified.⁶⁷

CIL was included in the Statute of the PCIJ because it had long been considered a source of law. CIL is said to be associated with *jus gentium*, a form of natural law which is based

⁶¹ *Statute of the International Court of Justice*, *supra* note 1 at Article 1; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, Article 92.

⁶² "International Court of Justice", *supra* note 5.

⁶³ *Ibid.*

⁶⁴ *Covenant of the League of Nations*, 28 April 1919, online: < [Refworld | Covenant of the League of Nations](#) > (last visited 26 February 2023) at Article 14.

⁶⁵ "International Court of Justice" (25 February 2023), online: *Permanent Court of Justice* <<https://www.icj-cij.org/pcij>>

⁶⁶ *Statute of the Permanent Court of International Justice*, 16 December 1920, online: < [Refworld | Statute of the Permanent Court of International Justice](#) > (last visited 26 February 2023) at Article 38.

⁶⁷ *Ibid* at Annex II.

on the view that human beings have innate values that govern their reasoning and behaviour.⁶⁸ *Jus gentium* was mainly associated with the practice of Catholic countries during the time of Francisco de Vitoria, one of the scholars of early international law in the 16th Century.⁶⁹ CIL developed at a time when there were attempts to extend *jus gentium* to non-Christians as part of the colonization of the non-European world by European States.⁷⁰ Vitoria particularly advocated for *jus gentium* (and therefore colonization) when he justified the Spaniards' conquest of the Indies, after the inhabitants of the Indies did not want to engage in trade with the Spaniards.⁷¹ According to him, subjecting foreigners to hostile treatment and preventing them from trading in a host country violated the overriding principle to treat others with love and camaraderie and therefore was a violation of *jus gentium* which could justify war.⁷²

In the 17th Century, Hugo Grotius, often called the father of modern international law, also argued for principles of international law based on "universal reason".⁷³ He propounded fundamental universal principles such as freedom of commerce and navigation and argued for the right to punish violators of these universal principles.⁷⁴

The 18th Century saw a shift to legal positivism and the idea that CIL was created by tacit consent of States. The main proponent of this view was Emer de Vattel. He regarded CIL

⁶⁸ J. Patrick Kelly, "Reexamining Historical and Theoretical Perspectives on Customary International Law" in Brian D. Lepard, ed, *Reexamining Customary International Law* (Cambridge, UK: Cambridge University Press, 2017) 47 at 52.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* Vitoria's justification of the legality of the invasion of the Indies meant that a host state was denied its sovereign right to choose with whom to trade and provided the rationale for colonization and conquest around the world.

⁷² *Ibid.*

⁷³ *Ibid* at 53.

⁷⁴ *Ibid.*

as dependent on the free will of States and argued that it was “neither universal nor mandatory” on States.⁷⁵ However, this view did not stand the test of time because it did not take into consideration the dispositions of States at the time. The 19th Century was witnessing the involvement of new non-Western States in international relations and there was a need (from the European point of view) for a “universal theory of international law” which would bind non-European nations to European norms which had roots in natural law.⁷⁶

In late 19th and early 20th Centuries, a universal social consensus theory of CIL became popular due to propositions of positivists such as W.E. Hall and Lassa Oppenheim.⁷⁷ The universal social consensus theory is based on the common consent of States, which expresses a universal law accepted by many States.⁷⁸ This common consent theory appeared to have instructed the adoption of CIL as one of the sources of international law by the PCIJ and ICJ and particularly its description as general practice accepted as law.

By the description of CIL in the ICJ statute, the law must conjunctively have two components which are state practice and acceptance of the practice as law (*opinio juris*). It is important to examine how the Court has interpreted the formation of these two components in the first decade of its formation, in the 20th Century, and finally in the present Century so far. This helps to provide a general sense of the common themes and

⁷⁵ *Ibid* at 55.

⁷⁶ *Ibid* at 56.

⁷⁷ *Ibid* at 56 citing to W.E. Hall, *International Law*, 3rd ed (Oxford: Oxford University Press, 1890) at 5, and Lassa Oppenheim, *International Law*, vol 1 (London: Longmans, Green & Co, 1912) at 15-17.

⁷⁸ *Ibid* at 56.

differences in how the Court has formulated CIL - themes which will be built upon in subsequent chapters.

2.3 The ICJ's Consideration of Custom in the 20th Century

This part discusses cases decided by the PCIJ and the ICJ on CIL in the 20th Century. It shows that, in most of the cases, save one, the Court emphasized the strict requirement of the element of *opinio juris* before a practice was established as constituting CIL.

It is important to begin a discussion of how the ICJ considered CIL in the 20th Century with a key judgment of the PCIJ, the 1927 *S.S. Lotus* case.⁷⁹ This judgment has had far-reaching influence on the definition and identification of CIL by the ICJ. This case dealt with the exercise of jurisdiction in international law and consideration of whether there was a norm under CIL permitting a country to initiate proceedings against a national of another country. There was a collision on the high seas between a French vessel, the *S.S. Lotus*, and a Turkish vessel, the *S.S. Boz-Kourt*, which resulted in the sinking of the latter vessel and death of eight Turkish nationals.⁸⁰ The Turkish government charged the officer on watch of the *S.S. Lotus* and the captain of the Turkish ship with manslaughter.⁸¹ The Turkish court sentenced the officer of the *S.S. Lotus*, a French national, to 80 days of imprisonment and a fine.⁸² The French government protested and demanded his release or the transfer of his case to the French courts. Turkey and France agreed to refer the dispute on the jurisdiction to the PCIJ.⁸³

⁷⁹ *The Case of the S.S. Lotus*, *supra* note 53.

⁸⁰ *Ibid* at 10.

⁸¹ *Ibid* at 11.

⁸² *Ibid*.

⁸³ *Ibid*.

The parties disagreed as to whether CIL permitted Turkey to assert jurisdiction over a French national in this manner. Citing the decisions of municipal courts, the French government argued that there is a rule of CIL which affirmed the jurisdiction of the flag state for crimes committed on a vessel on the high seas.⁸⁴ The Turkish government, on the other hand, cited the teachings of publicists of international law and examples of national jurisdiction as evidence of the CIL character of the principle allowing a country to claim jurisdiction to try a national for offences committed abroad that affects its own citizens.⁸⁵ The Turkish government also added that there was no evidence that CIL expressly prohibited the exercise of the principle and thus, the exercise of jurisdiction by Turkey was in order.⁸⁶

The PCIJ found that there were only a few examples of municipal judgments prohibiting the exercise of jurisdiction by a country over the national of another country. However, these few examples did not translate into a general rule prohibiting the exercise of jurisdiction. Specifically, the Court held as follows:

Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true.⁸⁷

⁸⁴ *Ibid* at 28.

⁸⁵ *Ibid* at 9.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at 28.

This decision of the PCIJ on CIL is crucial because not only did the Court focus on state practice, it also laid emphasis on the element of *opinio juris*. As could be deduced from the decision, the practice amongst States only revealed their abstinence from exercising jurisdiction over a foreigner in this instance but the Court held the States' practice of abstinence could not be taken to mean a legal obligation to abstain, especially as municipal judgments were divided on the issue.⁸⁸ Hence, there was no acceptance of the practice as law.

The decision of the PCIJ in the *S.S. Lotus* was cited by its successor, the ICJ, in the 1969 *North Sea Continental Shelf Cases*.⁸⁹ In these cases, the Court applied the ratio of the PCIJ and held that, in the absence of evidence revealing that States are carrying on a practice because they feel legally compelled to so do by a reason of a rule of CIL obliging them, there is no CIL.⁹⁰

Two of the earliest cases on CIL decided by the ICJ, upon succeeding the PCIJ, were the 1950 *Asylum*⁹¹ and 1951 *Fisheries*⁹² *Cases*. The *Asylum Case* was about a regional custom, and it involved a failed attempt to overthrow the government of Peru in 1948. The Colombian government allowed Mr. Victor Raúl Haya de la Torre, the coup leader, sanctuary in the Colombian embassy in Lima, the capital of Peru.⁹³ The Colombian government granted him asylum, but the Peruvian government refused to grant safe passage out of Peru. Colombia argued before the ICJ that there was a custom among Latin

⁸⁸ *Ibid* at 29.

⁸⁹ *North Sea Continental Cases*, *supra* note 49 at para 78.

⁹⁰ *Ibid*.

⁹¹ *Asylum Case*, *supra* note 50.

⁹² *Fisheries*, *supra* note 56.

⁹³ *Asylum Case*, *supra* note 50 at 273.

American States to grant diplomatic asylum, and that this custom was binding on Peru. To support this argument, Colombia referred to treaties such as the *Bolivarian Agreement on Extradition of 1911*, the *Havana Convention on Asylum of 1928*, the *Montevideo Convention on Political Asylum of 1933*, and (in general) Latin American international law.⁹⁴

Aside from holding that the treaties cited by Colombia were not ratified by Peru, the ICJ also held that:

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom “as evidence of a general practice accepted as law”.⁹⁵

From the citation above, the Court recognized that it was dealing with a regional custom where it must be specially proven that a defendant has consented to the custom alleged. The standard of proof is stricter in regional or special custom cases because of the smaller number of States participating in the alleged custom or the subject matter.⁹⁶ A party seeking to establish a custom of this kind is required to show that the defendant has expressly or tacitly consented to the custom in question.⁹⁷ Despite Colombia’s citation of a large number of cases in which diplomatic asylum was granted, the Court stated that Colombia did not

⁹⁴ *Ibid* at 272.

⁹⁵ *Ibid* at 276-277.

⁹⁶ Anthony D'Amato, “The Concept of Special Custom in International Law” (1969) 63:2 AJIL 211 at 223.

⁹⁷ *Asylum Case*, *supra* note 50 at 277-278.

also show that States granting asylum did so as a *legal duty* incumbent on them, as opposed to granting asylum merely as an exercise performed for political reasons.⁹⁸

The *Fisheries* case involved a dispute between the UK and Norway over the breadth of the territorial waters off the Norwegian Coast. The UK argued that CIL did not allow the length of a baseline drawn across a bay to be longer than 10 miles.⁹⁹ Norway argued that its delimitation method was consistent with “international law”, i.e. CIL.¹⁰⁰

In this case, the Court did not mention *opinio juris* in confirming the existence of CIL. The Court only discussed positive state practice and lack of contrary state practice. It could be said that the Court did not consider *opinio juris* at all because it did not find uniform and consistent practice on the ten-mile rule. Thus, the Court considered dissent by a State to a particular practice as detrimental to the confirmation of such practice as CIL. Specifically, the Court held as follows:

In these circumstances, the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.¹⁰¹

The Court further held that since Norway had always opposed any attempt to apply the ten-mile rule, it was not bound by that rule.¹⁰²

⁹⁸ *Ibid* at 277.

⁹⁹ *Fisheries*, *supra* note 56 at 131.

¹⁰⁰ *Ibid* at 134.

¹⁰¹ *Ibid* at 131.

¹⁰² *Ibid* at 138.

The Court reverted to a consideration of *opinio juris* in the 1952 case of *Rights of Nationals of the United States of America in Morocco*.¹⁰³ In that case, French authorities in the Moroccan Protectorate imposed a system of license controls for certain imports, and the United States argued that this measure affected its rights under treaties with Morocco under which no Moroccan law or regulation could be applied to its nationals in Morocco without its previous consent.¹⁰⁴ One of the contentions of the United States was that its consular jurisdiction and other capitulatory rights in Morocco were founded on CIL. Relying on the *Asylum* case, the ICJ held that there was no sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.¹⁰⁵ The United States had sought to develop its contention by claiming that its consular jurisdiction and extraterritoriality in Morocco were based on custom and usage, both prior to the British abandonment of extraterritoriality in the French Zone in 1937, and since that time. Rejecting this contention, the Court said that, throughout the whole period, the United States' consular jurisdiction was in fact based on treaty rights and not custom or usage.¹⁰⁶ The Court added that, though it was true that there were other States which had no treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco, this was not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights also enjoyed independent title based on custom and usage.¹⁰⁷ The emphasis of the Court that a party must prove that a custom has become binding on

¹⁰³ *Rights of Nationals of the United States of America in Morocco*, *supra* note 55.

¹⁰⁴ *Ibid* at 180.

¹⁰⁵ *Ibid* at 200.

¹⁰⁶ *Ibid* at 199.

¹⁰⁷ *Ibid* at 200.

the other party is a direct reference to the requirement of *opinio juris* for the establishment of a rule of CIL. This case is also an example of a special custom as it dealt with capitulatory rights between the US and Morocco. While the Court found that there was a practice of treaty-based extraterritoriality in Morocco, the Court could not find proof that Morocco had consented to the extraterritoriality under CIL.¹⁰⁸

The Court focused equally on state practice and *opinio juris* in the determination of CIL in the 1960 regional custom case of *Right of Passage over Indian Territory*.¹⁰⁹ In this case, Portugal possessed two enclaves in India which had passed under an autonomous local administration. Portugal claimed it had a right of passage to those enclaves and between one enclave and another to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India.¹¹⁰ Portugal also claimed that, contrary to practice previously followed, India had prevented it from exercising that right and therefore approached the ICJ to seek redress.

Portugal relied on the *Treaty of Poona of 1779* and two sanads (decrees) issued by the Maratha ruler in 1783 and 1785.¹¹¹ This required the Court to consider law applicable at the time of the treaty and its application and interpretation over time. The ICJ held that, with regard to private persons, civil officials and goods in general, there existed during the British and post-British periods a constant and uniform practice allowing free passage between the enclaves.¹¹² The Court stressed that, since the practice had continued over a

¹⁰⁸ *Ibid.*

¹⁰⁹ *Right of Passage over Indian Territory*, *supra* note 57.

¹¹⁰ *Ibid* at 9-10.

¹¹¹ *Ibid* at 37.

¹¹² *Ibid* at 40.

period extending beyond 125 years unaffected by the change of regime when India became independent, it was satisfied that the practice was accepted as law by the Parties and had given rise to a right and a correlative obligation.¹¹³ This case dealt with a regional custom between two countries. Custom was found because India did not challenge a long-time practice and, as a result, the Court inferred tacit consent.¹¹⁴ This approach suggests that positive practice which remains uncontroverted in spite of change in a regime or political situation is likely to be adopted as confirmation of such practice as law.

The 1969 *North Sea Continental Shelf Cases*¹¹⁵ have proven to be a turning point in the determination of CIL by the ICJ. In this judgment, the Court focused on both state practice and *opinio juris*, though it emphasized the importance of the latter. Though the Court had always considered *opinio juris* in its previous judgments, except the *Fisheries* case, the emphasis on *opinio juris* was intensified in this judgment.

These cases were between Denmark and the Federal Republic of Germany on the one hand, and the Netherlands and the Federal Republic of Germany on the other hand. The parties had disagreed on the principles and rules of international law applicable to the delimitation of the continental shelf areas. The parties therefore requested the ICJ to decide the principles or rules applicable in this instance.¹¹⁶ Netherlands and Denmark relied on the principle of equidistance as defined in the 1958 *Geneva Convention on the Continental Shelf*.¹¹⁷ Germany contended that the delimitation of the continental shelf areas

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *North Sea Continental Shelf Cases*, *supra* note 49.

¹¹⁶ *Ibid* at paras 1-2.

¹¹⁷ *Ibid* at para 6.

was governed by the principle that each coastal state is entitled to a “just and equitable share.”¹¹⁸ Contrary to Denmark and Netherlands, Germany argued that the principle of equidistance was neither a mandatory rule in delimitation of the continental shelf nor a rule of CIL that was binding on Germany.¹¹⁹

The ICJ held that the Germany was not legally bound by the *Geneva Convention on the Continental Shelf* since it had not ratified the Convention,¹²⁰ and that the use of the equidistance method had not crystallized into CIL. The Court held this latter view because there was no evidence to show that the States which drew their boundaries according to the principle of equidistance did so because they felt legally compelled to draw them in this way by reason of a rule of CIL obliging them to do so.¹²¹

The cases above indicate that, in the first two decades of the ICJ’s existence, the Court tended to focus on the elements of State practice and *opinio juris* in a traditional manner, evaluating State practice first, and then turning to *opinio juris* if State practice was found. These cases showed the tendency of the Court to only ascribe CIL to a rule when there was proof of State practice and a clear acceptance of such rule as legally binding.

The 1986 case *Concerning the Military and Paramilitary Activities in and against Nicaragua*¹²² is considered to be a watershed moment in the history of the Court due to its

¹¹⁸ *Ibid* at para 15.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at para 26.

¹²¹ *Ibid* at para 78.

¹²² *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua, supra* note 6. This is a case decided on merits. The earlier case on the issue dealt with deciding whether the ICJ had the jurisdiction to entertain the application of Nicaragua: *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, [1984] ICJ Rep 421.

approach to state practice and *opinio juris*.¹²³ The case is particularly significant for its pronouncements on the relationship between state practice and *opinio juris*, and between treaty and CIL. In the case, Nicaragua had instituted an action against the United States because of the military and paramilitary actions of the United States against Nicaragua from 1981 to 1984.¹²⁴ Due to the United States' multilateral treaty reservation to the ICJ's jurisdiction, the Court could not rely on the UN Charter and thus, had to base its findings on CIL.¹²⁵ The United States argued that the provisions of CIL and those of the UN Charter on use of force in inter-state relations are similar and so prevent the Court from applying this CIL because it is not different from the UN Charter, which the Court cannot apply.¹²⁶

The Court held that, where principles of CIL are identical to provisions in a treaty, they continue to exist side by side.¹²⁷ In deciding whether the principles on the non-use of force and non-intervention are rules of CIL, the Court analyzed how the principles are supported by state practice and *opinio juris*. The Court held that state practice on the non-use of force is shown by the Parties' commitments to treaties on non-use of force.¹²⁸ Further, the Court stated that, for a rule to be established as CIL, it is not necessary to have complete consistency in state practice, and that inconsistent state practice does not affect the formation of CIL but should be treated as a breach of that rule.¹²⁹ In respect of *opinio juris*, the Court discussed how to deduce *opinio juris* from acts of State such as the attitude of

¹²³ Much has been written on the ICJ's evaluation of CIL in this case. See, for example, Hilary Charlesworth, *supra* note 25. This case's consideration of *opinio juris* is discussed in more depth in Chapter 4.

¹²⁴ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at paras 18-21.

¹²⁵ *Ibid* at para 172.

¹²⁶ *Ibid* at para 173.

¹²⁷ *Ibid* at para 178.

¹²⁸ *Ibid* at para 185.

¹²⁹ *Ibid* at para 186.

States towards certain General Assembly resolutions, statements by State representatives, and obligations undertaken by States in international fora¹³⁰ The Court also indicated that the findings of the International Law Commission on what constitutes custom were relevant in its consideration of CIL.¹³¹

The Court also added that, before it could be concluded that the prohibitions on the use of force and on intervention in the affairs of another country have attained CIL status, there must be instances of state practice and *opinio juris*. The Court agreed that, though there have been instances of foreign intervention for the benefit of forces opposed to the government of another State, there is no evidence of *opinio juris* to justify it.¹³² The Court said the United States particularly showed no proof that its use of force and intervention in Nicaragua had a legal basis.¹³³ Therefore, the Court refused to accept the United States' argument that instances of foreign intervention for the benefit of forces opposed to the government of another State constitutes an emerging CIL in the face of the absence of the element of *opinio juris*.¹³⁴ Overall, the Court found that the United States had been involved in unlawful use of force and intervention in Nicaragua.¹³⁵

While the ways in which the ICJ's reasoning in this case upended the traditional understanding of state practice and *opinio juris* will be explored further in Chapters 3 and 4, it is important to note two points here. First, in this case, the ICJ explicitly stated that state practice can be proof of *opinio juris* when it indicated that it "must satisfy itself that

¹³⁰ *Ibid* at para 188-193.

¹³¹ *Ibid* at para 190.

¹³² *Ibid* at para 206-207.

¹³³ *Ibid* at para 208.

¹³⁴ *Ibid* at para 209.

¹³⁵ *Ibid* at para 227-242.

the existence of the rule in the *opinio juris* of States is confirmed by practice”.¹³⁶ This raised concerns that it was collapsing the two element test into a single element.¹³⁷ Second, it deduced the customary rules from a variety of sources: from non-intervention statements found in treaties, UN resolutions, and other sources, rather than directly from the domestic practice of States.¹³⁸ This seemed to elevate words over physical actions.¹³⁹ This, along with a statement excusing contrary state practice,¹⁴⁰ appeared to minimize the importance of state practice in this case.¹⁴¹

The ICJ, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹⁴² refused to establish CIL because of the absence of *opinio juris*, demonstrated by divided practice of States. The opinion was requested by the UN General Assembly. In the opinion, apart from examining the provisions of the UN Charter relating to the threat or use of force,¹⁴³ the Court examined whether a prohibition of the threat or use of nuclear weapons is a rule of CIL.¹⁴⁴ The Court noted that, because States were profoundly divided as to whether the practice of non-recourse to nuclear weapons over the past 50 years constituted *opinio juris* on illegality, it was unable to find such *opinio juris*.¹⁴⁵ While also noting that General Assembly resolutions may have normative value and provide proof for the establishment of a rule as *opinio juris*, the Court held that several of the General

¹³⁶ *Ibid* at para 184.

¹³⁷ Anthony D’Amato, *supra* note 14.

¹³⁸ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at paras 188-192.

¹³⁹ Charlesworth, *supra* note 25 at 18.

¹⁴⁰ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at para 186.

¹⁴¹ Brian D. Lepard, *supra* note 22 at 132; Frederic L. Kirgis, *supra* note 41 at 148.

¹⁴² *Legality of the Threat or Use of Nuclear Weapons Case*, *supra* note 8.

¹⁴³ *Ibid* at paras 37-50.

¹⁴⁴ *Ibid* at para 64.

¹⁴⁵ *Ibid* at paras 65-67.

Assembly resolutions proclaiming the illegality of the use of nuclear weapons had been adopted with substantial numbers of negative votes and abstentions, thus falling short of establishing an *opinio juris*.¹⁴⁶ Additionally, the Court stated that the emergence, as extant law, of a customary rule specifically prohibiting the use of nuclear weapons as such was hampered by the continuing tensions between the “nascent *opinio juris* and the still strong adherence to the practice of deterrence.”¹⁴⁷ This case was in sharp contrast with the 1986 case *Concerning the Military and Paramilitary Activities in and against Nicaragua*, where the Court held that inconsistent practice was not a bar to the establishment of a rule of CIL,¹⁴⁸ especially where the subject matter in the case has normative value.

2.4 The ICJ’s Consideration of Custom in the 21st Century

This part considers the cases of the ICJ on CIL in the 21st Century. One of the earliest 21st Century ICJ cases on the formation of CIL was the 2002 *Arrest Warrant Case*¹⁴⁹ where the Court only examined State practice to determine whether there was an exception under CIL to the immunity from criminal jurisdiction and inviolability accorded to incumbent Ministers for Foreign Affairs of States. In this case, the Congo had prayed the Court to declare that the issuance and circulation of an arrest warrant by Belgium against its Minister for Foreign Affairs was a violation of the rule of CIL concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers.¹⁵⁰ In its defence, Belgium countered that immunities given to incumbent Ministers for Foreign

¹⁴⁶ *Ibid* at paras 65-71.

¹⁴⁷ *Ibid* at para 73.

¹⁴⁸ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at 186.

¹⁴⁹ *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3.

¹⁵⁰ *Ibid* at paras 10-11.

Affairs cannot protect them where they are suspected of having committed war crimes or crimes against humanity.¹⁵¹ Belgium further cited provisions of the instruments creating international criminal tribunals which expressly state that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction. Belgium, in addition, stressed certain decisions of national courts to support its argument.¹⁵² The Congo, for its part, argued that State practice supported its contention that there is no exception under international law to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where they are accused of an international crime.¹⁵³

In its decision, the Court held that, after careful examination of state practice such as national legislation, decisions of national higher courts, legal instruments and decisions of international criminal tribunals (such as the Nuremberg and Tokyo international military tribunals, and the International Criminal Tribunal for the former Yugoslavia), it was unable to deduce from the practice that there existed under CIL any form of exception to the rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs where they are suspected of war crimes or crimes against immunity.¹⁵⁴

It is not surprising that the Court did not mention *opinio juris* in this case, having found that no state practice exists in the first place. This case followed the traditional approach of first examining of state practice and, if state practice is found, then determining whether States believe that the practice creates a legal obligation.

¹⁵¹ *Ibid* at para 53.

¹⁵² *Ibid* at para 56.

¹⁵³ *Ibid* at para 57.

¹⁵⁴ *Ibid* at para 58.

The Court laid more emphasis on state practice than *opinio juris* in the 2009 *Dispute Regarding Navigational and Related Rights*¹⁵⁵ concerning the San Juan River. Costa Rica instituted this case requesting the Court to declare that Nicaragua was in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and associated rights such as fishing rights on the San Juan River.¹⁵⁶ Costa Rica claimed in the case that its right of free navigation on part of the River derives from, on the one hand, certain treaty provisions such as the Treaty of Limits of 1958 and, on the other hand, rules of general international law that are applicable to navigation on international rivers. It, however, based its fishing rights for subsistence purposes on custom.¹⁵⁷

Costa Rica submitted that there has been a practice allowing the inhabitants of the Costa Rican bank of the San Juan River to fish for subsistence purposes and that the practice survived the Treaty of 1858, making it a customary right.¹⁵⁸ To prove its claim, Costa Rica referenced a Royal Ordinance of 1540 under which the upper part of the River belonged to Nicaragua and the lower part to Costa Rica for the purposes of navigation and fishing.¹⁵⁹ It added that the continuing practice of Costa Rican riparians of fishing for subsistence purposes was not challenged by Nicaragua until after the instant proceedings were initiated.¹⁶⁰ Nicaragua countered Costa Rica's argument by stating that the latter has failed to prove that the custom is established in such a manner that it has become binding on Nicaragua.¹⁶¹

¹⁵⁵ *Dispute Regarding Navigational and Related Rights*, *supra* note 58.

¹⁵⁶ *Ibid* at paras 12-13.

¹⁵⁷ *Ibid* at para 142.

¹⁵⁸ *Ibid* at para 140.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

In its decision on whether Costa Rica has a customary right to fish for subsistence purposes, the Court held that, while the practice is not documented, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period of time showed there indeed was a customary right which should be respected by Nicaragua.¹⁶² The Court did not, however, agree that the customary right extended to fishing from vessels on the River because there is only limited and recent evidence of such a practice.¹⁶³ The decision of the ICJ in this case is significant because it shows that a practice between two States that has continued over a long period of time without any objection from either of those States can be established as CIL.

Similarly, in the 2012 *Case Concerning the Jurisdictional Immunities of the State*,¹⁶⁴ the requirement of state practice took preeminence in determining whether the suspension of immunities for foreign dignitaries, where there has been a violation of international humanitarian law, has taken the position of CIL. Germany instituted the case against Italy following various decisions by Italian courts which ignored the state immunity of Germany when confronted with claims against Germany by victims of Nazi-era war crimes.¹⁶⁵ The Italian courts had ordered reparations to be paid to Italian victims of violations of international humanitarian law committed by forces of the German Reich. Germany claimed the Italian courts' orders of reparations were violations of jurisdictional immunity which Germany enjoys under international law.¹⁶⁶

¹⁶² *Ibid* at paras 141 & 144.

¹⁶³ *Ibid* at para 143.

¹⁶⁴ *Jurisdictional Immunities of the State*, *supra* note 44.

¹⁶⁵ *Ibid* at para 15.

¹⁶⁶ *Ibid* at para 37.

The Court noted that it would determine the question and scope of immunity between Germany and Italy by CIL because Italy was not a party to the extant European Convention on State Immunity of 1972 and neither State was a party to the UN Convention on Jurisdictional Immunities of States of 2004.¹⁶⁷ Italy contended that CIL has developed to the point where a State is no longer entitled to immunity in respect of acts of a sovereign nature and which are subjected to immunity.¹⁶⁸ Germany countered that no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict, and that the Courts in several States expressly declined jurisdiction in such cases on the grounds that the respondent State was entitled to immunity.¹⁶⁹ Also, Italy argued that its denial of immunity was justified on the ground that the acts forming the subject matter of the claims before the Italian courts were serious violations of international humanitarian law and CIL has developed to a point where a State is not entitled to immunity in the case of serious violations of international humanitarian law.¹⁷⁰

Upon examining judgments of national courts regarding State immunity in relation to the acts of armed forces, the Court held that state practice supports the argument that state immunity for sovereign acts of a State continues to extend to acts of its armed forces.¹⁷¹ The Court added that *opinio juris* is demonstrated by the positions taken by States and the decisions of a number of national courts which have concluded that CIL required

¹⁶⁷ *Ibid* at para 54.

¹⁶⁸ *Ibid* at para 62.

¹⁶⁹ *Ibid* at para 63.

¹⁷⁰ *Ibid* at para 80.

¹⁷¹ *Ibid* at paras 72-78.

immunity.¹⁷² In the same vein, the Court also held that there is a substantial body of state practice from other countries which shows that CIL does not treat a State's entitlement to immunity as dependent on the gravity of the act it is alleged to have violated.¹⁷³

The case *Concerning the Jurisdictional Immunities of the State* shows an instance of where state practice was also used to determine *opinio juris*. Decisions of national courts were used to establish the state practice on State immunity and also used to demonstrate that States have accepted accordance of immunity to acts committed by a State as legally binding.

The inclination of the ICJ to deduce *opinio juris* from state practice appeared to also have been exhibited in the case of 2012 *Questions Relating to the Obligation to Prosecute or Extradite*.¹⁷⁴ In that case, Belgium had claimed, amongst others, that Senegal had breached its obligations under Article 5(2) of the Convention against Torture of 1984¹⁷⁵ and CIL in respect of a former Chadian Leader, Hissène Habré, who had been accused of committing grave violations of international human rights law during his time in power. Habré had fled to Senegal where he was granted asylum and Belgium sought his extradition for trial.¹⁷⁶

Because Belgium did not make any claim with respect to other crimes under CIL allegedly committed by Habré, and Senegal did not dispute any such claim, the ICJ found no dispute

¹⁷² *Ibid* at para 77.

¹⁷³ *Ibid* at paras 83-91.

¹⁷⁴ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 422.

¹⁷⁵ Article 5(2) of the Convention against Torture provides that each party to the Convention shall take measures as may be necessary to establish jurisdiction over offences constituting acts of torture where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.

¹⁷⁶ *Questions Relating to the Obligation to Prosecute or Extradite*, *supra* note 174 at para 13.

between the parties beyond the Convention against Torture.¹⁷⁷ Nevertheless, the Court, while speaking on the customary nature of prohibition of torture, held as follows:

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.¹⁷⁸

This case gives instances of how a party attempting to establish a rule as CIL can rely on the appearance of the rule in treaty provisions, General Assembly resolutions, and in the domestic laws of States. The opinion of the Court on how the prohibition of torture has become a rule of CIL gives the impression that no other separate act may be required to prove *opinio juris*.

The use of UN General Assembly resolutions to establish CIL was considered in the ICJ's 2019 advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.¹⁷⁹ The UN General Assembly had asked the Court to give an advisory opinion on whether the United Kingdom's process of decolonizing Mauritius was lawfully completed when Mauritius was granted independence in 1968.¹⁸⁰ At that time, the United Kingdom separated the Chagos Archipelago from Mauritius and incorporated it into the British Indian Ocean Territory.¹⁸¹ Between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or

¹⁷⁷ *Ibid* at paras 54-55.

¹⁷⁸ *Ibid* at para 99.

¹⁷⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

¹⁸⁰ *Ibid* at para 1.

¹⁸¹ *Ibid* at para 33.

forcibly removed and prevented from returning by the United Kingdom.¹⁸² In giving its opinion, the Court analyzed the right to self-determination in the context of decolonization. In doing this, it considered opposing views amongst the participants in the advisory proceedings on the customary status of the right to self-determination, its content and how it was exercised in the period between 1965 and 1968.¹⁸³

The Court resolved the opposing views by considering the resolutions of the General Assembly on decolonization and self-determination at the material time; describing one of such resolutions – resolution 1514 (XV) of 1960 - as a defining moment in the consolidation of state practice on decolonization.¹⁸⁴ Referencing its decision in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*,¹⁸⁵ on deducing custom from General Assembly's resolutions, the Court noted that resolution 1514 (XV) has a normative character with regard to the right of self-determination as a customary norm.¹⁸⁶ The Court added that the resolution is customary in nature because it was adopted by 89 votes with 9 abstentions, and none of the States participating in the vote contested the existence of the right of peoples to self-determination.¹⁸⁷ The Court thus acknowledged that resolutions of the General Assembly on self-determination constituted both state practice and *opinio juris* on the customary nature of right to self-determination.

¹⁸² *Ibid* at 43.

¹⁸³ *Ibid* at para 145.

¹⁸⁴ *Ibid* at para 150.

¹⁸⁵ *Legality of the Threat or Use of Nuclear Weapons Case*, *supra* note 8.

¹⁸⁶ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44 at paras 151 and 153.

¹⁸⁷ *Ibid* at para 152.

A recent ICJ case on the establishment of CIL is the 2022 *Dispute over the Status and Use of the Waters of the Silala*¹⁸⁸ where Chile called upon the Court to declare, amongst others, that the Silala River system, together with the subterranean portions of its system, is an international watercourse, the use of which is governed by CIL.¹⁸⁹ As both Chile and Bolivia are not parties to the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997, the Court had to determine the respective rights and obligations of the parties through CIL. The Court noted that the parties agreed that the Silala River system is an international watercourse. However, the parties did not agree on Bolivia's obligation to notify Chile before taking any action that might have an adverse effect on the River. The parties, specifically, disagreed regarding the scope and threshold for the application of the obligation. Chile argued that the obligations relating to the exchange of information and prior notification laid down in Article 11 of the 1997 Convention reflects CIL.¹⁹⁰ Bolivia, however, disagreed about the meaning of Article 11 and whether it reflects CIL.¹⁹¹ In resolving the opposing views, the Court referred to commentaries to the International Law Commission Draft Articles, noting that the commentary to Article 11 does not refer to any relevant state practice. The Court further stated that, in the absence of any general practice or *opinio juris* to support this contention, the Court cannot conclude that Article 11 of the 1997 Convention reflects customary international law.¹⁹²

¹⁸⁸ *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, [2022] ICJ Rep 1.

¹⁸⁹ *Ibid* at para 25.

¹⁹⁰ *Ibid* at para 103.

¹⁹¹ *Ibid* at para 106.

¹⁹² *Ibid* at para 111.

This case shows the preoccupation of the Court with state practice in the establishment of a rule as CIL and how commentaries to the International Law Commission Draft Articles may be another way of identifying state practice. The question that remains unanswered is, if the commentaries to the International Law Commission Draft Articles had in fact referred to relevant state practice, would the Court have held that Article 11 of the 1997 Convention reflected CIL without separate consideration of *opinio juris*?

Finally, the most recent decision of the Court is the 2023 *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*.¹⁹³ In that case, Nicaragua asked the Court to determine the “delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured and the continental shelf of Colombia on the other hand.”¹⁹⁴ Nicaragua argued that it is entitled to a continental shelf beyond 200 nautical miles.¹⁹⁵ On the contrary, Colombia argued that, under CIL, a State may not claim a continental shelf beyond 200 nautical miles from its baselines that encroached on another State’s entitlement to a 200-nautical-mile exclusive economic zone (EEZ) and continental shelf measured from its mainland coast and island.¹⁹⁶

The ICJ noted that there was state practice on the delimitation of continental shelves and EEZs, as seen “primarily through declarations, laws and regulations”, that predated the

¹⁹³ *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44.

¹⁹⁴ *Ibid* at para 1.

¹⁹⁵ *Ibid* at para 27.

¹⁹⁶ *Ibid* at para 32.

negotiation of the UN Convention on the Law of the Sea (UNCLOS).¹⁹⁷ UNCLOS was then negotiated over a nine year period and that state practice was “taken into account during the drafting of the Convention”.¹⁹⁸ The ICJ then seemed to indicate that *opinio juris* was demonstrated by the subsequent ratification of the UNCLOS by a “very large number of States ... which has significantly contributed to the crystallization of certain customary rules”, including with respect to the relationship between continental shelves and EEZs.¹⁹⁹ The ICJ examined that relationship, relying on submissions of States to the Commission on the Limits of the Continental Shelf (CLCS): “[t]he Court considers that the practice of States before the CLCS is indicative of *opinio juris*”, in particular that there is a “sufficiently widespread and uniform” practice of States not asserting outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State.²⁰⁰ As can be seen, the ICJ used evidence of state practice to determine *opinio juris*.

The decision of the ICJ in this latest case appears to contradict what the Court held in the *North Sea Continental Shelf Cases*, where the Court refused to find CIL because, according to the Court, there was no evidence that the States that applied the principle of equidistance did so because they felt legally compelled to draw them in this way by reason of a rule of CIL obliging them to do so.²⁰¹ In the instant case, the Court mentioned that it was possible that the States involved in the practice of not asserting 200 nautical outer limits of their extended continental shelf within 200 nautical miles of other coastal States were doing

¹⁹⁷ *Ibid* at para 47.

¹⁹⁸ *Ibid* at para 47.

¹⁹⁹ *Ibid* at paras 47, 50, 52.

²⁰⁰ *Ibid* at para 77.

²⁰¹ *North Sea Continental Cases*, *supra* note 49 at para 78.

were doing so due to other reasons and not because they felt it was obligatory.²⁰² Nevertheless, the Court declared the practice as CIL.

2.5 Notable Trends in ICJ Cases

The cases analyzed in part four reveal notable trends reflecting increasing dynamism in the ways the ICJ identifies rules of CIL. This part will identify two types of trends, which are interrelated (so they will be discussed together): a trend relating to the subject matter of the cases; and a trend involving the identification of state practice and *opinio juris*.

A significant trend in both Centuries is that the types of cases the Court grappled with in the 20th Century have changed in the 21st Century. In the 20th Century and early part of the 21st Century, the Court mainly handled cases that dealt with inter-state disputes such as issues relating to delimitation of boundaries on land and water, diplomatic immunity, and very specific questions of concern to a small number of States. These types of issues have been called “traditional” and “facilitative” customs not involving “substantive moral issues”.²⁰³ In these cases, the Court tended to place emphasis on state practice to determine a rule of CIL. When the Court does this, it is said to be applying the inductive methodology to assess state practice (an approach described in detail, and questioned, in Chapter 4).²⁰⁴ For instance, and as described above, in the *S.S. Lotus Case*, after examining decisions of

²⁰² *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44 at para 77.

²⁰³ Anthea Roberts, *supra* note 14 at 757 & 764. It is possible for a facilitative custom to have moral substance. Roberts herself acknowledges that a law could be both facilitative and have “strong” moral content – See Anthea Roberts, *supra* note 14 at 764. Examples of issues that reflect facilitative and moral attributes are water borders, which could have deep impacts on national pride on the cultural use of the water by inhabitants. Another example is that of diplomatic immunity, as inviolability is grounded in the promotion of peace and the representative nature of diplomats as envoys of peace.

²⁰⁴ Stefan Talmon, *supra* note 14 at 420.

national courts in respect of prosecution of crimes related to collisions on the high seas, the Court did not find CIL. Similarly in *Fisheries*, the Court examined the absence of state practice to determine that the ten-mile rule on delimitation of baselines was not CIL. In respect of regional customs, the Court decided cases such as the 1950 *Asylum Case*, 1960 *Right of Passage over Indian Territory* and the 2009 *Dispute Regarding Navigational and Related Rights* through emphasis on state practice. In the *Asylum Case*, the Court required strict proof of the elements of CIL in respect of whether there was a regional custom amongst Latin American States on granting asylum. After finding that there was inconsistent practice amongst Latin American States, the Court also concluded that Peru had not expressly consented to the alleged practice.²⁰⁵ In *Right of Passage over Indian Territory* and *Dispute Regarding Navigational and Related Rights* the Court found CIL due to the age-long and unchallenged practices involved. In the *Dispute Regarding Navigational and Related Rights*, state practice was again central: the Court rejected Nicaragua's protest that its tolerance of the practice did not create a legal obligation.²⁰⁶

In the last three to four decades, however, the Court has increasingly dealt with “modern customs” addressing fundamental principles such as use of force, human rights, and environmental degradation.²⁰⁷ Because these issues are normative, the Court has deemphasized the importance of state practice in the determination of CIL.²⁰⁸ In these types

²⁰⁵ *Asylum Case*, *supra* note 50 at 277-278.

²⁰⁶ *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at 140. This shows the significance of time of a custom in the establishment of CIL: A State which has allowed a custom to continue for a long period of time without expressing reservation is taken to have accepted such as a custom creating legal obligations and rights.

²⁰⁷ Anthea Roberts, *supra* note 14 at 765.

²⁰⁸ *Ibid.* It is not unlikely for critics to argue that traditional customs could be normative. For instance, normativity is reflected in issues such as boundaries, where the right of people to clean water and other resources needed to survive could arise, and diplomatic immunity in relation to the prosecution of diplomats believed to have violated international human rights or humanitarian laws. I thank Prof. Charles

of cases, the Court has also downplayed inconsistent state practice as preventing the establishment of a rule of CIL. Hence in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, the Court stated that, for a rule to be established as CIL, it is not necessary to have complete consistency in state practice and inconsistent state practice should be treated as a breach of that rule.²⁰⁹ In “modern custom”, *opinio juris* is very important. In these cases, the Court deduces general rules governing a practice and apply the rules to the specific case (this is explored more in Chapters 4 and 5). The Court looks for these general rules in places such as resolutions of the UN General Assembly, treaties, and commentaries of the International Law Commission.²¹⁰ In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,²¹¹ the Court relied upon the adoption of a UN General Assembly resolution on the right to self-determination to find a customary norm.²¹²

Having identified these interlinked trends, there is still evidence of inconsistency and lack of coherence to the two-element approach. For example, state practice was central to the outcome in the *Case Concerning the Jurisdictional Immunities of the State*, while one might expect a central focus on *opinio juris*, given the “moral custom” subject matter. As well, several cases were identified above in which state practice is used to determine *opinio juris* - i.e. where state practice serves as evidence of itself as well as *opinio juris*. This was seen in the case *Concerning the Military and Paramilitary Activities in and against*

Jones of the Department of Political Science, Western University, for raising this point during my thesis examination on August 14, 2023.

²⁰⁹ *Ibid* at para 186.

²¹⁰ Alberto Alvarez-Jiménez, *supra* note 14 at 687.

²¹¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

²¹² *Ibid* at paras 151 and 153.

*Nicaragua*²¹³ where the Court used the UN General Assembly Resolutions to find that the principle of non-use of force is CIL. Another example is the judgment in *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, in which the Court analyzed attitude of States towards the UNCLOS before and after the negotiation of the treaty.²¹⁴ The Court noted that the attitude of States towards the treaty indicated *opinio juris* and ultimately CIL that a State may not extend its 200 nautical miles continental shelf baseline within the limit of 200 nautical miles of another State.²¹⁵

2.6 Conclusion

This chapter has examined the key cases and advisory opinions of the ICJ on CIL in the 20th and 21st Centuries. From the examination, there were insights about how and when the Court emphasized elements of CIL. Where it is a traditional type of custom at issue, the Court typically lays emphasis on state practice. The Court tends to do this by analyzing specific state practice and inductively using the result of the analysis to determine whether a rule of CIL exists or not. Where the Court is dealing with a “modern custom” which is based on fundamental principles, the Court tends to lay emphasis on *opinio juris* and establish a rule of CIL even if there are inconsistent state practices. At the same time, it should be noted that, even though there are observable trends, these trends are not universally true, as will be seen in Chapters 3 and 4. Thus, the trends themselves do not

²¹³ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6.

²¹⁴ *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44 at para 47.

²¹⁵ *Ibid* at para 77.

help to demonstrate either a coherent mode of analysis by the ICJ or a path to consistency and predictability.

CHAPTER 3: THE ICJ, STATE PRACTICE, AND METHODOLOGIES OF REASONING

3.1 Introduction

Chapter 2 has shown that the Court is not consistent with the way it finds rules of CIL. Sometimes, the Court emphasizes state practice more than *opinio juris*. Other times, the Court stresses *opinio juris* more than state practice. Yet, in some other cases, the Court stresses both elements or even refuses to identify either of the elements. Carrying that theme one step forward, this chapter examines the role of state practice in the ICJ's methodology in determining customary international law (CIL). However, since the Court often does not specify how it arrives at a rule of CIL, this is not an easy task. Hence, scholars and commentators have been left to rationalize how the Court actually finds a rule of CIL. The most commonly referenced methodologies are the inductive and deductive methodologies.²¹⁶ The inductive approach focuses on state practice and de-emphasizes *opinio juris*, while the spotlight of the deductive approach is *opinio juris*.²¹⁷ That said, Worster has noted that no analysis of the Court's cases can be completely classified as either inductive or deductive.²¹⁸ Instead, he observes that the Court uses a blend of both approaches in its cases.²¹⁹ Another scholar has concluded the Court sometimes employs neither approach and simply asserts rules of CIL as it deems fit.²²⁰

²¹⁶ Stefan Talmon, *supra* note 14; Anthea Roberts, *supra* note 14; William Thomas Worster, "The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches" (2014) 45:2 *Geo J Intl L* 445; Alberto Alvarez-Jiménez, *supra* note 14 at 686; Robert Kolb, "Selected Problems in the Theory of Customary International Law" (2003) 50:2 *Nethl Intl L Rev* 119 at 125.

²¹⁷ Stefan Talmon, *supra* note 14 at 420; Anthea Roberts, *supra* note 4 at 758.

²¹⁸ William Thomas Worster, *supra* note 216 at 446.

²¹⁹ *Ibid.*

²²⁰ Stefan Talmon, *supra* note 14 at 420.

This chapter examines the approaches identified above with the aim of finding veracity in the assertions made about the Court's methodologies. The chapter is divided into five parts. After the introduction in this part, part two discusses the inductive and deductive approaches, which are the general methodologies associated with the Court. Part three examines other approaches identified in the ICJ's establishment of a rule of CIL. These include the mixed, assertive, and core 'rights' approaches. Part four delves into the analyses of ICJ cases and advisory opinions to determine which of the approaches the Court utilized in arriving at its conclusions in those judgments. With insights drawn from the aforementioned parts, part five comes to a conclusion on the analysis that should be used by the Court to bring consistency to its use of state practice in its identification of rules of CIL.

3.2 The Inductive and Deductive Approaches

“There is widespread agreement that customary international law is, as a rule, ascertained by induction.”²²¹ Generally, induction is the process of deriving general rules after drawing references from specific situations.²²² In a leading article analyzing induction in the identification of a rule of CIL, Stefan Talmon states that the induction of CIL means the derivation of a general customary rule from a pattern of specific instances of state practice and *opinio juris*.²²³ It is a process that involves “systematic observation and empirical generalization” of past behaviour.²²⁴ Similarly, Birgit Schlütter describes the inductive

²²¹ *Ibid* at 421.

²²² See “Cambridge Dictionary” (last modified 31 July 2023), online: *induction* <[INDUCTION | definition in the Cambridge English Dictionary](#)> where induction is defined “as the process of discovering a general principle from a set of facts”.

²²³ Stefan Talmon, *supra* note 14 at 420.

²²⁴ *Ibid*.

method as the process involving derivation of “a particular rule of law from examples of [past] practice, i.e. from facts alone, leading to a general presumption as to the existence of the rule or support for an author’s thesis as to the existence of a rule”.²²⁵ Bruno Simma and Philip Alston appear to agree with this suggestion, when they state that in adopting inductive reasoning, the ICJ looks into the past to determine instances of state practice and then utilizes the outcome to make a normative projection for the future.²²⁶ With respect to the ICJ, Alvarez-Jiménez refers to the Court’s “strict inductive method”, under which it declares the existence of customary norms only once the two elements of state practice and *opinio juris* have been demonstrated.²²⁷ This method requires a high threshold of proof.²²⁸

A number of scholars align the inductive method with traditional custom, which derives a general custom from instances of state practice: for example, Scoville concurs that the traditional custom operates by an “inductive process that identifies custom on the basis of broad surveys of state practice over time.”²²⁹ Talmon further explains that the method is “conservative, positivistic and characterized by descriptive accuracy”.²³⁰ Schlütter also states that the inductive method is associated with positivism, the main tenet of which is that law is created by “a sovereign or legitimized legislative entity”.²³¹ This view suggests that, in traditional custom, States are essentially taken as makers of CIL since their practices are what form a rule of CIL.

²²⁵ Birgit Schlütter, *supra* note 46 at 16 & 17.

²²⁶ Bruno Simma & Philip Alston, *supra* note 41 at 89.

²²⁷ Alberto Alvarez-Jiménez, *supra* note 14 at 686.

²²⁸ *Ibid* at 687.

²²⁹ Ryan M. Scoville, “Finding Customary International Law” (2016) 101:5 Iowa L Rev 1893 at 1938.

²³⁰ Stefan Talmon, *supra* note 14 at 420. Descriptive accuracy, according to Roberts, is discovery made “by observation and reasoning” of what the practice has been and indicates law conforming to reality: Anthea Roberts, *supra* note 14 at 762.

²³¹ *Ibid* at 17.

Evaluating the significance of the inductive method's goal of descriptive accuracy, Roberts suggests that using the inductive method in the identification of CIL makes the law realistic, since it focuses on what the law has been.²³² She further indicates that descriptive accuracy assists in making "predictions of future state behaviour".²³³

The inductive method has been denounced by some scholars. Leading the attack on what others have classified as the ICJ's inductive method is Talmon. He points out that the ICJ has rarely used the term 'induction' in the technical sense identified above, but rather (confusingly) has used terms such as 'infer' and even 'deduce' when deriving a general rule from state practice.²³⁴ He analyzes ICJ jurisprudence and concludes that it is inaccurate to say that the ICJ uses inductive reasoning: in reality, inductive and deductive methods are intermixed or completely absent.²³⁵ He also indicates that, even if the ICJ is following the inductive method, it is not as empirical as claimed: it is "just as subjective, unpredictable and prone to law creation as the deductive method".²³⁶ This is because it is practically impossible for the ICJ to examine the practice of 193 UN Member States, so it, by necessity, only examines the practice of a select number of states.²³⁷ This means that, in reality, the ICJ "could thus engage in a self-fulfilling collection of state practice ... supportive of a preconceived rule" of CIL.²³⁸ This means that the inductive approach can make a custom have a different meaning than intended by States, since it is the Court that

²³² Anthea Roberts, *supra* note 14 at 762. She goes on to say: "Laws must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten". *Ibid.*

²³³ *Ibid.*

²³⁴ Stefan Talmon, *supra* note 14 at 420.

²³⁵ *Ibid* at 442.

²³⁶ *Ibid* at 432.

²³⁷ *Ibid.*

²³⁸ *Ibid.* See also Anthea Roberts, *supra* note 14 at 768 where it is stated that the selectivity of state practice by the ICJ results in a "democratic deficit" since custom is derived from the practices of few States.

“formulates the rule that is inferred from a particular practice ... and the rule may be broad or narrow, abstract or specific, with or without exceptions.”²³⁹ Others have expressed similar worries about “selective analysis”.²⁴⁰ Alberto-Alvarez also mentions that the strict inductive method is not “truly representative” since custom is based on the practices of “mainly imperialist powers”.²⁴¹

Talmon indicates that inductive reasoning cannot logically be the central method of determining CIL (by the ICJ or other decision makers) because there are instances when the inductive method does not apply. First, where a rule of CIL can be proven by the presence of an underlying principle, then the inductive method has no purpose.²⁴² He then mentions four other instances where it would be “impossible” for the ICJ to use the inductive method in the identification of CIL:²⁴³ first, where there is no state practice because the issue in question is novel; second, where there are contrasting state practices; third, where there are cases of negative state practices characterized by abstention and omission; and finally, when there is a discrepancy between state practice and *opinio juris*.²⁴⁴ Talmon concludes that “if induction were the only method for ascertaining the rules of customary international law, the Court would have to pronounce a *non liquet* whenever the inductive method was practically impossible to apply”.²⁴⁵ In the *Nuclear Weapons* advisory opinion, Judge Higgins stated that “the concept of *non liquet* ... has no

²³⁹ Stefan Talmon, *supra* note 14 at 433.

²⁴⁰ Roberts uses this term: Anthea Roberts, *supra* note 14 at 767. For more on this concern, see Jonathan I. Charney, ‘Universal International Law’, (1993) 87 AJIL 529 at 537; David Fidler, ‘Challenging the Classical Concept of Custom’, (1996) German Yearbook Int’l L. 196 at 203, 217.

²⁴¹ Alberto Alvarez-Jiménez, *supra* note 14 at 689.

²⁴² Stefan Talmon, *supra* note 14 at 427.

²⁴³ *Ibid* at 422.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid* at 421.

part of the Court’s jurisprudence”.²⁴⁶ Talmon suggests that the ICJ “resorts to deductive reasoning in order to avoid a *non liquet*”.²⁴⁷ He adds that the inadequacy of the inductive method makes the deductive method desirable but that deduction should not be seen as an alternative to the inductive method: it is, rather, complementary.²⁴⁸

In contrast to induction, deduction generally involves deriving a specific rule after analyzing general situations.²⁴⁹ In determining a rule of CIL, the deductive method involves going from the general to the specific.²⁵⁰ The ICJ’s deductive method stresses *opinio juris* over state practice because it looks at statements of States and not their actions.²⁵¹ In studying the ICJ’s jurisprudence, Talmon concludes that, in fact, the Court adopts three different methods of deduction in determining a rule of CIL: namely normative, functional and analogical methods.²⁵² The Court employs normative deduction when “[n]ew rules are inferred ...from existing rules and principles of customary international law”.²⁵³ Functional deduction is used when the Court “deduces rules from general considerations concerning the function of a person or an organization” such as the United Nations.²⁵⁴ The third deductive method is analogical deduction and it is used when the idea behind an existing rule is extended to cover an analogous situation.²⁵⁵ Talmon

²⁴⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, “Dissenting Opinion of Judge Higgins” [8 July 1996] ICJ Rep 66 at para 36, Dissenting Opinion of Judge Higgins.

²⁴⁷ Stefan Talmon, *supra* note 14 at 423.

²⁴⁸ *Ibid.*

²⁴⁹ See “Cambridge Dictionary” (last modified 31 July 2023), online: deduction < [DEDUCTION | definition in the Cambridge English Dictionary](#)> where deduction is defined as “the process of learning something by considering a general set of facts and thinking about how something specific relates to them”.

²⁵⁰ Stefan Talmon, *supra* note 14 at 420; Anthea Roberts, *supra* note 14 at 758.

²⁵¹ Anthea Roberts, *supra* note 14 at 758.

²⁵² Stefan Talmon, *supra* note 14 at 423.

²⁵³ *Ibid.*

²⁵⁴ *Ibid* at 426.

²⁵⁵ *Ibid.*

characterizes the deductive method as “convenient” and, indeed, routinely applied by the ICJ.²⁵⁶ He also points out that the use of the deductive method is often mixed with the use of the inductive method. For example, it is used by the ICJ to substantiate results of an inductive process.²⁵⁷

Agreeing with Roberts, Talmon says the deductive method is associated with modern custom, which stresses *opinio juris* over state practice “because it relies primarily on statements rather than actions”.²⁵⁸ In summarizing the literature on the topic, Roberts describes the view that the deductive method allows for faster development of CIL: “[m]odern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs”.²⁵⁹ She also claims that the deductive method accommodates the current international reality in which important values such as the environment, human rights, and the use of force have become more nuanced.²⁶⁰ The deductive method is also said to be normative as it focuses on what the law ought to be but it is also possible that the deductive method be descriptive especially when relying on a treaty or resolution which frames its wording in a mandatory way.²⁶¹

Alvarez-Jimenez describes the ICJ’s deductive reasoning as the “flexible deductive” method for three reasons. First, it does not look for complete uniformity of state practice and a contrary state practice could be regarded as a violation of the rule in question and not

²⁵⁶ *Ibid* at 427.

²⁵⁷ *Ibid* at 427.

²⁵⁸ *Ibid* at 429; Anthea Roberts, *supra* note 14 at 758.

²⁵⁹ Anthea Roberts, *supra* note 14 at 758. See also Ryan M. Scoville, *supra* note 229 at 1938.

²⁶⁰ Anthea Roberts, *supra* note 14 at 765.

²⁶¹ *Ibid* at 763.

what prevents formation of a rule of CIL.²⁶² Second, the method favours “loosening” the requirements for inference of the existence of *opinio juris*, including from resolutions of the UN General Assembly.²⁶³ Third, the method continues to uphold the validity of CIL, even when it has been codified into multilateral treaties.²⁶⁴ This echoes Roberts’ explanation on why the deductive method can more quickly identify a developing develop rule of CIL than the inductive method.²⁶⁵

Schlütter explains that the deductive method is naturalistic because it focuses on “higher moral principles ... which represent the underlying basis for the international legal order”.²⁶⁶ These higher moral principles or fundamental principles include the “sovereign equality of states, environmental law, common values of mankind”.²⁶⁷ Schlütter agrees that the deductive approach deals with what the law ought to be and is the basis for the modern approach to custom, especially as it relates to the formation of customary international human rights and humanitarian law.²⁶⁸

Notwithstanding the normative value of the deductive approach, it has also been strongly criticized. For instance, because the deductive method prioritizes *opinio juris*, D’Amato has stated that the method contravenes the essence of CIL, which begins with finding state practice; therefore, when the ICJ applies the deductive approach, it “completely

²⁶² Alberto Alvarez-Jiménez, *supra* note 14 at 687.

²⁶³ *Ibid* at 687.

²⁶⁴ *Ibid*.

²⁶⁵ Anthea Roberts, *supra* note 14 at 758. See also Ryan M. Scoville, *supra* note 229 at 1938.

²⁶⁶ Birgit Schlütter, *supra* note 46 at 39.

²⁶⁷ *Ibid* at 40 citing to Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law” (1999) 281:1 Rec des Cours 9 at 438.

²⁶⁸ Birgit Schlütter, *supra* note 46 at 39-40: “... the deductive method has a popular modern basis for a theoretical approach to the formation of norms of customary international human rights and humanitarian law”.

misunderstands” CIL.²⁶⁹ Further, Roberts says the method exhibits “normative chauvinism” which significantly focuses on the human rights obligations of Western countries.²⁷⁰ The method has also been denounced as merely aspirational and does not really reflect reality, a condition Roberts labels as “utopian”.²⁷¹

3.3 Assertive, Mixed, and Core ‘Rights’ Approaches

This part discusses other approaches that have been used in order to explain the reasoning of the ICJ in its identification of rules of state practice and *opinio juris*.

After identifying cases in which the ICJ reflected either the inductive and deductive approach, Talmon indicates that the assertive method, in which the Court “simply asserts the law as it sees fit”, is its main mode of ‘reasoning’.²⁷² Referencing a number of cases, Talmon scathingly remarks that the Court did not give any evidence of state practice and *opinio juris* in situations where it ought to.²⁷³ In other words, it has “pulled a number of customary international law ‘rabbits’ out of its hat”.²⁷⁴ He adds that the Court casts a shadow of legitimacy on its assertion method by making references to the work of the International Law Commission (ILC) or stating that a particular treaty reflects CIL.²⁷⁵ Charlesworth shares Talmon’s concerns about the Court’s alleged assertive method. She says that the reliance of the Court on international organizations such as the ILC suggests

²⁶⁹ Anthony D’Amato, *supra* note 14.

²⁷⁰ Anthea Roberts, *supra* note 14 at 769.

²⁷¹ *Ibid* at 767 & 768.

²⁷² Stefan Talmon, *supra* note 14 at 424.

²⁷³ *Ibid*.

²⁷⁴ *Ibid* at 434.

²⁷⁵ *Ibid* at 437-438.

that CIL “is based on more than simply the consent of states and the activities of international groups made of independent individuals can contribute to it”.²⁷⁶

However, some scholars are of view that the Court mixes the inductive and deductive methods in determining a rule of CIL. The main proponent of this approach is Worster. Roberts also agrees that the approach of the Court is not completely inductive or deductive but entails both to varying degrees.²⁷⁷ According to Worster, the inductive and deductive methods are both used by the Court in the identification of CIL “in a delicate, yet valuable, balance where two trends exist in a corrective tension with each other”.²⁷⁸ Worster explains that the mixed method begins with finding the elements of CIL, a process which he describes as a deductive one because it involves looking at the Statute of the Court.²⁷⁹ After deducing the elements of CIL, he claims that the Court goes ahead to find the “elements, factors and evidence” that prove one or both elements of CIL.²⁸⁰ He further explains that content of practice is proved inductively, as the Court looks examines samples of practices of States to arrive at a conclusion.²⁸¹ The Court thereafter assess the “vital needs of the international community” using the deductive method.²⁸²

An offshoot of the deductive approach is Theodor Meron’s ‘core rights approach’. The approach supports finding proof of CIL from *opinio juris* alone but only as it relates to

²⁷⁶ Hilary Charlesworth, *supra* note 25 at 18.

²⁷⁷ Anthea Roberts, *supra* note 14 at 767.

²⁷⁸ William Thomas Worster, *supra* note 216 at 447 & 464.

²⁷⁹ *Ibid* at 468.

²⁸⁰ *Ibid* at 469.

²⁸¹ *Ibid* at 471.

²⁸² *Ibid*.

human rights and humanitarian law.²⁸³ His reason is based on the idea that human right norms are more significant than other international laws and state practice does not help in finding these universally accepted laws.²⁸⁴ He states that, when there is a violation of a norm so important that it generates outcry from the international community, only *opinio juris* is required as confirmatory evidence for its formation.²⁸⁵ He suggests that the standard of proof required for customary human rights norm be lowered because “[t]here is a direct relationship between the importance attributed by the international community to particular norms and the readiness to lower the burden of proof required to establish custom”.²⁸⁶

Clearly, there is a great deal of debate and discussion about the methodology (if any) the ICJ uses to come to conclusions on the existence, or not, of CIL. In order to test these approaches, the next part of this chapter will examine the ICJ’s methodology used in a number of cases.

3.4 The ICJ’s Methodology in Practice

It is pertinent to gain insight into how the ICJ has approached Article 38(1)(b) of its Statute which provides that CIL is “general practice accepted as law”. A cursory look at the phrase suggests that state practice should be the starting point of the Court in determining a rule of CIL. As the part above has illustrated, scholars have said the Court uses inductive reasoning to determine state practice by analyzing samples of practices of some States and

²⁸³ Theodor Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law” (1996) 90:2 AJIL 238 at 239; Theodor Meron, “The Geneva Conventions as Customary Law” (1987) 81:2 AJIL 348 at 359.

²⁸⁴ Theodor Meron, “International Law in the Age of Human Rights: General Course on Public International Law” (2003) 301 Rec des Cours 9 at 378.

²⁸⁵ *Ibid* at 378.

²⁸⁶ *Ibid* at 388.

then reaching a general conclusion from the analysis. Others have said international reality requires the Court to use the deductive approach to find general rules about a norm and then make a specific instance of rule of CIL. Yet others like Worster posit that both approaches are needed, while Talmon claims that the Court usually simply imposes its own understanding of the identification of CIL. This part evaluates the Court's cases and advisory opinions against these claims, specifically looking at what the Court does, and not what it says it does, to examine the methodologies used.

3.4.1 ICJ Cases that Reflect the Inductive Approach

The Permanent Court of Justice – the ICJ's predecessor – used the inductive method in arriving at its conclusion in the 1927 *S.S. Lotus Case*. The Court was called upon to determine whether CIL permitted Turkey to prosecute a French national over a collision on the high seas involving ships from both countries.²⁸⁷ The French government cited decisions of national courts to infer that there is a rule of CIL which gave jurisdiction to prosecute in this instance to the flag state.²⁸⁸ In reaching a conclusion in the negative, the Court held that the judicial decisions considered proved that States only abstained from instituting criminal proceedings in this instance against nationals of another State, not because they recognized themselves as being obliged to do so.²⁸⁹ The Court specifically cited the decisions of six States to buttress its conclusion. The Court said as follows:

... the Court feels called upon to stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from

²⁸⁷ *The Case of the S.S. Lotus*, *supra* note 53 at 10-11.

²⁸⁸ *Ibid* at 28.

²⁸⁹ *Ibid*.

that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts.²⁹⁰

In this judgment, the Court clearly considered the practices of States, through their domestic judicial decisions, to ascertain whether those practices supported the French government's argument that a culpable national involved in high seas collision could only be tried by their flag State.²⁹¹ However, the consideration of judicial decisions of only six States also lends credence to Talmon's criticism of the inductive method that the Court only *selects* practices of few chosen States.

The Court also used the inductive method in the 1951 *Fisheries Case*, where the Court did not consider *opinio juris* at all.²⁹² In the case, the Court had to consider whether the methods used by Norway to delimit its territorial sea were in accordance with CIL. The United Kingdom had argued that a length of baseline longer than 10 miles drawn across a bay was contrary to CIL.²⁹³ Relying on state practice, the Court inferred that, while other States had adopted the ten-mile rule in their national laws and conventions, "the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast".²⁹⁴ The Court therefore considered state practices on the ten-mile rule and, upon finding inconsistency in the practice, it held that the rule had not become CIL.²⁹⁵ This gives the impression that, if there was uniform

²⁹⁰ *Ibid* at 29.

²⁹¹ *Ibid* at 28-29.

²⁹² *Fisheries (United Kingdom v Norway)*, *supra* note 56.

²⁹³ *Ibid* at 131.

²⁹⁴ *Ibid*.

²⁹⁵ *Ibid*.

adoption of the ten-mile rule in national laws, the ten-mile rule would have been established as a state practice.

In the 1960 regional custom case of *Right of Passage over Indian Territory*, the Court also utilized the inductive method to reach the conclusion that there was a rule of CIL based on state practice.²⁹⁶ Portugal had claimed right of passage over India's territory since 1779 and asserted that the right was customary between both countries.²⁹⁷ Portugal further submitted that it was an "unbroken practice."²⁹⁸ In its judgment, the Court held that there "a constant and uniform practice" in respect of free passage of private persons, civil official and goods.²⁹⁹ The Court also noted that "[t]his practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and correlative obligation".³⁰⁰

The 1969 *North Sea Continental Shelf Cases* also reflected the Court's use of the inductive approach in the establishment of CIL.³⁰¹ In the cases, the Parties had asked the Court to determine the principles and rules governing the delimitation of the continental shelf between them in the North Sea. The Court resolved to use CIL to determine the request as one of the Parties, Germany, had not ratified the Geneva Convention on the Continental Shelf.³⁰² The Netherlands and Denmark argued that delimitation of the continental shelf

²⁹⁶ *Case Concerning Right of Passage over Indian Territory*, *supra* note 57.

²⁹⁷ *Ibid* at 33 & 39.

²⁹⁸ *Ibid* at 11.

²⁹⁹ *Ibid* at 40.

³⁰⁰ *Ibid*.

³⁰¹ *North Sea Continental Cases*, *supra* note 49.

³⁰² *Ibid* at para 28.

was governed by the equidistance principle and that the principle had crystallized into CIL.³⁰³ Germany however contended that the delimitation was governed by the *principle* that each coastal state is entitled to a just and equitable share.³⁰⁴ The Court held that “the position is simply that in certain cases-not a great number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they acted because they felt legally compelled to draw them in this by reason of a rule of customary law obliging them to do so...”.³⁰⁵ This conclusion is inductive, having been derived after considering the practice of States. Since there was no uniform or consistent practice, the Court rejected the Netherlands and Denmark’s arguments that the equidistance principle was CIL.³⁰⁶

The most famous statement by the ICJ of the inductive reasoning process is found in the 1984 case of *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, a case between Canada and United States.³⁰⁷ In that case, Canada and the United States had approached the Court to resolve their disagreement over the delimitation of the continental shelf and the fisheries zones shared by both States in the Canada in the Gulf of Maine.³⁰⁸ Both Parties agreed that there existed under international law “a fundamental norm” which required that a delimitation of a single maritime boundary be done according to the principle of equitable principles.³⁰⁹ The Parties, however, did not agree on the further rules

³⁰³ *Ibid* at para 21.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid* at para 78.

³⁰⁶ *Ibid* at para 81.

³⁰⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] ICJ Rep 246.

³⁰⁸ *Ibid* at para 5.

³⁰⁹ *Ibid* at paras 98-99.

to be derived from such “fundamental norm”.³¹⁰ The Court noted that it is “unrewarding ... to look to general international law to provide rules for solving any delimitation issues that rise.”³¹¹ The Court particularly stated in respect of CIL that:

[a] body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.³¹²

The Court concluded that that the fundamental norm of CIL required that all maritime boundary delimitations, whether through negotiation or dispute resolution, must be achieved “by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.”³¹³

The citation above clearly indicates the support of the Court for the inductive method.³¹⁴ However, there are authors who have argued that the *Gulf of Maine* citation indicates the need for both deductive and inductive reasoning. For instance, Robert Kolb states that what the Court meant is that there might be a category of CIL rooted in the structure of the international community in which proof of state practice and *opinio juris* are well settled, and there might be another category which requires gathering evidence of actual practice.³¹⁵ Schlütter, relying on Tomuschat, also contends that the reasoning of the Court

³¹⁰ *Ibid* at para 99.

³¹¹ *Ibid* at para 111.

³¹² *Ibid*.

³¹³ *Ibid* at 113.

³¹⁴ Authors who believe the Court was supporting inductive reasoning are: Anthea Roberts, *supra* note 14 at 15; Stefan Talmon, *supra* note 14 at 418; Brian D. Lepard, *supra* note 22 at 132.

³¹⁵ Robert Kolb, *supra* note 216 at 126.

is deductive since the Court relied on fundamental norms to find rules to resolve the dispute.³¹⁶

Similar to the *Right of Passage over Indian Territory* case, in the 2009 case of *Dispute Regarding Navigational and Related Rights*, the Court had to evaluate whether there was a local (special) custom between Costa Rica and Nicaragua allowing the former to fish for subsistence purposes from the shared San Juan River.³¹⁷ Costa Rica submitted that the practice had been in existence before and continued after the Treaty of 1958, which regulated navigational rights in the river.³¹⁸ Nicaragua argued that though it had tolerated the practice, it urged the Court not to consider the tolerance as creating a legal right.³¹⁹ The Court held that: “for the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued and unquestioned over a long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right”.³²⁰

The *Right of Passage over Indian Territory* and *Dispute Regarding Navigational and Related Rights* cases can be grouped together because they considered instances of customs which only affect two States. In these cases dealing with regional or special customs, where the Court found positive and constant state practice, the Court was satisfied with inferring *opinio juris* from that state practice and did not go further in finding separate evidence of

³¹⁶ Birgit Schlütter, *supra* note 46 at 151 citing to Christian Tomuschat, “Obligations Arising for States Without or Against Their Will” (1993) 241:1 Rec des Cours 195 at 298.

³¹⁷ *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at para 140.

³¹⁸ *Ibid* at 12.

³¹⁹ *Ibid* at 140.

³²⁰ *Ibid* at 141.

opinio juris.³²¹ This could be because the practice in question only affected a small number of States and it was most pertinent to find evidence of consent of the participating States.³²² Conversely, where the Court found inconsistent practice as seen in the *Asylum* case discussed below, the Court was inclined to find separate *opinio juris* thereby making the case reflect a mixed approach to the identification of CIL.

Further, in the 2002 *Arrest Warrant case*, the Court used inductive reasoning in arriving at its conclusion.³²³ In that case, the Democratic Republic of the Congo submitted to the Court that the Belgian arrest warrant issued against its Foreign Affairs Minister violated CIL in respect of “absolute inviolability and immunity from criminal process of incumbent foreign ministers”.³²⁴ Belgium based its contrary argument on provisions of instruments creating international criminal tribunals and national judicial decisions holding that immunities given to incumbent Foreign Affairs Ministers could be stripped where they are suspected of having committed war crimes or crimes against humanity.³²⁵ The Court inductively held that it “carefully examined State Practice, including national legislation and those few decisions of national higher courts...”, as well as instruments creating international criminal tribunals, and it was unable to conclude there was an exception to the rule of immunities for incumbent Foreign Affairs Ministers in CIL.³²⁶

The ICJ continues to apply the inductive method. This is evident in the 2023 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200*

³²¹ *Case Concerning Right of Passage over Indian Territory*, *supra* note 57 at 40; *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at para 141.

³²² See Chapter 4 for a further discussion of state consent in the context of (inferring) *opinio juris*.

³²³ *Arrest Warrant Case*, *supra* note 149.

³²⁴ *Ibid* at paras 10-11.

³²⁵ *Ibid* at para 56.

³²⁶ *Ibid* at para 58.

Nautical Miles from the Nicaraguan Coast.³²⁷ To determine that a State is not permitted to extend its continental shelf within 200 nautical miles of another State, the Court analyzed state practices on the delimitation of continental shelves and exclusive economic zones, the attitude of States toward the UN Convention on the Law of the Sea,³²⁸ and submissions of States to the Commission on the Limits of the Continental Shelf.³²⁹ The Court concluded that there was “sufficiently widespread and uniform” practice indicative of *opinio juris* of States not extending their continental shelves within 200 nautical miles of another State.³³⁰ It stated: “[i]ndeed, this element [*opinio juris*] may be demonstrated “by induction based on the analysis of a sufficiently extensive and convincing practice” – in other words, state practice is proof of *opinio juris*.³³¹

It is interesting to note that the clearest articulations by the ICJ that it is using the inductive reasoning process arise in what Roberts calls “facilitative custom” cases which “do not involve strong issues of principle” (as opposed to “moral custom” cases which “involve important issues of principle” such as whether torture is prohibited).³³² The cases described above are largely cases involving maritime boundaries or maritime rights, which, once clarified by the ICJ, make “an important contribution to coexistence and cooperation”, but do not require substantive consideration of moral issues.³³³

³²⁷ *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44 at para 77.

³²⁸ *Ibid* at para 47.

³²⁹ *Ibid* at para 77.

³³⁰ *Ibid*.

³³¹ *Ibid* at 77. The Court cited *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 308 at para 111.

³³² Anthea Roberts, *supra* note 14 at 781.

³³³ *Ibid* at 782. Her illustrative example of facilitative custom also involved a maritime rule.

3.4.2 ICJ Cases that Reflect the Deductive Approach

In the 1996 advisory opinion of the Court in *Legality of the Threat or Use of Nuclear Weapons* on whether international law permitted the threat or use of nuclear weapons under any circumstance, the Court's answers were deductive.³³⁴ The Court noted that "members of the international community were divided on the matter" of non-recourse to nuclear weapons.³³⁵ Some States, in their submissions to the Court, stated that certain UN General Assembly resolutions condemned recourse to nuclear weapons.³³⁶ However, other States rejected the submission that UN General Assembly resolutions had any significance in international law.³³⁷ In its opinion, the Court stated that:

... General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish if this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption.³³⁸

The Court concluded that since States were profoundly divided as to whether the practice of non-recourse to nuclear weapons over the past 50 years constituted *opinio juris* on illegality, it was unable to find such *opinio juris*.³³⁹ The reasoning of the Court was deductive in that it stressed the normative value of having a rule prohibiting non-use of nuclear weapons: it deduced from the UN General Assembly resolutions "that the use of nuclear weapons would be a direct violation of the Charter of the United Nations and in certain formulations that such use should be prohibited".

³³⁴ *Legality of the Threat or Use of Nuclear Weapons Case*, *supra* note 8 at para 1.

³³⁵ *Ibid* at para 67.

³³⁶ *Ibid* at para 68.

³³⁷ *Ibid*.

³³⁸ *Ibid* at para 70.

³³⁹ *Ibid* at paras 65-67.

Likewise, in the 2019 advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, State submissions indicated that they were divided on the customary law status of the right to self-determination.³⁴⁰ Some States argued that the right to self-determination was broad and applied everywhere.³⁴¹ Other States submitted that the right to self-determination did not include “an obligation to implement the right within the boundaries of the non-self-governing territory”.³⁴² In order to address this difference of opinion, the Court resorted to considering resolutions of the UN General Assembly on decolonization and self-determination.³⁴³ The Court held that one such resolution – resolution 1514 (XV) of 1960 – has a normative character with respect to the right to self-determination.³⁴⁴ The Court explained that the resolution was customary in nature by looking at the conditions of its adoption: it was adopted by 89 votes and 9 abstentions; the abstentions were because of the time required for the implementation of the right; and no State participating in the vote contested the existence of the right of peoples to self-determination.³⁴⁵ The Court also reasoned as follows: “[t]he wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that ‘[a]ll peoples have the right to self-determination’. Its preamble proclaims ‘the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations’ and its first paragraph states that ‘[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the

³⁴⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

³⁴¹ *Ibid* at para 145.

³⁴² *Ibid* at para 159.

³⁴³ *Ibid* at para 150.

³⁴⁴ *Ibid*.

³⁴⁵ *Ibid* at para 152.

Charter of the United Nations’.”³⁴⁶ The reasoning of the Court was deductive: it deduced CIL on the fundamental principle of sovereignty from this resolution, and used this general principle as the premise for its decision. It is a good example of what Roberts refers to as “moral custom” as self-determination is considered a fundamental norm of public international law, one involving “strong moral content” requiring “a more normative equilibrium”.³⁴⁷

3.4.3 ICJ Cases that Reflect the Mixed Approach

Recall that a mixed approach involves the Court using the inductive and deductive approaches to varying degrees in a case. The mixed approach played out in the 1950 *Asylum Case*, which was one of the first cases decided by the Court upon succeeding the Permanent Court of Justice. The Court was tasked with determining whether there was a regional custom amongst Latin American countries to grant diplomatic asylum.³⁴⁸ Colombia had claimed that this custom was extant in the Latin American region and had relied on a large number of cases in which diplomatic asylum was granted and respected.³⁴⁹ The Court approached the argument of Colombia inductively by stating that:

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of offence.³⁵⁰

³⁴⁶ *Ibid* at para 153.

³⁴⁷ Anthea Roberts, *supra* note 14 at 781.

³⁴⁸ *Asylum Case*, *supra* note 50 at 276-277.

³⁴⁹ *Ibid* at 277.

³⁵⁰ *Ibid*.

The Court therefore found inconsistent practice in the granting of diplomatic asylum in the region. The Court also considered whether the general principle of sovereignty could support Colombia's claim. The Court found that "[i]n the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State... . Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case".³⁵¹ Since the Court was unable to find that a general rule of international law applied in this instance, the Court held that it could not "deduce... any conclusion which would apply to the question now under consideration".³⁵² Thus, the Court mixed inductive and deductive methods in coming to its conclusion about the absence of regional CIL on diplomatic asylum.

A thorough analysis of the 1986 case *Concerning the Military and Paramilitary Activities in and against Nicaragua*³⁵³ shows that the Court employed mixed methodologies to arrive at its decision. This is contrary to the assertion of authors like Roberts, Talmon and Alvarez-Jimenez that only the deductive method is reflected in the case.³⁵⁴ In the case, Nicaragua had instituted an action against the United States because of the military and paramilitary actions of the United States against Nicaragua from 1981 to 1984.³⁵⁵ The Court used CIL to determine the case because the United States had made a multilateral

³⁵¹ *Ibid* at 274-275.

³⁵² *Ibid* at 275.

³⁵³ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6.

³⁵⁴ Anthea Roberts, *supra* note 14 at 758; Stefan Talmon, *supra* note 14 at 431; Alberto Alvarez-Jiménez, *supra* note 14 at 686. Roberts et al. may have come to this conclusion because the deductive method was reflected more than the inductive method. Compare to: William Thomas Worster, *supra* note 216 at 518, who observed that the Court's approach was mixed.

³⁵⁵ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at para 18-21.

treaty reservation to the Court's jurisdiction.³⁵⁶ The United States, however, objected to the use of CIL on the ground that rules of CIL that also appear in a multilateral treaty did not apply in the case.³⁵⁷ Rejecting the United States' submission, the Court held that rules of CIL continue to exist side by side with a treaty which has codified the same rules of CIL.³⁵⁸ The Court then considered the CIL nature of the prohibition of the use of force, the principle of non-intervention, and the principle of self-defence, which were the applicable norms in the case. In respect of the prohibition of the use of force, the Court held that the presence of the prohibition in the UN Charter and its nature as a rule of CIL is derived from a "common fundamental principle outlawing the use of force in international relations".³⁵⁹ This is deductive, as the Court arrived at its conclusion in this instance from a general rule outlawing use of force. The Court also held that the customary rules on the prohibition of use of force can only be derived from the "practice and *opinio juris* of States".³⁶⁰ The Court held that "the Court may not disregard the essential role played by general state practice...The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice".³⁶¹ This is inductive. Nevertheless, the Court also held that complete uniformity of state practice is not required for the emergence of CIL. The Court said "it is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal

³⁵⁶ *Ibid* at para 73

³⁵⁷ *Ibid* at para 173.

³⁵⁸ *Ibid* at para 177.

³⁵⁹ *Ibid* at para 181.

³⁶⁰ *Ibid* at para 183.

³⁶¹ *Ibid* at para 184.

affairs”.³⁶² This is also deductive. The Court further held that the UN General Assembly resolutions play an important role in determining *opinio juris*. The Court stated that “[T]his *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolution, and particularly resolution 2625 (XXV)”.³⁶³ Notwithstanding the Court’s used of “deduce”, this part is purely inductive as it involves looking at attitudes of States towards a resolution in order to determine consistency in the States’ attitude.

In the 2012 case of *Jurisdictional Immunities of the State*, the Court also used both approaches in its decision.³⁶⁴ The contention between the Parties was whether there was a rule of CIL stating that a State is not entitled to immunity in respect of certain acts committed by the armed forces of a State in the course of conducting an armed conflict.³⁶⁵ Germany submitted that that no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces in the context of an armed conflict, and that courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.³⁶⁶ Italy countered that state immunity could be denied where there were serious violations of international humanitarian law.³⁶⁷ The Court examined state practice on state immunity by analyzing decisions of national courts, and held that “there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State’s entitlement to

³⁶² *Ibid* at para 186.

³⁶³ *Ibid* at para 188.

³⁶⁴ *Jurisdictional Immunities of the State*, *supra* note 44.

³⁶⁵ *Ibid* at para 61.

³⁶⁶ *Ibid* at para 63.

³⁶⁷ *Ibid* at para 80.

immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated”.³⁶⁸ This inference is inductive as state practice on state immunity was used to arrive at this conclusion. The Court also stated that “...practice shows whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity”.³⁶⁹ This general rule strengthened the Court’s conclusion about state immunity in the case;³⁷⁰ thereby making it reflective of deductive reasoning.

In sum, the ICJ is not explicit about the way in which it uses both inductive and deductive reasoning processes in its decisions, but the cases examined above illustrate that both methods can be identified in certain cases.

3.4.4 ICJ Cases that Reflect the Assertive Approach

Talmon has claimed that the “main method” used by the Court is assertion, rather than either the inductive or deductive approaches.³⁷¹ He states: “[i]n the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit”.³⁷² Talmon argues that the Court has used the assertion method to identify positive rules of CIL and to deny the existence of some.³⁷³ He says that, by using this method, the Court has essentially been pulling “rabbits out of its hat” in the way it identifies

³⁶⁸ *Ibid* at para 84.

³⁶⁹ *Ibid* at para 56.

³⁷⁰ *Ibid* at para 57.

³⁷¹ Stefan Talmon, *supra* note 14 at 434.

³⁷² *Ibid* at 434.

³⁷³ *Ibid*.

rules of CIL.³⁷⁴ Talmon gives the example of the 1949 *Corfu Channel Case*, where the Court had to decide whether Albania was legally responsible for the 1946 mine explosions in Albanian waters which caused damage to United Kingdom warships and killed some crew members.³⁷⁵ The Court was also to decide whether the United Kingdom violated the sovereignty of Albania by reason of its minesweeping operation in the Corfu Channel without the authorization of the Albanian Government.³⁷⁶ In respect of the latter, the Court held that “it is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent”.³⁷⁷ Talmon’s contention with the conclusion of the Court was that the Court did not give any evidence of state practice and *opinio juris* in asserting that innocent passage was a customary right generally recognized.³⁷⁸ However, the Court could be said to have used the deductive approach in this regard. The Court anchored its conclusion about innocent right of passage being a rule of CIL on a universally recognized and fundamental principle of freedom of navigation in international waters.³⁷⁹ It is a right that Grotius considered as “most specific and unimpeachable axiom of the Law of Nations, called a primary rule or

³⁷⁴ *Ibid.*

³⁷⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Merits [1949] ICJ Rep 4 at 10.

³⁷⁶ *Ibid* at 12.

³⁷⁷ *Ibid* at 28.

³⁷⁸ Stefan Talmon, *supra* note 14 at 434.

³⁷⁹ *Corfu Channel*, *supra* note 375 at 22 where the Court indicated that right of free passage is based on “certain general and well-recognized principles: namely elementary considerations of humanity...”.

first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation and to trade with it”.³⁸⁰

Further, Talmon claims that, by claiming to have observed a rule, the Court is actually asserting in this instance and not inferring or deducing.³⁸¹ He referenced the 2005 *Case Concerning Armed Activities on the Territory of the Congo* where the Court was tasked with deciding, among others, whether the Republic of Uganda had violated principles of conventional and customary law by engaging in military and paramilitary activities against the Congo by occupying its territory and by supporting rebels in the country.³⁸² The Court stated “[t]he Court *observes* that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised”.³⁸³ While there is veracity in Talmon’s assertion that the Court did not offer evidence of state practice and *opinio juris* in respect of its observation, the Hague Regulations referred to by the Court deal with international humanitarian laws which – according to the International Committee of the Red Cross’ careful study of customary international humanitarian law - reflect universally accepted laws.³⁸⁴ Thus, it could be said that the Court was deducing a conclusion from a general rule on wars on land. The Court went ahead to apply the principle

³⁸⁰ Benedict Kingsbury, “Gentili, Grotius and the Extra-European World” in Harry N. Schneiber (ed), *Law of the Sea: The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff, 2000) 39 at 53-57.

³⁸¹ Stefan Talmon, *supra* note 14 at 436.

³⁸² *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at para 24.

³⁸³ *Ibid* at para 172.

³⁸⁴ “Customary International Humanitarian Law Database” (last modified 21 July 2023), online: *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907* <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907>.

from the Hague Regulations by stating that “the Court will now ascertain whether parts of the DRC were placed under the authority of the Ugandan army in the sense of Article 42 of the Hague Regulations of 1907.”³⁸⁵

Further, Talmon claims one of the assertion techniques used by the Court is to reference the ILC as a “shortcut” to establishing CIL.³⁸⁶ He acknowledged that “[in] light of the ILC’s extensive review of state practice and opinion juris in its reports and commentaries, this simply might be an example of the Court outsourcing the inductive process to the Commission”.³⁸⁷ In line with this claim, it could be said that the Court used the assertive method in the 2022 case of *Dispute over the Status and Use of the Waters of the Silala* involving Chile and Bolivia.³⁸⁸ In that case, the Court had to decide whether Article 11 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses reflected a rule of CIL, or not, as the Parties were not in agreement on this.³⁸⁹ To resolve the disagreement, the Court examined the ILC Draft Commentary on Article 11 of the Convention.³⁹⁰ The Court held that the Commission “does not refer to any State practice or judicial authority that could suggest the customary nature of this provision... Thus, the Commission did not appear to consider that Article 11 reflected an obligation under customary international law”.³⁹¹

Having examined these cases, it is not entirely clear whether pure assertion is indeed the ICJ’s main methodology of reasoning in its judgments and advisory opinions, as Talmon

³⁸⁵ *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 382 at para 174.

³⁸⁶ Stefan Talmon, *supra* note 14 at 437.

³⁸⁷ *Ibid.*

³⁸⁸ *Dispute over the Status and Use of the Waters of the Silala*, *supra* note 188.

³⁸⁹ *Ibid* at para 106.

³⁹⁰ *Ibid* at para 112.

³⁹¹ *Ibid* at para 111.

states.³⁹² Rather, it appears that the ICJ uses a combination of implicit inductive or deductive reasoning combined with explicit assertions about the content of certain norms of CIL.

3.5 Conclusion

Having considered key ICJ cases above that reflect inductive, deductive, and assertion approaches, it is also necessary – given the theme of this thesis - to consider the approach which appears most likely to result in predictable, consistent analysis by the ICJ of CIL. The answer is that there is no single type of methodological reasoning – either inductive or deductive - that is appropriate in every single instance. That said, given the analysis directly above, one can conclude that pure assertion may only be relevant for "notorious custom" involving long and well-established rules of CIL.³⁹³

The cases analyzed above have demonstrated that it is unusual for a case to contain strictly one approach. The Court arrives at its decisions by intermingling approaches. Article 38(1)(b) of the ICJ Statute requires elements of state practice and *opinio juris*. Abiding by this provision necessarily requires using various approaches. The mixed approach is ideal because it combines the advantages of both the inductive and deductive approaches - approaches which are "complementary" of each other.³⁹⁴ For instance, the inductive approach allows the Court to analyze State practice in respect of an issue and the deductive

³⁹² Stefan Talmon, *supra* note 14 at 434.

³⁹³ Talmon recognizes that one would not expect the Court to use inductive or deductive reasoning to "establish long and well-recognized rules" of CIL "such as the inviolability of diplomatic agents" (which he classifies as "notorious custom"): *Ibid* at 434. Even in cases of "notorious custom", it may well be that the ILC has issued a report or commentary on that CIL on which the ICJ can rely, in which case it would be pure assertion.

³⁹⁴ *Ibid* at 423.

approach enables the Court to determine the normative value of such an issue. Where there are inconsistent State practices, the deductive approach comes to the rescue by looking at general rules on the issue. Furthermore, the approach allows the Court to be flexible in bringing to the fore the expectations of the international community about certain fundamental values. Custom is not static and its validity is majorly premised on States' actions and inactions, which themselves are subject to change.³⁹⁵ The change inherent in actions and inactions of States might tilt towards the extreme end of state practice or *opinio juris* and in some cases might be an amalgamation of both elements. In the latter instance particularly, the mixed approach allows the Court to evaluate a custom in light of current and actual practice and moral values.³⁹⁶ The flexibility afforded by the mixed approach means that the decisions of the Court can be consistent with current realities in international affairs as well as aspirations of States.

This chapter has examined the methodologies used by the Court in identifying rules of CIL. The chapter has also discussed the ICJ cases that fall under each of these methodologies to figure out which fell under the inductive, deductive, mixed, or assertive approaches. The chapter demonstrated that some of the Court's cases reflected either the inductive or deductive method; while others reflected a mix of both approaches. Other cases also seemed to reflect the assertive approach to some degree, but some unpacking of the decisions revealed that they may not rest on pure assertion. Finally, the chapter ended by stating that the mixed approach appears to be the most realistic and practical as it allows for dynamism and fluidity where needed. As will be seen in Chapter 5, creating space for

³⁹⁵ Anthea Roberts, *supra* note 14 at 784.

³⁹⁶ *Ibid.*

dynamism and fluidity in the identification of CIL by the ICJ helps to ensure a more nuanced and methodologically dense understanding of custom.

The next chapter turns to theories of *opinio juris*, the element that makes a customary norm obligatory, with the purpose of further ascertaining how the ICJ identifies rules of CIL and the inconsistencies reflected.

CHAPTER 4: HOW THE INTERNATIONAL COURT OF JUSTICE HAS ADDRESSED *OPINIO JURIS*

4.1 Introduction

The International Court of Justice (ICJ) has indicated that, for customary international law (CIL) to be established, two elements are required: state practice and *opinio juris*.³⁹⁷ The previous chapter discussed the ICJ's approach to methodology, especially with respect to state practice. This chapter therefore turns to a consideration of how the ICJ has approached *opinio juris*, the subjective or psychological element of CIL under which the custom is viewed by States as binding.³⁹⁸ The method by which the ICJ determines *opinio juris* is not straightforward. As examined in Chapter 2, in some cases the Court established a rule as CIL without clear evidence of *opinio juris*,³⁹⁹ while in other cases, the Court emphasized *opinio juris* while making little recourse to state practice.⁴⁰⁰ Indeed, Charlesworth has observed that *opinio juris* can be "elusive" and "[i]ts absence is considerably easier to establish than its presence".⁴⁰¹ The ICJ's inconsistent approach to *opinio juris* has prompted some publicists to question whether it should even be a requirement for the

³⁹⁷ *North Sea Continental Cases*, *supra* note 49 at para 77.

³⁹⁸ Olufemi Elias, *supra* note 51 at 501; James Crawford, *supra* note 19 at 23; Ademola Abass, *supra* note 19 at 40.

³⁹⁹ *Case Concerning Right of Passage over Indian Territory*, *supra* note 57 at 38, *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at paras 141 & 144.

⁴⁰⁰ *The Case of the S.S. Lotus*, *supra* note 53 at 28, *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at paras 206-207.

⁴⁰¹ Hilary Charlesworth, *supra* note 25 at 8.

establishment of CIL,⁴⁰² while others have commented that it should be the *only* element for the establishment of CIL.⁴⁰³

Two theories are usually advanced to back up the requirement of *opinio juris* in the identification of CIL: the consent-based theory and the belief-based theory.⁴⁰⁴ In basic terms, the consent-based theory indicates that a State must consent to a custom before it becomes bound by it. The belief-based theory, on the other hand, posits that a State is not required to consent to a custom before it becomes bound by it; the State only needs to demonstrate belief in the validity of the custom in international law. This chapter considers in-depth whether the ICJ either explicitly or implicitly follows one, both, or neither of these theories in its cases and advisory opinions. This chapter also considers ‘sliding scale’ theories, particularly Kirgis’ theory, which questions the binary nature of the two theories mentioned above and instead advances that *opinio juris* is only relevant when there is a decline in the frequency and consistency of state practice.⁴⁰⁵ The chapter further considers the superfluous theory which states that it is unnecessary to enquire whether a State has a belief about a norm or consents to it.⁴⁰⁶

To achieve its objectives, this chapter is divided into five parts. Following this introduction, the second part introduces the legal theories underlying the nature of *opinio juris* because the issues raised by these theories are crucial to understanding how the ICJ has interpreted

⁴⁰² Lazare Kopelmanas, “Custom as a Means of the Creation of International Law” (1937) 18:1 Brit YB Intl L 127 at 129-130; Anthony D’Amato, “Customary International Law: A Reformulation” (1998) 4:1 Intl Leg Theory 1 at 1.

⁴⁰³ Bin Cheng, *Studies in International Space Law* (Oxford: Oxford University Press, 1997) at 138; Andrew Guzman, *supra* note 59 at 153-154.

⁴⁰⁴ Christian Dahlman, “The Function of *Opinio Juris* in Customary International Law” (2012) 81:1 Nordic J Intl L 327 at 330; Olufemi Elias, *supra* note 51 at 504.

⁴⁰⁵ Frederic L. Kirgis, *supra* note 41 at 149.

⁴⁰⁶ I.C. MacGibbon, “Customary International Law and Acquiescence” (1957) 33:1 Brit YB Intl L 115 at 126.

this aspect of CIL and the debates around how the Court has done so. Part three explains how the ICJ has approached evidence of *opinio juris* in its judgments and advisory opinions on CIL. It specifically examines whether the ICJ's approach is consent-based or belief-based, or whether it reveals another theoretical underpinning. The fourth part delves into the new forms of evidence that might be used by the ICJ to determine *opinio juris*, to examine whether new forms of evidence might assist in clarifying the conceptual underpinnings of this requirement of CIL. Part five concludes that a new definition of *opinio juris* is not only helpful, it is warranted, given the opaque nature of this aspect of CIL today.

4.2 Meaning and Theories of *Opinio Juris*

Opinio juris, from *opinio juris sive necessitatis*, which simply means 'a belief that something is required by law or necessity', is the second ingredient needed to establish CIL. A number of international law writers have traced the formulation of *opinio juris* to Francois Geny in 1899.⁴⁰⁷ According to Abass, Geny coined the term '*opinio juris*' while attempting to distinguish between legally binding custom and mere social usage.⁴⁰⁸ Other international legal theorists have followed suit. For example, Malanczuk defines *opinio juris* as a conviction felt by States that a certain form of conduct is required by international law.⁴⁰⁹ Brierly also defines it as the recognition by States of a certain practice as obligatory.⁴¹⁰ Gény, Malanczuk, and Brierly all stress the subjective nature of *opinio juris*,

⁴⁰⁷ Ademola Abass, *supra* note 19 at 40; Olufemi Elias, *supra* note 51 at 504; Christian Dahlman, *supra* note 404 at 330.

⁴⁰⁸ Ademola Abass, *supra* note 19 at 40 and Olufemi Elias, *supra* note 51 at 504 citing to François Gény, *Methode d'Interpretation et Sources en Droit Prive Positif*, 1899, para 110.

⁴⁰⁹ Peter Malanczuk, ed, *Akehurst's Modern Introduction to International Law*, 7th revd ed (New York: Routledge, 1997) at 44.

⁴¹⁰ James Leslie Brierly, *The Law of Nations* (Oxford: Clarendon Press, 1963) at 60.

which sits in opposition to the objective nature of state practice.⁴¹¹ Crawford, and Kadens and Young describe *opinio juris* as the extra ingredient necessary to transform a general practice into a binding rule.⁴¹² Commenting on the meaning of *opinio juris*, the International Law Commission in its Draft Conclusions on Identification of CIL, states that *opinio juris* means “...that the practice in question must be undertaken with a sense of legal right or obligation”.⁴¹³

To explain the subjective nature of *opinio juris*, two theories have been propounded: the consensualist theory (also known as the acceptance-based theory⁴¹⁴ or voluntarist approach⁴¹⁵) and the intellectualist theory (also called the belief-based theory⁴¹⁶).⁴¹⁷ Given the numerous titles for these theories, this chapter will use the terms ‘consent theory’ and ‘belief theory’.

The consent theory requires every State to agree to a custom before being bound by it because States cannot acquire an obligation without first consenting to it.⁴¹⁸ The proponents of this theory equate *opinio juris* with the will of States.⁴¹⁹ They view *opinio juris* as identical to consent, and consent here means agreement, compliance, concurrence or

⁴¹¹ See Peter Malanczuk, *supra* note 409 at 44, who describes *opinio juris* as the “conviction felt by States that a certain form of conduct is required by international law”.

⁴¹² James Crawford, *supra* note 2 at 24; Emily Kadens & Ernest A Young, “How Customary is Customary International Law?” (2013) 54:3 Wm & Mary Rev 885 at 907.

⁴¹³ International Law Commission, “Draft Conclusions on Identification of Customary International Law” in *Report of the International Law Commission*, UN GAOR, 73rd Sess, Supp No 10, Addendum, UN Doc A/73/10 (2018) at para 65, Conclusion 9(1).

⁴¹⁴ Christian Dahlman, *supra* note 404 at 330.

⁴¹⁵ Maurice Mendelson, “The Subjective Element in Customary International Law” (1996) 66:1 Brit YB Intl L 177 at 180-181.

⁴¹⁶ Christian Dahlman, *supra* note 404 at 330.

⁴¹⁷ Olufemi Elias, *supra* note 51 at 501.

⁴¹⁸ Maurice Mendelson, *supra* note 415 at 185.

⁴¹⁹ Olufemi Elias, *supra* note 51 at 501.

permission to a given state of affairs.⁴²⁰ The theory puts forward the hypothesis that States initiate a practice, then look for the reactions of other States to the new practice.⁴²¹ If other States consent, that is, agree, acquiesce in, comply with, concur with or permit the new practice, then there is *opinio juris* in relation to the new practice and it is that *opinio juris* which turns the practice into CIL.⁴²² The theory has its origins in Roman Law, which treated custom like legislation and one of the methods by which the people create law.⁴²³ According to Walden, the theory was expressed in the famous words of Ulpian, a Roman jurist: “Custom is the tacit consent of the people, preserved by long-standing usage”.⁴²⁴ Mendelson, while also agreeing that the theory on the key role of *opinio juris* in law creation dates back to a series of Roman Law texts, states that the rejection of natural law by positivists in the 20th century, and “emphasis on the sovereign will of States, brought the consent theory of *opinio juris* to the fore.”⁴²⁵

The consent theory’s approach to *opinio juris* has been attacked. This theory relies on a strong conception of sovereignty, under which no obligations can be imposed on a sovereign unless that sovereign has consented to it.⁴²⁶ Mendelson critiques this approach as outdated and no longer reflecting legal reality.⁴²⁷ The legal reality today, according to him, is that states have a number of CIL obligations to which they have not consented.⁴²⁸ He mentions customary rules relating to diplomatic immunities, the prohibition of piracy

⁴²⁰ *Ibid* at 509.

⁴²¹ *Ibid*.

⁴²² *Ibid*.

⁴²³ Raphael M. Walden, “The Subjective Element in the Formation of Customary International Law” (1977) 12:3 *Israel LR* 344 at 344.

⁴²⁴ *Ibid*.

⁴²⁵ Maurice Mendelson, *supra* note 415 at 184.

⁴²⁶ *Ibid* at 185.

⁴²⁷ *Ibid*.

⁴²⁸ *Ibid*.

and privateering, and sovereign rights over the continental shelf as instances of CIL obligations to which not every State positively consented to their emergence. Others agree – for example, Elias opines that the acceptance of a given practice as law by a great majority of States may cause a State which has not accepted that practice to consider itself bound by it.⁴²⁹ He adds that this situation creates bandwagon *opinio juris*, in which there is a binding rule based on the fact of general consent and not because a State voluntarily accepted to be bound by it.⁴³⁰

In comparison to the consent theory, the belief theory states that for a norm to be CIL, it must be generally practised among States because they *believe* that the norm is valid in international law (not because they have consented to it).⁴³¹ The belief theory was promoted by Friedrich Karl von Savigny in the 19th century and the German historical school.⁴³² According to Walden, von Savigny and the historical school saw law as a phenomenon which, like language, was a spontaneous and natural product of the people, and not something willed and arbitrary.⁴³³ The belief theory requires that a practice, in order to be CIL, must be applied in the conviction that it is already binding; it is therefore declaratory of legal obligations.⁴³⁴ In sum, this theory takes *opinio juris* to be a State's belief that there is a rule of law in existence which renders a practice obligatory and binding. Malanczuk clearly has the belief theory in mind when he defines *opinio juris* as "...a conviction felt by states that a certain form of conduct is required by international

⁴²⁹ Olufemi Elias, *supra* note 51 at 510.

⁴³⁰ *Ibid.*

⁴³¹ Christian Dahlman, *supra* note 404 at 331.

⁴³² *Ibid.*, Raphael M. Walden, *supra* note 423 at 359.

⁴³³ Raphael M. Walden, *supra* note 423 at 358.

⁴³⁴ *Ibid* at 359.

law”.⁴³⁵ He says the definition presupposes that all rules of international law are framed in terms of duties.⁴³⁶

In Dahlman’s view, the belief theory is circuitous.⁴³⁷ It gives the impression that, for a norm to be a part of international law, it must already be a part of international law and for a norm to exist, it must already exist.⁴³⁸ Charlesworth puts it this way: “A logical dilemma is created by the World Court’s insistence in both the *Lotus* and *North Sea Continental Shelf* cases that states are required to believe that something is already law before it can become law.”⁴³⁹ D’Amato similarly expresses concern: “if custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law?”⁴⁴⁰ The logic of the belief theory is, indeed, befuddling as it does not seem to allow for the crystallization of *opinio juris*. As Dahlman further considers, the belief theory also renders it possible for a rule of CIL to be created by mistakes because States wrongly believe that there is law.⁴⁴¹ As Charlesworth has stated when considering explanations of *opinio juris*, the “paradox of the traditional theory of customary international law [requiring belief in a pre-existing rule to create that same rule] has never been persuasively resolved.”⁴⁴² Koskenniemi posits that only by accepting that a

⁴³⁵ Peter Malanczuk, *supra* note 409 at 44.

⁴³⁶ *Ibid.*

⁴³⁷ Christian Dahlman, *supra* note 404 at 332.

⁴³⁸ *Ibid.*

⁴³⁹ Hilary Charlesworth, *supra* note 25 at 9.

⁴⁴⁰ Anthony D’Amato, *supra* note 41 at 53.

⁴⁴¹ *Ibid.* at 361.

⁴⁴² Hilary Charlesworth, *supra* note 25 at 9.

“notion of justice” underlies CIL and contextualizes state practice and *opinio juris* will this paradox be resolved.⁴⁴³

In order to sidestep the weaknesses of the consent and belief theories, Frederic L. Kirgis proposes the sliding scale theory.⁴⁴⁴ His theory is functional, in that it does not look for whether a State consents to be bound by a norm or it believes that a rule already creates legal obligations and should therefore be binding. Rather, Kirgis’ theory looks to explain the role of *opinio juris* in the identification of CIL. According to the author, “on a sliding scale, very frequent, consistent state practice establishes CIL without the need for much or any affirmative showing of *opinio juris*, so long as that practice is not negated by evidence of non-normative intent” (i.e. intent that would demonstrate that a state is undertaking that state practice for reasons of comity or other non-legal purposes).⁴⁴⁵ As the frequency and consistency of the practice decline, a stronger showing of *opinio juris* is required.⁴⁴⁶ Kirgis further explains that, at the other end of the scale, a strong evidence of *opinio juris* establishes CIL “without the need for much or any affirmative showing that governments are consistently behaving in accordance with the asserted rule.”⁴⁴⁷ He adds that exactly how much state practice will substitute for *opinio juris*, and how clear a showing will substitute for consistent behaviour, depends on the activity in question and on the reasonableness of the asserted CIL.⁴⁴⁸ Thus, “[t]he more destabilizing or morally distasteful the activity - for example, the offensive use of force or the deprivation of fundamental

⁴⁴³ Martti Koskenniemi, "The Normative Force of Habit; International Custom and Social Theory " (1990) 1 Finnish YB Int'l L 77 at 152 (see also 141-151 leading to this conclusion).

⁴⁴⁴ Frederic L. Kirgis, *supra* note 41 at 149.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

human rights - the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable.”⁴⁴⁹ Conversely, “[i]f the activity is not so destructive of widely accepted human values, or if the asserted rule seems unreasonable under the circumstances, the decision maker is likely to be more exacting in finding the necessary elements for the rule.”⁴⁵⁰ Under Kirgis’ theory, one or the other of either State consent or belief may be present in a given situation, but it is belief that is most important when there is infrequent or inconsistent state practice. This is because difficulties with evidence of state practice can be overcome by strong evidence that States feel compelled to take a particular action.

Two prominent scholars disagree with Kirgis’ explanation of the identification of CIL using the sliding scale. Bruno Simma and Philip Alston argue that – at least in the international human rights law realm – Kirgis’ sliding scale approach “would seem to be a case of arriving at the wrong conclusion for the right reasons”.⁴⁵¹ In particular, Simma and Alston conclude that Kirgis’ approach allows results-based reasoning: “it is surely open to doubt whether the concept of custom [in international human rights law, as explained by Kirgis] should be so fundamentally shaped in a manner which disregards its intrinsic limitations (and some would say, virtues) in order to accommodate a desired (and highly admirable) policy outcome”.⁴⁵²

Others adopt and adapt Kirgis’ sliding scale approach. Tasioulas argues that Kirgis’ sliding scale is actually situated between ‘fit’ and ‘substance’, rather than state practice and *opinio*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ Bruno Simma & Philip Alston, *supra* note 41 at 96.

⁴⁵² *Ibid.*

juris.⁴⁵³ ‘Fit’ is, according Tasioulas, “a rough threshold requirement that an interpretation actually cohere[s] with the raw data of legal practice to an adequate degree”.⁴⁵⁴ Consideration of the “raw data of legal practice” includes an examination of both “the general practice and *opinio juris* of states”.⁴⁵⁵ In other words, both traditional elements of CIL are to be analyzed together under ‘fit’. ‘Substance’ “stipulates, broadly, that where more than one interpretation satisfies the threshold test imposed by the dimension of ‘fit’, that interpretation is to be selected as best which makes the practice appear in its best light. In the case of legal practice, this is the interpretation which possesses the greatest substantive moral soundness.”⁴⁵⁶ In straightforward cases, strong state practice and *opinio juris* result in only one interpretation.⁴⁵⁷ When there is inconsistent state practice and *opinio juris*, there may be multiple interpretations and thus the best interpretation must be selected on the sliding scale between ‘fit’ and ‘substance’ where both must be balanced against each other.⁴⁵⁸ As a result, Kirgis's sliding scale conception of custom is contextualized within Dworkin’s interpretive theory of law and applied to CIL.⁴⁵⁹ As Anthea Roberts explains, Tasioulas’ conception of the sliding scale “shows why the Court may be less exacting in requiring state practice and *opinio juris* in cases that deal with important moral issues.”⁴⁶⁰ As can be seen, Tasioulas combines Kirgis’ functional approach with a theory of interpretation.

⁴⁵³ John Tasioulas, *supra* note 41 at 112. He builds on the work of earlier theorists such as Dworkin.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ John Tasioulas, *supra* note 41 at 112.

⁴⁵⁷ Anthea Roberts, *supra* note 14 at 772 (interpreting Tasioulas).

⁴⁵⁸ John Tasioulas, *supra* note 41 at 113.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Anthea Roberts, *supra* note 14 at 760.

Roberts further adapts Tasioulas' adaptation of Kirgis' sliding scale to measure 'fit' and 'substance'.⁴⁶¹ She observes that, in fact, Tasioulas creates two sliding scales: "[t]he first weighs state practice and *opinio juris* against each other at the level of fit to create eligible interpretations. If there are multiple eligible interpretations, the best interpretation is determined by employing a second sliding scale to balance the dimensions of fit and substance."⁴⁶² Given this, she concludes that Kirgis and Tasioulas' approaches do not adequately explain the use by the ICJ of *opinio juris* at either step. She says that, while Kirgis and Tasioulas claim that the more morally distasteful an activity, the more readily the Court will substitute *opinio juris* for state practice and *vice versa*, this does not hold for all cases: where there is strong state practice and weak *opinio juris*, the Court will not necessarily consider whether the activity is morally distasteful.⁴⁶³ Therefore, she "re-conceptualizes the nature of fit and substance and balances them in a Rawlsian reflective equilibrium", an approach which is examined in detail in Chapter 5.⁴⁶⁴

MacGibbon believes *opinio juris* plays a redundant role in the formation of CIL. He explains that convenience and self-interest influence the conduct of a State towards a particular norm and not necessarily belief or acceptance of the State that the norm conforms with a law.⁴⁶⁵ Relying on Kopelmenas, MacGibbon agrees that "the formation of custom does not depend on the presence in the minds of the parties of an *opinio juris*"⁴⁶⁶ He further notes that *opinio juris* does not help in clarifying the phrase "accepted as law" in Article

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid* at 773.

⁴⁶³ *Ibid* at 773, giving the example of: S.S. Wimbledon, 1923 PCIJ (ser. A) No. 1, at 25 (Aug. 17).

⁴⁶⁴ *Ibid* at 774.

⁴⁶⁵ I.C. MacGibbon, *supra* note 406 at 127.

⁴⁶⁶ *Ibid* at 128 citing to Lazare Kopelmanas, *supra* note 402 at 151.

38(1)(b) of the ICJ Statute as the phrase could mean that an unlawful practice may be considered as CIL as long as “it is accepted as having been validated by consent.”⁴⁶⁷

These different theories indicate that many different approaches may be in play in any given ICJ judgment or advisory opinion. The next Part examines whether the ICJ has indeed treated the creation of *opinio juris* as one requiring States’ consent or belief, and whether the use of one or more sliding scales is evident.

4.3 The ICJ’S Consideration of *Opinio Juris*

The description of CIL in Article 38(1)(b) of the ICJ Statute as “general practice accepted as law” appears to give a nod to the consent theory.⁴⁶⁸ According to Spiermann, the consensual approach had an appeal at the time the Statute of the ICJ was drafted.⁴⁶⁹ On the other hand, the phrase “general practice accepted as law” could also mean ‘general practice *believed* as law, that is, *accepted* as already binding as law’.⁴⁷⁰ If this is the case, the ICJ Statute could be taken as supporting the belief theory. Authors such as Elias and Walden agree that the interpretation of Article 38(1)(b) of the ICJ Statute supports the belief theory. According to Elias, the wording of Article 38(1)(b) resembles the approach of the historical school of legal theory, which found the true source of law in the spirit of the people.⁴⁷¹ To

⁴⁶⁷ *Ibid* at 130.

⁴⁶⁸ Christian Dahlman, *supra* note 404 at 331.

⁴⁶⁹ Ole Spiermann, “The History of Article 38 of the Statute of the International Court of Justice: A Purely Platonic Discussion?” in Jean d’Aspremont and Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2018) 165 at 166. The definition of CIL in Article 38(1)(b) is the same as in Statute of the PCIJ.

⁴⁷⁰ Olufemi Elias, *supra* note 51 at 506.

⁴⁷¹ *Ibid* at 503.

the historical school, international law consists of rules emanating from the consciousness of a group of States sharing a common race or religion.⁴⁷²

Despite the seeming preference for the consent theory in the wording of the ICJ Statute, in its cases and advisory opinions, the ICJ has wavered between the two theories of consent and belief when considering *opinio juris*. To demonstrate, this part examines judgments of the ICJ which expressly or appear to support either or both theories.⁴⁷³ This part also evaluates whether the sliding scale theory is evident in the ICJ's considerations of CIL. This part concludes by considering the challenges posed by this divergence of approaches to *opinio juris*.

4.3.1 ICJ Cases that Reflect the Belief Theory

The ICJ's first in-depth examination of evidence of *opinio juris* took place in the *North Sea Continental Shelf Cases*⁴⁷⁴ and the belief theory was very prominent in the Court's reasoning. In the case, Netherlands and Denmark cited delimitation agreements by non-parties to the 1958 Geneva Convention on the Continental Shelf to prove the existence of a new rule of CIL regarding delimitation.⁴⁷⁵ Rejecting this contention, the Court observed that:

even if these instances ... were much more numerous than they in fact are, they would not, even in the aggregate, suffice to constitute the *opinio juris*; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice but they must also be such, or be carried out

⁴⁷² Raphael M. Walden, *supra* note 423 at 359.

⁴⁷³ The thesis examines few cases and advisory opinions of the ICJ because the Court rarely discusses how it identifies *opinio juris*. Like Lepard says, "Many other decisions of the ICJ refer to a uniform "usage" or "practice" or "custom", and, without much analysis, discover in the practice a norm of customary international law." See Brian D. Lepard, *supra* note 22 at 23.

⁴⁷⁴ *North Sea Continental Cases*, *supra* note 49 at para 77.

⁴⁷⁵ *Ibid* at para 75.

in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁴⁷⁶

The Court added that the States concerned must feel that they are conforming to what amounts to a legal obligation, and frequency, or even habitual character of the acts is not itself enough.⁴⁷⁷ Clearly, the Court prioritized the search for evidence that States practiced a norm because they subjectively believed that the norm is required under international law.

In another case in which *opinio juris* was directly discussed – the 1986 case *Concerning the Military and Paramilitary Activities in and against Nicaragua* involving Nicaragua and the United States - the Court noted that there was considerable degree of agreement between the Parties as to the CIL relating to the non-use of force and non-intervention.⁴⁷⁸ However, the Court refused to simply accept the Parties' agreement in this respect, and thus examined the *opinio juris* itself.⁴⁷⁹ The Court ultimately came to the same conclusion as the Parties, finding *opinio juris* by considering the attitude of States as expressed in certain UN General Assembly resolutions, statements by state representatives, obligations undertaken by States in international fora, the findings of the International Law Commission on what constitutes CIL, and multilateral conventions.⁴⁸⁰ The Court's

⁴⁷⁶ *Ibid* at para 77.

⁴⁷⁷ *Ibid*.

⁴⁷⁸ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua, supra* note 6 at para 188.

⁴⁷⁹ *Ibid*.

⁴⁸⁰ *Ibid* at para 188-193. The UN General Assembly resolution particularly considered by the ICJ in this case was the Resolution 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Multilateral Conventions considered by the Court were the Montevideo Convention on Rights and Duties of States, 1933; Charter of the United Nations, 1945; and the Convention on the Rights and Duties of States in the Event of Civil Strife, 1928.

approach to *opinio juris* indicates that agreement between Parties on the existence of CIL is not sufficient and therefore must be supported by evidence of belief amongst States that the prohibition on the use of force has become a rule of CIL.⁴⁸¹ Since the Court specifically delved into evidence that showed belief of States about prohibition on the use of force, it is clear that the Court subscribed to the belief theory. The Court, on its own, analyzed the attitude of the parties and other States towards some resolutions⁴⁸² of the UN General Assembly that dealt with prohibition of use of force.⁴⁸³

The belief theory was evident again in 2019 in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,⁴⁸⁴ where the Court was asked by the UN General Assembly to provide an advisory opinion on the legality of the decolonization of Mauritius. In order to determine whether the right to self-determination is a norm of CIL, the Court examined various resolutions of the UN General Assembly on decolonization and self-determination. In doing so, the Court reiterated the belief theory of *opinio juris* it spelt out in the *North Sea Continental Shelf* cases by stating that “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.” The States concerned must therefore feel that they are conforming to what amounts to a legal

⁴⁸¹ *Ibid* at para 188.

⁴⁸² One of the resolutions examined by the Court was Resolution 2625 (XXV) titled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. See *Ibid*, para 188.

⁴⁸³ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at para 188.

⁴⁸⁴ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

obligation. ... ”.⁴⁸⁵ The Court specifically explained that resolution 1514 (XV) of 1960 entitled ‘The Declaration of the Granting of Independence to Colonial Countries and Peoples’ has a “declaratory character with regard to self-determination as a customary norm” having been adopted by 89 votes with 9 abstentions.⁴⁸⁶ With respect to *opinio juris*, the Court added that none of the States participating in the vote contested the existence of the right of peoples to self-determination and certain States defended their abstention on the basis of the time required for the implementation of such a right.⁴⁸⁷ Thus, the Court seemed to be indicating that there was no proof of contrary *opinio juris*. Having completed this analysis, the Court ruled that the right to self-determination is a customary norm.⁴⁸⁸ The ICJ’s approach in this case gives the impression that it views UN General Assembly resolutions as revealing States’ conviction that they are conforming to a legal obligation. The Court relied on other resolutions of the UN General Assembly on self-determination such as resolutions 637 (VII) of 1952, 738 (VIII) of 1953, 1188 (XII) of 1957, and 2200 A (XXI) of 1966 and 2625 (XXV) of 1970 in finding *opinio juris* on the customary right to self-determination.⁴⁸⁹

The most recent judgment of the Court to apparently consider the belief theory is the 2023 case on the *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*.⁴⁹⁰ In that case, the Court requested the Parties to argue whether, under CIL, a State’s entitlement to a continental

⁴⁸⁵ *Ibid* at para 149.

⁴⁸⁶ *Ibid* at para 152.

⁴⁸⁷ *Ibid* at para 151.

⁴⁸⁸ *Ibid* at para 153.

⁴⁸⁹ *Ibid* at paras 150, 154 & 155.

⁴⁹⁰ *Question of the 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44.

shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may extend within 200 nautical miles of the baselines of another State. The Court also asked the parties to present arguments on criteria under CIL for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and whether paragraphs 2 and 6 of Article 76 of the UN Convention on the Law of the Sea (UNCLOS) reflect CIL.⁴⁹¹ Answering in the negative, the Court noted that there was state practice on the delimitation of continental shelves and exclusive economic zones (EEZs), as seen “primarily through declarations, laws and regulations”, that predated the negotiation of the UNCLOS.⁴⁹² The UNCLOS was subsequently negotiated over a nine year period and that state practice was “taken into account during the drafting of the Convention”.⁴⁹³ The ICJ then seemed to indicate (without using the term) that *opinio juris* was demonstrated by the subsequent ratification of the UNCLOS by a “very large number of States ... which has significantly contributed to the crystallization of certain customary rules”, including with respect to the relationship between continental shelves and EEZs.⁴⁹⁴ The ICJ examined that relationship, relying on submissions of States to the Commission on the Limits of the Continental Shelf (CLCS): “[t]he Court considers that the practice of States before the CLCS is indicative of *opinio juris*”, in particular that there is a “sufficiently widespread and uniform” practice of States not asserting outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State.⁴⁹⁵ The Court’s conclusion could

⁴⁹¹ *Ibid* at para 15.

⁴⁹² *Ibid* at para 47.

⁴⁹³ *Ibid*.

⁴⁹⁴ *Ibid* at paras 47, 50, 52.

⁴⁹⁵ *Ibid* at para 77.

be interpreted as this: the general practice among States not to assert outer limits of their extended continental shelf within 200 miles of another State's is valid because States believe that there were norms that required it even before the ratification of the UNCLOS. The belief of States is further accentuated by the fact that the norms influenced the UNCLOS, which a significant number of States ratified.

4.3.2 ICJ Cases that Reflect the Consent Theory

In the 1960 *Case Concerning Right of Passage over Indian Territory* – a case involving special (regional) custom⁴⁹⁶ - the ICJ ruled that *opinio juris* had been formed when the practice of free enclave passage by Portugal had continued over a period extending beyond 125 years and was unaffected by the change of regime when India became independent.⁴⁹⁷ The Court stressed that it was satisfied that the practice (as between these two States) was *accepted* as law by the Parties and had given rise to a right and a correlative obligation.⁴⁹⁸ As discussed above at the beginning of this Part, the word “accepted” is amenable to both the consent and belief theories. Recall that the consent theory states that it is the acceptance of a custom that makes the custom a law, while the belief theory states that *opinio juris* means the belief in question is a norm of international law. The phrase “accepted as law and had given rise to a right and a correlative obligation” used in this case appears to support the consent theory. This is because it was the acceptance, evidenced by passage of time and lack of any protest by India, that transformed the practice into a legal right, not

⁴⁹⁶ The Court stated that this "a concrete case having special features" whereby the practice between the two States was "clearly established," and therefore "such a particular practice must prevail over any general rules." *Case Concerning Right of Passage over Indian Territory*, *supra* note 57 at 44.

⁴⁹⁷ *Ibid* at 40.

⁴⁹⁸ *Ibid* at 40.

that there already existed a rule that made the practice obligatory as advanced by the belief theorists.⁴⁹⁹

Likewise, in the 2009 *Dispute Regarding Navigational and Related Rights*, the ICJ inferred *opinio juris* from an unchallenged act.⁵⁰⁰ In the case, the Court was called upon to decide, among others, whether Costa Rica had a customary right to fish for subsistence purposes on the San Juan River at the border between Costa Rica and Nicaragua.⁵⁰¹ Costa Rica presented evidence that Nicaragua had allowed Costa Ricans to fish for subsistence purposes, thereby making the practice a customary right.⁵⁰² Nicaragua did not provide any contrary evidence that it had challenged the practice, but it argued that the practice had not become binding on it – in other words, that it did not believe that the practice was valid in law.⁵⁰³ The Court held that the failure of Nicaragua to deny the existence of the practice which had continued undisturbed and unquestioned over a very long period of time showed that there indeed was an obligation on Nicaragua to respect the practice.⁵⁰⁴ The Court equated the silence of Nicaragua with tacit consent, which it stated created *opinio juris* for the practice of subsistence fishing.⁵⁰⁵ Not questioning long-time practice has also been

⁴⁹⁹ This focus on belief, supported by evidence of acquiescence or lack of protest, is interesting to note, as it seems to indicate a different standard of proof of *opinio juris* in cases of special or regional custom. In cases of general custom, lack of action on a mass scale is harder to prove. In a 1969 article, D'Amato called for recognition that "[a]n important analytical step forward can be taken if the problem of the proof of general custom is seen to be an entirely separate question from the problem of proving the requisite consent for special custom." Anthony A. D'Amato, *supra* note 96 at 223.

⁵⁰⁰ *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at para 141.

⁵⁰¹ *Ibid* at paras 140.

⁵⁰² *Ibid*.

⁵⁰³ *Ibid*.

⁵⁰⁴ *Ibid* at paras 141 & 144.

⁵⁰⁵ *Ibid* at para 141. This approach is not new – in *Fisheries*, the Court held that the UK's failure to protest against the Norwegian straight baselines of which it must have known and which directly affected its national interests, precluded it from complaining about the application of those rules to its nationals: *Fisheries*, *supra* note 56 at 136-139.

referred to as failure to react.⁵⁰⁶ The International Law Commission has acknowledged the failure to react as evidence of *opinio juris*, in Conclusion 10(3) of its Draft Conclusions on Identification of Customary International Law.⁵⁰⁷

It appears that whenever the Court is dealing with a regional custom such as seen in the *Asylum Case*, *Case Concerning Right of Passage over Indian Territory*, and *Dispute Regarding Navigational and Related Rights* case, or a specific custom such as seen in the *Rights of Nationals of the United States of America in Morocco*, the Court used the consent theory of *opinio juris*. In *Rights of Nationals of the United States of America in Morocco*, the Court was requested to, among others, decide on the capitulatory rights of the United States in Morocco.⁵⁰⁸ The United States had claimed that its consular jurisdiction and extraterritoriality in Morocco were based on custom and usage.⁵⁰⁹ Citing the *Asylum case*, the Court found that “[i]n the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco”.⁵¹⁰ According to D’Amato, the reliance of the Court on the *Asylum case* shows that a party invoking a specific custom must prove has indicated consent to derogation from its territorial rights.⁵¹¹ The reason the Court uses the consent theory for regional or specific

⁵⁰⁶ Katie A. Johnston, “The Nature and Context of Rules and the Identification of Customary International Law” (2021) 32:4 Eur J Intl L 1167 at 1185.

⁵⁰⁷ International Law Commission, *supra* note 17 at para 65. The ILC has also indicated alternative sources of evidence of *opinio juris*. According to the Commission in Conclusion 10(2), “Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States, official publications, treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference”.⁵⁰⁷ The ICJ has made use of these sources in its cases to determine *opinio juris*.

⁵⁰⁸ *Rights of Nationals of the United States of America in Morocco supra* note 55 at 200.

⁵⁰⁹ *Ibid* at 199.

⁵¹⁰ *Ibid* at 200.

⁵¹¹ Anthony D’Amato, *supra* note 96 at 217.

customs seems not far-fetched. These customs require a stricter threshold of proof than general custom because of the number of States or non-generalizable topics involved.⁵¹² It is therefore not surprising that the Court, in these cases, was not inclined to look into whether the States believed there were laws that conferred validity on the respective practices in question but instead looked into how the States themselves have recognized and accepted the practice as law. This is also applicable to the *Asylum case*, which is discussed immediately below under ICJ cases reflecting both the consent and belief theories.

4.3.3 ICJ Cases that Reflect Both the Belief and Consent Theories

The foundational 1927 *S.S. Lotus case*,⁵¹³ which was decided by the predecessor of the ICJ, appears to support both the belief and consent theories. Theorists from each approach found encouragement in the case when the Permanent Court of International Justice (PCIJ) observed that: “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law...”.⁵¹⁴ Stating that “rules of law binding upon States emanate from their own free will” suggests support for the consent theory while the phrase “generally accepted” implies backing for the belief theory. In the case, France attempted to prove *opinio juris* of a custom which allegedly gave jurisdiction to the flag state for crimes committed on a vessel on the high seas by relying on the relative absence of prosecutions of the crew of foreign ships involved in

⁵¹² *Ibid* at 212.

⁵¹³ *The Case of the S.S. Lotus*, *supra* note 53 at 28.

⁵¹⁴ *Ibid* at 18.

collisions on the high seas. Specifically, the French Government argued that “prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.”⁵¹⁵ Rejecting this argument, the PCIJ stated that “...only if such abstention [from prosecuting] were based on [States] being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact of [general abstention] does not allow one to infer that States have been conscious of having such a duty.”⁵¹⁶ With the Court’s pronouncements in this case, the belief theory eventually prevailed as the Court searched for evidence pointing to States’ conscious belief of having a duty not to prosecute crimes involving high sea collisions.⁵¹⁷

In the 1950 *Asylum case* involving Colombia and Peru,⁵¹⁸ both the consent and belief theories of *opinio juris* were also reflected when the Court was deciding whether there was a regional custom among Latin American States to grant diplomatic asylum. Colombia attempted to prove a legal obligation upon a territorial State to recognize the validity of asylum in two ways. First, it relied on regional treaties in respect of asylum such as the *Bolivarian Agreement on Extradition of 1911*, the *Havana Convention on Asylum of 1928*, and the *Montevideo Convention on Political Asylum*.⁵¹⁹ Second, it cited numerous cases in which asylum had been granted by various States in Latin America.⁵²⁰ The Court rejected the first argument on the premise that the treaties had not been ratified by Peru.⁵²¹

⁵¹⁵ *Ibid* at 28.

⁵¹⁶ *Ibid*.

⁵¹⁷ *Ibid* at 28-29.

⁵¹⁸ *Asylum Case*, *supra* note 50 at 276-277.

⁵¹⁹ *Ibid* at 272.

⁵²⁰ *Ibid* at 286

⁵²¹ *Ibid* at 276-277

According to the Vienna Convention on the Law of Treaties, ratification is an international act whereby a State indicates on the international plane its consent to be bound by a treaty.⁵²² When a State becomes a party to a treaty in force, this means that the State has accepted all of the legal obligations of that treaty.⁵²³ Thus, one can deduce that the Court was lending credence to the consent theory by refusing to identify a practice because the Respondent State had not ratified (consented to) the relevant treaties and as a result, the Court could not hold that any custom stemming from those treaties had become binding on Peru. The ICJ also rejected Colombia's second argument on the ground that the Court believed that, in many cases, States acquiesced to the granting of asylum "for reasons of political expediency" and not because they had any feeling of legal obligation.⁵²⁴ The Court referenced the cases cited by Colombia to come to this conclusion.⁵²⁵ The latter part of the Court's pronouncements in this case suggest the belief theory: the Court ruled that the evidence pointed to States granting asylum for political reasons rather than out of a belief that there was a law requiring them to do so.⁵²⁶

4.3.4 ICJ Cases that Reflect the Sliding Scale Theories

The case that prompted the sliding scale theories of Kirgis and Tasioulas was the 1986 *Military and Paramilitary Activities in and against Nicaragua* case involving Nicaragua and the United States.⁵²⁷ In that case, the Court focused heavily on *opinio juris* to find CIL

⁵²² Article 2, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155 at 331 (entered into force 27 January 1980) [VCLT].

⁵²³ *Ibid.*

⁵²⁴ *Asylum Case*, *supra* note 50 at 286.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.* at 277.

⁵²⁷ Frederic L. Kirgis, *supra* note 41 at 147; John Tasioulas, *supra* note 41 at 85.

on the prohibition on the use of force by States.⁵²⁸ It did so by identifying CIL norms of non-use of force by States against each other and non-intervention of one State in the affairs of another State through Article 2(4) of the UN Charter, the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, a resolution of the Organization of American States General Assembly, and a statement of the International Law Commission, among other sources.⁵²⁹ It did not, however, reference state practice except to note that instances of inconsistent state practice had been treated as breaches of the rule concerned rather than as generating a new rule.⁵³⁰ As Kirgis put it: the ICJ found CIL “without any reference whatsoever to the ways in which governments actually behave”.⁵³¹ This prompted Kirgis to observe that “[w]hen issues of armed force are involved, it may well be that the need for stability explains the international decision maker’s primary reliance on normative words rather than on a combination of words and consistent deeds”.⁵³² Thus, as this was a case of “destabilizing or morally distasteful” activity, he concluded that the ICJ focused on *opinio juris* at the expense of state practice in order to identify a “reasonable” CIL norm.⁵³³ Tasioulas similarly concluded that the ICJ focused strongly on *opinio juris* as part of its evaluation of ‘fit’, and conducted balancing under ‘substance’ to

⁵²⁸ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6 at paras 188-192.

⁵²⁹ *Ibid* at paras 188-192

⁵³⁰ *Ibid* at para. 186. The Court goes on to say: “If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”, *ibid* at para. 186.

⁵³¹ Frederic Kirgis *supra* note 41 at 147.

⁵³² *Ibid*.

⁵³³ *Ibid* at 149.

derive CIL outlawing the use of force and intervention, in order to realize “the minimum world order objective of peaceful co-existence”.⁵³⁴

In the 2002 *Arrest Warrant Case* involving the Democratic Republic of the Congo and Belgium, the Court examined decisions of national higher courts, such as the United Kingdom’s House of Lords and the French Court of Cassation, to determine whether those courts had considered whether an exception to the customary rule of diplomatic immunity for Ministers of Foreign Affairs existed for criminal prosecutions alleging war crimes or crimes against humanity.⁵³⁵ The ICJ concluded in this case that the decisions of the national courts considered did not provide evidence that States had come to recognize such an exception as authoritative customary law.⁵³⁶ In this case, consistent court decisions showed that there was no exception to the customary rule of diplomatic immunity for Ministers of Foreign Affairs existed for criminal prosecutions, which made finding *opinio juris* irrelevant. In this respect, this case is the opposite of Kirgis’ *Military and Paramilitary Activities in and against Nicaragua Case* example, but helps to support his point: the sliding scale focus on state practice was used to confirm CIL on diplomatic immunity as a

⁵³⁴ John Tasioulas, *supra* note 41 at 119.

⁵³⁵ *Arrest Warrant Case*, *supra* note 149 at para 56.

⁵³⁶ *Ibid* at 58. In respect of using decisions of national courts as *opinion juris*, one scholar has mentioned that “it is only when decisions of domestic courts are not rejected by the State’s executive that they can be taken to express the State’s *opinio juris*, so that they are capable of contributing towards the formation or development of customary law”: Antonios Tzanakopoulos, Co-Rapporteur, “Preliminary Report, Principles on the Engagement of Domestic Courts with International Law” (Paper delivered at the 75th Conference of the International Law Association in Sofia, Bulgaria, 28 August 2012 [unpublished] at para 7. In rejecting the scholar’s view, Karol Wolfke argued that decisions of national courts have less importance in the formation of CIL than decisions of international courts, especially of the ICJ: Karol Wolfke, *Custom in Present International Law* (Warsaw: Warsaw Scientific Society, 1964) 74 and 144-145. Referencing a report of the International Law Commission, Wolfke explains that decisions of national courts on international law are frequently based on international law only insofar as provisions of the latter have been incorporated into national law and that this incorporation is limited: *ibid* at 144 citing to the Yearbook of the International Law Commission, 1955, vol 1, part 176.

reasonable norm. Similarly, Tasioulas' sliding scale theory was also evident as the use of national court decisions in the 'fit' analysis led to the reinforcement of diplomatic immunity as (implicitly) a key part of peaceful co-existence.⁵³⁷

In the 2012 case *Concerning the Jurisdictional Immunities of the State*, which was between Germany and Italy with Greece intervening, the Court primarily examined judgments of national courts of seven States regarding State immunity in relation to the acts of armed forces, and held that state practice supports the argument that state immunity for sovereign acts of a State continues to extend to acts of its armed forces.⁵³⁸ The Court added that *opinio juris* was demonstrated by the positions taken by States on this state practice, and the decisions of a number of national courts which concluded that CIL required immunity.⁵³⁹ Since there was a state practice affirming immunity of sovereign acts, and the state practice was evidenced by consistent and frequent decisions of national courts, *opinio juris* became unnecessary, illustrating Kirgis's sliding scale argument about how the ICJ reinforced State immunity as a reasonable norm. Similarly, this reasoning seems to support Tasioulas' approach, as the 'fit' was determined by weighing state practice more heavily, to reach the substantive inference that State immunity is an important norm requiring reinforcement.⁵⁴⁰

To conclude this part, it is pertinent to consider why the Court needs proof that a State has consented to a custom or believes that a custom is a rule of law. It is not in doubt that *opinio juris* is needed in the identification of CIL to prevent turning every mere usage or comity

⁵³⁷ *Ibid* at 55-56.

⁵³⁸ *Jurisdictional Immunities of the State*, *supra* note 44 at paras 72-78.

⁵³⁹ *Ibid*.

⁵⁴⁰ *Ibid* at para 57 where the Court stated that it "considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order".

into rules of CIL. From the cases of the Court considered above, it is evident that both the consent and belief theories are employed by the ICJ's judges and that there is no clear trend in support of one or the other approaches. It is also evident that the Court will mix these theories in a single judgment. Given this mix of approaches, the question of what differentiates *opinio juris* from state practice is still not fully answered and may, indeed, signal that the sliding scale theories have explanatory relevance in cases in which there is a strong reliance on one element over the other. In the vein of considering the focus or 'fit' aspects of the sliding scale theories, the next part turns to a consideration of sources, or potential sources, of *opinio juris*.

4.4 Alternative Potential Sources of *Opinio Juris* for the ICJ

In the cases described above, the ICJ has generally looked to traditional sources when determining *opinio juris*: the State actually carrying out or allowing a certain practice (free enclave passage or allowing fishing by non-nationals in its waters), support by States of UN General Assembly resolutions passed unanimously or with a high number of positive votes, statements by State representatives, and State ratifications of multilateral conventions. The only non-State-focused source of evidence of *opinio juris* discussed in the cases above is findings of the International Law Commission, which are still State-related as presumably the ICJ would not rely upon ILC findings that have been rejected by States. Leppard argues that the ICJ should search for evidence of *opinio juris* from a wider variety of sources.⁵⁴¹

⁵⁴¹ Brian D. Leppard, *supra* note 22 at 175-187

Lepard links the need for new sources of *opinio juris* to the importance of redefining *opinio juris*.⁵⁴² He proposes that *opinio juris* be redefined as a requirement that States generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct.⁵⁴³ According to him, this redefinition gives respect to the views of States and honours the ethical principle of state autonomy.⁵⁴⁴ He adds that his redefinition of *opinio juris* takes into account the ethical principle of States' membership in a global community of States.⁵⁴⁵ His redefinition allows the views of States generally to form a legal rule that binds all States, except where States themselves believe that exceptions should apply for States that object to the rule, or that a State's obligation should be conditioned on its explicit consent to the rule.⁵⁴⁶ Lepard therefore recommends that various types of evidence of State attitudes ought to be considered in assessing whether States generally believe it is now, or in the near future, desirable to institute a particular legal norm.⁵⁴⁷ Alcala adds that that there may be a need to also consider pronouncements of non-state actors, due to State silence and resulting absence of *opinio juris* on some issues.⁵⁴⁸ The alternative potential sources of *opinio juris* identified by these and other authors are discussed below.

Lepard has emphasized that the reactions of States to opinions of the UN Secretary-General, whether positive or negative, may constitute evidence of *opinio juris*.⁵⁴⁹ He adds

⁵⁴² *Ibid* at 171.

⁵⁴³ *Ibid* at 97-98.

⁵⁴⁴ *Ibid* at 110.

⁵⁴⁵ *Ibid* at 117.

⁵⁴⁶ *Ibid*.

⁵⁴⁷ *Ibid* at 171.

⁵⁴⁸ Ronald Alcala, "Opinio Juris and the Essential Role of States" (11 February 2021), online: *The Lieber Institute for Law & Warfare at West Point* <<https://lieber.westpoint.edu/opinio-juris-essential-role-states/>>

⁵⁴⁹ *Ibid* at 180.

that since the duties of the Secretary-General include expressing expert opinions on the status of particular norms under international law, and is approved by broadly representative international bodies, and is often called upon to summarize the views of states about norms that exist or may be desirable to implement as legal norms throughout the global membership of the UN, some degree of weight should be given to these statements as evidence of *opinio juris*.⁵⁵⁰ He also advocates that the views of other UN organs about the legal status of particular norms or the desirability of implementing them universally should be given a weight based on an assessment of similar factors such as the ICTY, the International Criminal Court for Rwanda, other specialized international criminal tribunals, the UN Human Rights Council, and treaty-monitoring bodies, such as the UN Human Rights Committee created under the International Covenant on Civil and Political Rights to supervise implementation by States parties of their treaty obligations.⁵⁵¹

Karol Wolfke also urges that opinions of publicists should be considered in the establishment of *opinio juris*. He backs his advocacy by stating that the ICJ, the contribution of which to the formation of customs is indisputable, is itself composed of most eminent publicists, whom he refers to as “representatives of doctrine.”⁵⁵² In his view, the writings of publicists analyze facts and opinions, and draw conclusions on binding and evolving customary rules, making their views important to consider when identifying

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid* at 183.

⁵⁵² Karol Wolfke, *supra* note 536 at 79.

CIL.⁵⁵³ He also adds that, by attracting attention to international practice and appraising it, the writers indirectly influence its evolution, and hence the development of custom.⁵⁵⁴

Some scholars have advocated that national laws by their nature are a source of evidence of *opinio juris* to the extent that they recognize that it is at least desirable to recognize certain rules as legal rules within a national legal system.⁵⁵⁵ According to Lepard, “a particular national law deserves greater weight when weighing *opinio juris* to the extent that under the unique circumstances of its adoption, it can be inferred that the legislature believes that the law or its underlying principles ought to be recognized by other States as an international legal norm.”⁵⁵⁶ National laws may show consent of a State to a norm law when adopted after widespread consultations that allow for input from the people or from their freely elected representatives.⁵⁵⁷

The ICJ makes use of national laws to infer *opinio juris*. For instance, in the *Arrest Warrant Case*, the Court examined national legislation from a number of jurisdictions to determine the issue of diplomatic immunity.⁵⁵⁸ However, in the *S.S. Lotus Case*, Judge Altamira, in his dissenting opinion, stated that national laws have no relevance as evidence of *opinio juris*: “the municipal legislation of different countries, as it does not by nature belong to the domain of international law, is not capable of creating an international custom, still less a law”.⁵⁵⁹ This argument is flawed in the sense that the law-making body of a State has

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Brian D. Lepard, *supra* note 22 at 176.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Arrest Warrant Case*, *supra* note 149 at para 58.

⁵⁵⁹ *The Case of the S.S. Lotus (France v Turkey)*, Dissenting Opinion of Judge Altamira (7 September 1927), PCIJ (Series A) No. 10 at 96.

internal authority and the laws emanating from the body, especially on international matters, should be respected and taken as acceptance of the laws as binding.

As explained in part three above, the ICJ has also utilized UN General Assembly resolutions to determine *opinio juris* in certain cases.⁵⁶⁰ However, a new use of this source may be to determine whether a practice has crystallized into ‘instant custom’. According to some scholars, when a resolution is adopted unanimously or by a large majorities, the resolution can constitute both the objective and subjective elements needed to establish instant custom.⁵⁶¹ Scharf says that there are five main criticisms of using the UN General Assembly Resolutions to create instant custom.⁵⁶² The first is that the UN Charter does not describe the power and functions of the General Assembly as binding, compared to the Security Council which resolutions are binding.⁵⁶³ The second problem is that General Assembly resolutions blurs the line between what the law is and what the law and they are merely designed to develop the law and to stretch the consensus on the text as far as possible should be.⁵⁶⁴ The third problem is that States often vote for General Assembly resolutions to advance their own self-interests, without really expecting to become legally bound.⁵⁶⁵ The fourth problem is that, using the statements and votes of the General Assembly as evidence of both state practice and *opinio juris* “presents a skewed picture.”⁵⁶⁶ The fifth problem is that words in a non-binding General Assembly resolutions are “like a

⁵⁶⁰ *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 6; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

⁵⁶¹ See for example Michael P. Scharf, “Accelerated Formation of Customary International Law” (2014) 20:2 ILSA J IntL & Comp L 305 at 324.

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid* at 325 citing to Anthea Roberts, *supra* note 14 at 763.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid* at 325-326.

flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual state practice.”⁵⁶⁷ Given these problems, the concept of instant custom appears to be both flawed and contradictory as it erases the importance of state practice.⁵⁶⁸ Since the concept only needs *opinio juris* to be established, one cannot help but ask: what is customary law without any practice of the custom? Scharf also differentiates between instant custom and ‘Grotian Moments’, in that the latter “represent instances of rapid, as opposed to instantaneous, formation of customary international law. In addition to General Assembly resolutions and international court decisions, Grotian moments require some underpinning of state practice”.⁵⁶⁹ Boris has also argued that “a customary law, by its very nature, cannot appear in a moment; certain practice, longer or shorter, is its unavoidable part.”⁵⁷⁰ However, proponents of instant custom have defended this aspect by stating that instant custom showcases the power of international as a living law that caters for necessary changes.⁵⁷¹

There are many factors, such as political expediency, that may influence States’ behaviour and make them engage in a particular practice. To differentiate between practices engaged in due to extraneous reasons, discerning *opinio juris* is needed but finding it is not straightforward. The alternative potential sources of *opinio juris* analyzed above could

⁵⁶⁷ *Ibid* at 326 citing to Bruno Simma, “International Human Rights and General International Law: A Comparative Analysis” (1995) Collected Courses of the Academy of European Law 153 at 217.

⁵⁶⁸ Louis B. Sohn, “Sources of International Law” (1996) 25:1 Ga J Intl & Comp L 399 at 404; Samuel Estreicher, “A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes” (2010) 21:1 Duke J Comp & Intl L 57 at 60. Compared to Bin Cheng, *supra* note 403 at 146-147 where it is stated that CIL gets its lifeline from *opinio juris* and a *new opinio juris* may grow instantly.

⁵⁶⁹ Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press, 2013) 219.

⁵⁷⁰ Krivokapic Boris, “On the Issue of So-Called ‘Instant’ Customs In International Law” (2017) 9:1 Danubius Universitas Acta Administratio 81 at 87.

⁵⁷¹ Bin Cheng, *supra* note 403 at 147.

potentially help clarify and identify exactly what *opinio juris* is, and even help to make identification of CIL by the ICJ predictable and consistent.

4.5 A Common Understanding of *Opinio Juris*

A common understanding of *opinio juris* is essential for States and those adjudicating State disputes about CIL at the ICJ (and elsewhere). As examined through the cases described in Part 3 above, the crux of *opinio juris* relates to States' views of bindingness regarding a practice. Evidence of State practice alone is insufficient to identify customary international law. This is because States may engage in behaviors for non-legal reasons, including political expediency and social habit.⁵⁷² And yet explanations based on consent, belief, or the sliding scale theories are not enough, either, as they do not seem to fully or clearly explain the content of *opinio juris*.

A commonly agreed legal definition of *opinio juris* would therefore be extremely helpful. Authors have proposed a redefinition of *opinio juris* and one of the most prominent recent of them is Lepard.⁵⁷³ Lepard recommends that *opinio juris* should be interpreted as a requirement that States generally believe that it is desirable now, *or in the near future*, to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain State conducts.⁵⁷⁴ According to the author, this redefinition requires States to believe that a legal authoritative rule, not merely a social or moral rule, is desirable now or in the near

⁵⁷² Anthony D'Amato, *supra* note 44 at 75; Ronald Alcalá, *supra* note 163.

⁵⁷³ Brian D. Lepard, *supra* note 22 at 112.

⁵⁷⁴ *Ibid* at 113. In proposing this redefinition, he was inspired by J.M. Finnis' solution to the paradox of *opinio juris*: to define *opinio juris* as states seeing an authoritative rule as desirable both in general and in particular. *Ibid* at 112, citing to J.M. Finnis, 'Authority' in Joseph Raz (ed), *Authority* (New York University Press, 1990) 174 at 181.

future.⁵⁷⁵ This extends the current understanding of CIL by bringing to an end the time paradox inherent in the traditional definition of CIL, mentioned above: that CIL can come into existence only by virtue of the erroneous belief by States that it is already in existence. By adding “in the near future”, Lepard broadens the time element of *opinio juris* to allow for CIL to come into existence when States aspire for it to soon exist (i.e. feel that it must come into existence in a short period of time, not a “vague sense of long-term ‘desirability’”).⁵⁷⁶

Lepard argues that there are indications that the ICJ has considered that *opinio juris* is limited by the traditional time paradox. For example, in the *Fisheries Jurisdiction Case*,⁵⁷⁷ the Court considered the law of the sea negotiations. It found that the “various proposals and preparatory documents produced” in these negotiations “must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law.”⁵⁷⁸ In the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*,⁵⁷⁹ the ICJ decided that a significant number of UN member States, in a series of UN General Assembly resolutions, had expressed their desire to make the use of nuclear weapons categorically illegal – a desire that constituted a “nascent” *opinio juris*.⁵⁸⁰ The Court, however, concluded that their desire for the eventual abolition of nuclear weapons was not sufficient to constitute a present *opinio juris* in the face of opposition by many nuclear weapons to any such rule. The ICJ

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Brian D. Lepard, *supra* note 22 at 113.

⁵⁷⁷ *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, [1973] ICJ Rep 3.

⁵⁷⁸ *Ibid* at para 53.

⁵⁷⁹ *Legality of the Threat or Use of Nuclear Weapons Case*, *supra* note 8.

⁵⁸⁰ *Ibid* at para 73.

stated that “The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such as hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice on the other.”⁵⁸¹

Lepard suggests that the Court realized “that most States did not believe it was desirable to institute a prohibition of the threat or use of nuclear weapons now or in the near future.”⁵⁸²

Lepard’s redefinition also requires that States recognize that what must be seen as desirable now or in the future “is the imposition of an authoritative rule regarding a particular conduct.”⁵⁸³ According to him, accepting *opinio juris* as an expression of States’ belief that a practice should become an authoritative rule aligns with “the normative ideal of exercising caution in recognizing the existence of persuasive or binding obligations among States.”⁵⁸⁴ *Opinio juris* was recognized by the PCIJ in this light in the *S.S. Lotus case* where the Court resolved that the mere rarity of judicial decisions involving a State’s prosecution of a national of another State for a collision involving two ships, each flying the flag of each respective State, did not imply that States recognized an authoritative rule giving jurisdiction to prosecute only the State the flag of which is flown on the liable ship.⁵⁸⁵ The Court decided that this would merely suggest that States did not believe it was desirable to institute an authoritative rule prohibiting States other than the one on whose ship the offence was committed from initiating prosecutions, even though they may have seen abstention as a prudent course of action in most States.⁵⁸⁶ Also, in the *Asylum case*

⁵⁸¹ *Ibid.*

⁵⁸² Brian D. Lepard, *supra* note 22 at 113-114.

⁵⁸³ *Ibid* at 114.

⁵⁸⁴ *Ibid* at 115.

⁵⁸⁵ *The Case of the S.S. Lotus, supra* note 53 at 28.

⁵⁸⁶ *Ibid.*

involving a claim of regional custom, the ICJ found that the practice of States allowing other States to grant their nationals asylum did not mean that States recognized that it is desirable that there should be an authoritative rule obligating granting of asylum as a legal duty.⁵⁸⁷ The Court concluded that, in many cases where asylum was granted, States acquiesced for “reasons of political expediency.”⁵⁸⁸ In the *North Sea Continental Shelf cases*, the ICJ held that it does not suffice to change a norm into a rule of law just because it is convenient.⁵⁸⁹ According to the Court, “..., it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law.”⁵⁹⁰

The third aspect of Lepard’s redefinition of *opinio juris* requires that States “must be convinced that a rule ought to be obligatory as a *legal* authoritative norm and not merely, for example, as a *social* or *moral* authoritative norm” (emphasis in original).⁵⁹¹ In this respect, *opinio juris* has been recognized as what distinguishes authoritative legal rules from other kinds of authoritative rules.⁵⁹²

Finally, Lepard’s redefinition of *opinio juris* requires that States “must believe that it is desirable now or in the near future to apply a legal authoritative norm to the conduct of *all* States in the global community of states, or at least in a group of states, whether or not they have specifically consented to application of the norm, unless states believe that the norm

⁵⁸⁷ *Asylum Case*, supra note 50 at 286.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *North Sea Continental Cases*, supra note 49 at para 23.

⁵⁹⁰ *Ibid.*

⁵⁹¹ Brian D. Lepard, supra note 22 at 117.

⁵⁹² *Ibid.* As Lepard notes, others have made a similar point, including D’Amato and Wolfke.

should be subject to a requirement of specific consent or should allow persistent objection”.⁵⁹³ This means that CIL must necessarily be seen as binding, irrespective of whether a State is in existence when the norm becomes obligatory.

Other authors that have proposed redefinitions of *opinio juris* containing similar insights are J.M. Finnis, Hugh Thirlway and Michael Byers. Indeed, Lepard bases his redefinition of *opinio juris* on Finnis’ insights, and views his own redefinition as a refinement of Finnis’ proposal.⁵⁹⁴ Finnis contends that two practical judgments underpin *opinio juris* which are first, in some domain of human affairs, “it would be appropriate to have some determinate, common, and stable pattern of conduct and, correspondingly, an authoritative rule requiring that pattern of conduct” and that “to have this is more desirable than leaving conduct in this domain to the discretion of individual States.”⁵⁹⁵ The second underpinning of *opinio juris*, according to Finnis, is “this particular pattern of conduct . . . is appropriate, or would be if generally adopted and acquiesced in, for adoption as an authoritative common rule of conduct.”⁵⁹⁶

According to Thirlway, *opinio juris* consists of both beliefs that a norm is already law and should become law. He says “...at the initial stage of the development of the custom, it is sufficient that the States regard the practice as what the Court, in a different context, referred to as ‘potentially norm-creating’, as conforming to a rule which either already exists or is a useful and desirable rule which should exist.”⁵⁹⁷ This approach helps to avoid

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid* at 112.

⁵⁹⁵ J.M. Finnis, *supra* note 574 at 181.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972) 55-56.

the time paradox of *opinio juris* noted above, which Byers also attempts to resolve. Byers maintains that before a norm of CIL has come into being, “any shared ‘belief’ will be in respect of how the rule could arise, of the legal relevance of different instances of behaviour, and perhaps of the desirability of the rule arising”.⁵⁹⁸ In addition, Walden has asserted that *opinio juris* may not be “a belief that the practice is *already* legally binding, but a claim that it *ought* to be legally binding.”⁵⁹⁹ He continues, “those who follow the practice, and treat it as a legal standard of behaviour, may be doing with deliberate legislative intention.”⁶⁰⁰

On his part, D’Amato also held this view about *opinio juris*: “The simplest objective view of *opinio juris* is a requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act which will constitute the quantitative elements of custom.”⁶⁰¹ Lepard critiques this theory as leaving custom at the mercy of individual States and may result in a custom that does not reflect consensus amongst States.⁶⁰²

Other scholars have also proposed that *opinio juris* should be taken as expectations of States regarding the future behaviour of other States. McDougal, Laswell, and Chen, for instance, argue that the creation of CIL “involves the generation of expectations about policies, authority, and control by cooperative behaviour, both official and nonofficial. The perspectives among peoples, especially among their effective decision makers, are

⁵⁹⁸ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) 151.

⁵⁹⁹ Raphael M. Walden, “Customary International Law: A Jurisprudential Analysis” (2005) 13:1 *Israel LR* 86 at 97.

⁶⁰⁰ *Ibid.*

⁶⁰¹ Anthony D’Amato, *supra* note 41 at 74.

⁶⁰² Brian D. Lepard, *supra* note 22 at 119.

crystallized in such a way that certain past uniformities in decision and behaviour are expected to be continued in the future.”⁶⁰³ Further, W. Michael Reisman argues that *opinio juris* may be best understood as based on “the core notion of expectations.”⁶⁰⁴ S. James Anaya also states that “[a]s a general matter, norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms’ content and generally expect future behaviour in conformity with the norms.”⁶⁰⁵

Lepard convincingly contends that all of these definitions do not achieve what his redefinition does. This is because States may not always be consistent with the way they behave: the fact that they behave in a certain way presently is not a good reason to expect they will continue to behave that way in the future.⁶⁰⁶ Also, these definitions do not reflect the fact that States expecting others to engage in certain conduct may not actually believe that the conduct should be legally required or permitted.⁶⁰⁷ Third, there may be many reasons why States may believe a legally authoritative rule is desirable, apart from the expectations of states.⁶⁰⁸

Lepard’s redefinition of *opinio juris* is compelling as its adoption would assist the ICJ (as well as States and other courts) in implementing a consistent and predictable way to

⁶⁰³ Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale University Press, 1980) 269.

⁶⁰⁴ Michael W. Reisman, “International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture” (1981) 75:1 *American Society of International Law Proceedings* 101 at 103.

⁶⁰⁵ S. James Anaya, “Indigenous Peoples and Their Demands within the Modern Human Rights Movement” in Yael Danieli, Elsa Stamatopoulou & Clarence J. Dias, eds, *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, New York: Baywood Publishing Co., 1999) 160.

⁶⁰⁶ Brian D. Lepard, *supra* note 22 at 120.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

identify *opinio juris*. The redefinition allows for the investigation of States' own perceptions of the reasons for the imposition of an authoritative legal principle or rule. It reflects the will of States to be central to the identification of *opinio juris* and gives respect to the fundamental ethical principle of state autonomy. It does this by focusing on the views States about the desirability of instituting an authoritative norm; therefore providing an avenue for States to legislate for themselves. The redefinition also allows for new norms to be created, even if they are not already recognized as obligatory and even if certain standards of conduct are not already widely observed.

4.6 Conclusion

This chapter has examined the theories of *opinio juris*, namely the consent theory and belief theory, and as well as the alternate sliding scale theory propounded by Kirgis and others. The chapter has also analyzed the different cases in which the ICJ has opined on *opinio juris* to determine whether the Court's approach reflected the consent, belief, or sliding scale theories. It was explained in this chapter that, while some cases reflect the belief theory, a similar number of cases reflect the consent theory, and some cases reflect both theories. As well, other cases seemed to illustrate the validity of the sliding scale theories, indicating that, under Kirgis's approach, either or both approaches may be purely functional or, under Tasioulas' approach, that the mode of consideration of *opinio juris* may shift from case to case when considering 'fit' in particular. The chapter thereafter examined other sources the Court could use as evidence of *opinio juris* to make identification of CIL more straightforward (particularly under Lepard's redefinition of *opinio juris*). Finally, this chapter concluded that agreement on a clearly-delineated definition of *opinio juris* is the way forward and proposes that Lepard's redefinition

provides the clearest and most comprehensive approach that is likely to lead to consistency and predictability in the ICJ. This sets the stage for the final chapter of this thesis, which will examine the interplay between state practice and *opinio juris* and propose both a modern understanding of CIL and outline unanswered questions that require future research.

CHAPTER 5: CONCLUSION

5.1 Introduction

This thesis has examined the factors that have contributed to the inconsistency of the International Court of Justice's (ICJ's) approach to considering state practice and *opinio juris* as elements of customary international law. It has discussed key ICJ judgments and scholarly analysis on CIL, demonstrating three main and interconnected ways in which this inconsistency manifests. First, the Court is inconsistent in its written practice: in when and how it refers to each element, and in the weight it gives to each of the elements, in its judgments. The Court regularly restates the adage (originally from *North Sea Continental Shelf Cases*) that CIL consists of "settled practice" (state practice) plus "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*opinio juris*).⁶⁰⁹ Despite this, the ICJ will sometimes stress one element over the other, indicating or implying that either state practice or *opinio juris* is more important in that particular case. For example, in the *Asylum Case*, the most important element was *opinio juris*: an absence of evidence of *opinio juris* led to a finding that granting asylum had not become a regional rule of CIL.⁶¹⁰ This was in spite of the instituting Party citing numerous cases of practice where States had granted asylum.⁶¹¹ In *Case Concerning the Jurisdictional Immunities of the State*, the Court established that it was customary for state immunity to extend to acts of a State's armed forces.⁶¹² The Court referred to substantial body of state

⁶⁰⁹ *North Sea Continental Cases* *supra* note 49 at para 77. This two-element approach has been repeated in, for example, *Continental Shelf (Libya v Malta)*, *supra* note 20 at para 2; *Military and Paramilitary Activities in Nicaragua*, *supra* note 6 at paras 183 and 207; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44 at para 149.

⁶¹⁰ *Asylum Case*, *supra* note 50 at 276-277.

⁶¹¹ *Ibid* at 277.

⁶¹² *Jurisdictional Immunities of the State*, *supra* note 44 at para 80.

practice to reach its conclusion, while paying less attention to *opinio juris*.⁶¹³ In some cases, the Court will fail to acknowledge an element at all, such as in the *Case Concerning Armed Activities on the Territory of the Congo*⁶¹⁴ and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁶¹⁵ It is for this reason that Kirgis introduced the sliding scale approach, as discussed in Chapter 4.⁶¹⁶ Under this approach, Kirgis argues that there are situations in which CIL may be identified entirely or mostly through state practice, while there are other situations in which CIL may be identified predominantly or entirely through evidence of *opinio juris*.⁶¹⁷ There may also be situations in between these poles with differing levels of state practice and *opinio juris* required.⁶¹⁸ In other words, according to Kirgis, the determination of CIL is a dynamic activity.⁶¹⁹ At the same time, there are others who critique Kirgis' approach, while yet others build upon and amend the idea of a sliding scale by substituting 'fit' and 'substance' as the markers on the sliding scale, rather than state practice and *opinio juris*.⁶²⁰ Thus, it is clear that the ICJ's dynamism

⁶¹³ *Ibid* at paras 83 - 91.

⁶¹⁴ *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 382 at para 214. The Court did not demonstrate elements of state practice and *opinio juris* in relation to Article 3 of the Hague Convention, which the Court held is customary law.

⁶¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 87. The Court did not also analyze the two elements of CIL before coming to the conclusion that the principles as to the use of force UN General Assembly Resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States' reflect CIL.

⁶¹⁶ Frederic L. Kirgis, *supra* note 41. See also Frederic L. Kirgis, "Fuzzy Logic and the Sliding Scale Theorem" (2002) 53:1 Ala L Rev 421.

⁶¹⁷ Frederic L. Kirgis, *supra* note 41 at 146 & 149.

⁶¹⁸ *Ibid* at 149.

⁶¹⁹ *Ibid*.

⁶²⁰ For a critique of Kirgis' sliding scale approach, see Bruno Simma and Philip Alston, *supra* note 41 at 96. For those who amend and extend Kirgis' theory, see John Tasioulas, *supra* note 41 at 111 & 113. 'Fit' refers to rough threshold requirement that accepts an interpretation as eligible only if the raw data of legal practice adequately supports it, and 'substance' refers to consideration of moral and political ideals, as well as higher-order convictions about how these ideals should be prioritized when they conflict. See also Anthea Roberts, *supra* note 14 at 773-774.

raises questions both on how to explain the Court's practice and how that practice might be made more coherent, which will be examined in more detail below.

The second form of inconsistency identified in this thesis is in the Court's mode of determining state practice and *opinio juris*. This inconsistency stems from the ICJ's lack of a clear methodology to approach CIL, as discussed in Chapter 3. Sometimes it uses inductive reasoning to find *opinio juris* stemming from state practice,⁶²¹ such as in the 2023 *Case Concerning the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*.⁶²² It did the same in *Case Concerning the Jurisdictional Immunities of the State*.⁶²³ In other cases, it used deduction to evaluate one or both elements.⁶²⁴ For example, from "the principle of sovereign equality of States" it deduced a state's right "to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State" in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*.⁶²⁵ Many authors view the inductive method as the correct method of

⁶²¹ Stefan Talmon, *supra* note 14 at 419 & 421 – 422. See also Maurice Mendelson, "The Formation of Customary International Law" (1998) 272 *Rec des Cours* 155 at 181; Luigi Condorelli, "Customary International Law: The Yesterday, Today, and Tomorrow or General International Law" in Antonio Cassese ed, *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 147 at 148; Alberto Alvarez-Jiménez, *supra* note 14 at 686 – 687.

⁶²² *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44 at para 77.

⁶²³ *Jurisdictional Immunities of the State*, *supra* note 44 at para 57.

⁶²⁴ Stefan Talmon, *supra* note 14 at 425 - 426: "The Arrest Warrant case used deductive reasoning" [citing to paras 52-54, *Arrest Warrant Case*, *supra* note 149 at paras 52-54]. Judge Oda, in dissent, critiques this method of reasoning as a "hornbook-like explanation": See *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, "Dissenting Opinion of Judge Oda" [14 February 2002] ICJ Rep 3 at para. 14.

⁶²⁵ *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order of 3 March 2014, [2014] ICJ Rep 147 at para 27.

determining CIL (particularly state practice),⁶²⁶ with some also recognizing that there are situations in which it is difficult or impossible to utilize induction and therefore deduction is necessary.⁶²⁷ If a common understanding could be reached among the ICJ judges on those exceptions to inductive reasoning, that would go a long way toward understanding the Court's methodology.

In a number of cases, neither inductive or deductive reasoning is used: the Court will simply assert that something is custom.⁶²⁸ In Talmon's view, "the ICJ has pulled a number of customary international law 'rabbits' out of its hat" through assertion.⁶²⁹ For example, he points to the *Arrest Warrant* case where the Court asserted that "in international law it is firmly established that ... certain holders of high ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".⁶³⁰ The Court did not reference any state practice and *opinio juris* to support its observation. Also, in *Case Concerning Armed Activities on the Territory of the Congo*, the Court stated its observation that, under CIL, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.⁶³¹ The lack of clarity in the Court's approach to reasoning creates a challenge: without a direct or indirect explanation of methodology, it is unclear

⁶²⁶ Talmon indicates that there is "widespread agreement that customary international law is, as a rule, ascertained by induction": Stefan Talmon, *supra* note 14, at 421. Similarly, see: Maurice Mendelson, *supra* note 621 at 181; Luigi Condorelli, *supra* note 13 at 148.

⁶²⁷ Talmon points to four such situations: where a question is too new for state practice to have emerged; where state practice is inconclusive; where *opinio juris* cannot be established; and where there is a discrepancy between state practice and *opinio juris*: Stefan Talmon, *supra* note 14 at 422.

⁶²⁸ *Ibid* at 434-440.

⁶²⁹ *Ibid* at 434.

⁶³⁰ *Arrest Warrant Case*, *supra* note 149 at para 51.

⁶³¹ *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 382 at para 172.

whether the written practice of the judges has a solid legal underpinning or whether the Court is pulling state practice or *opinio juris* ‘rabbits’ out of a hat. A modern approach to method is discussed below.

A third form of inconsistency arises from the determination of *opinio juris*. In some cases, the Court clearly stated and demonstrated that it was following either the belief or consent theory and, in some cases, both theories were mixed. Yet, in other cases, it is unclear which - if any - of the theories the Court had in mind. As discussed in Chapter 4, the belief theorists require States to show belief in the validity of a norm because another law states it is valid.⁶³² The consent theorists, however, posit that States’ acceptance makes a rule valid as CIL.⁶³³ In the *North Sea Continental Shelf Cases*, the Court clearly spelt out the belief theory when it held that “... . Not only must the acts concerned amount to a settled practice but they must also be such, or be carried out in such a way, as to be evidence of a *belief* that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*”.⁶³⁴ The belief theory was reiterated in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.⁶³⁵ The consent theory was reflected in the *Dispute Regarding Navigational and Related Rights* where the Court found CIL because of the tacit consent of a Party to a long-standing practice.⁶³⁶ Likewise, in *Fisheries*, the Court indicated that the failure of a party to protest

⁶³² Christian Dahlman, *supra* note 404 at 330; Olufemi Elias, “*supra* note 51 at 501.

⁶³³ Maurice Mendelson, *supra* note 415 at 180 – 181; Olufemi Elias, *supra* note 51 at 501.

⁶³⁴ *North Sea Continental Cases*, *supra* note 49 at para 77 (emphasis added).

⁶³⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44 at para 149.

⁶³⁶ *Dispute Regarding Navigational and Related Rights*, *supra* note 58 at para 141.

against a practice suggested consent.⁶³⁷ There was a mixture of both theories in the S.S. *Lotus Case*⁶³⁸ and *Asylum Case*⁶³⁹ while in the case *Concerning the Jurisdictional Immunities of the State*,⁶⁴⁰ it was totally unclear whether the Court utilized either theory. There are scholars who have rejected both theories and have created a third theory, which is the superfluous concept theory.⁶⁴¹ They claim that the creation of CIL does not require that States have either a belief or consent attitude towards the norm in question. For instance, MacGibbon states that while *opinio juris* is relevant in the formation of CIL, it is only relevant “from the standpoint of the States affected by the exercise of the right in question, and then only if those States become bound to adopt some positive course of action under the correlative obligation in order to permit of the exercise of the right”.⁶⁴² Clearly, there is no agreed theory through which to identify *opinio juris*, which creates legal uncertainty about this element of CIL.

The unpredictable approach of the ICJ to its determination of CIL has led some commentators to conclude that the ICJ “might be said to locate CIL in some grey zone between *lex lata* and *lex ferenda*”, a zone Morss and Forbes call “*lex hypothetica*”.⁶⁴³ This concluding chapter of the thesis will examine how to move from ‘*lex hypothetica*’ to

⁶³⁷ *Fisheries (United Kingdom v Norway)*, *supra* note 56 at 136 – 139.

⁶³⁸ *The Case of the S.S. Lotus*, *supra* note 53 at 18 & 28.

⁶³⁹ *Asylum Case*, *supra* note 50 at 276 - 277.

⁶⁴⁰ *Jurisdictional Immunities of the State*, *supra* note 44.

⁶⁴¹ I.C. MacGibbon, *supra* note 406 at 126.

⁶⁴² *Ibid.* See also Lazare Kopelmanas, *supra* note 402 at 151 where it is stated that “... the formation of custom does not depend on the presence in the minds of the parties of an *opinio juris*, but ... on the contrary the content of the customary rule often plays the principal part. Sometimes it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has the character of a legal rule.”

⁶⁴³ John R. Moss & Emily Forbes, “‘And in the Darkness Bind Them’: Hand-Waving, Bootstrapping, and the Interpretation of Customary International Law after Chagos” in P. Merkouris, J. Kammerhofer & N. Arajarvi, eds, *The Theory, Practice, and Interpretation Of Customary International* (Cambridge: Cambridge University Press, 2022) 432 at 434.

increased certainty within the ICJ's determination of CIL. Certainty in the ICJ's determination of CIL would help to reduce attacks on the concept of CIL as a source of public international law, and would allow States and non-State actors to regulate their conduct in accordance with clear principles.

While this thesis has demonstrated that the ICJ is not following a clearly discernible and methodical pattern in its decisions on CIL, the subsequent parts of the thesis propose a way to bring order to the chaos. The remainder of this chapter is therefore devoted to a consideration of how to create more predictability in the ICJ's consideration of CIL. It begins by discussing the interaction of state practice and *opinio juris* as explained by scholars through the terms 'traditional' and 'modern' approaches to CIL. It does so because these approaches – particularly the 'modern' approach – may be useful building blocks toward increased predictability. The chapter then turns to a consideration of how an adapted 'modern' form of CIL determination is the most likely to assist in bringing certainty to the ICJ's determination of CIL. This part builds on the insights identified in Chapters 2, 3, and 4. Finally, this chapter concludes that the way forward still requires additional thinking, and proposes future areas of research.

5.2 The Interaction of State Practice and *Opinio Juris*: Traditional and Modern Approaches To CIL

There are two main approaches used to explain the elements of state practice and *opinio juris*, and the interactions between the two elements.⁶⁴⁴ These are termed the 'traditional'

⁶⁴⁴ Anthea Roberts, *supra* note 14 at 758. See also David Fidler, *supra* note 240; Hilary Charlesworth, *supra* note 25.

and ‘modern’ approaches to CIL. This part will examine the descriptions of both approaches by eminent scholars, with the goal of considering whether these approaches can assist in creating predictability in the ICJ’s consideration of CIL.

According to Anthea Roberts, the traditional approach uses the inductive reasoning process, in which a general custom is derived from specific instances of state practice.⁶⁴⁵ She notes that when the traditional approach is utilized, *opinio juris* is not prioritized but merely used to identify legal and non-legal obligations.⁶⁴⁶ State practice therefore takes centre stage.⁶⁴⁷ She gives an example of the *S.S. Lotus case*, where the Permanent Court of International Justice decided that past state practice indicated that States abstained from exercising jurisdiction over a foreigner involved in a collision on the high seas.⁶⁴⁸ Bruno Simma and Philip Alston praise the traditional approach for allowing “reasonably reliable predictions as to future state behaviour.”⁶⁴⁹ According to them, the traditional approach looks into the past to identify customary patterns of state practice and then to turn the resulting empirical result into a normative projection for the future.⁶⁵⁰ Hilary Charlesworth describes the traditional approach in a different way, through the consent theory. She terms it as “positivist and individualistic” because it views States as bound by international law only when they consent to its rules.⁶⁵¹ In sum, the traditional approach privileges state

⁶⁴⁵ Anthea Roberts, *supra* note 14 at 758.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ For Roberts, this is concerning; “[f]inding traditional custom on the strength of state practice and fit alone allows it to become an apology for state power”: *Ibid* at 789 (citing to Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) at 2.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Bruno Simma & Philip Alston, *supra* note 41 at 88 - 89.

⁶⁵⁰ *Ibid* at 89. See also Brian D. Lepard, *supra* note 22 at 3 & 8 where he gives an account of traditional approach of CIL. Lepard’s account of the traditional approach is based on equal recognition of state practice and *opinio juris*.

⁶⁵¹ Hilary Charlesworth, *supra* note 25 at 2.

practice, from which *opinio juris* can be determined. There may or may not be a future-oriented aspect within the traditional approach.

In contrast, Roberts states that the modern approach emphasizes *opinio juris* rather than state practice and it utilizes the deductive process, which starts with general statements of rules.⁶⁵² She suggests that the modern approach contributes to the development of custom due to the derivation of CIL from written sources such as multilateral treaties and declarations from international entities such as the UN General Assembly.⁶⁵³ She gives an instance of where the modern approach was used in the case *Concerning the Military and Paramilitary Activities in and against Nicaragua*. In the case, the Court put great weight on treaties and UN General Assembly resolutions in deriving CIL on non-use of force and non-intervention.⁶⁵⁴ The modern approach, in which diverse forms of evidence from international negotiations are used to support (often) *opinio juris*, appears to enjoy some accolades from scholars. For instance, David Fidler describes the traditional approach as outdated due to increase in the number of States, increase in the diversity of States, and the appearance of global problems that have yet to be definitively addressed in the international fora.⁶⁵⁵ He explains that it is not practical to analyze practice of States which differ economically and which must confront global problems together.⁶⁵⁶ He notes that the modern approach, on the other hand, makes CIL a progressive source of law that can deal with current moral issues and challenges.⁶⁵⁷ Other scholars have also stated that modern

⁶⁵² Anthea Roberts, *supra* note 14 at 758. He notes that the traditional approach is subject to competing theories and enigmatic.

⁶⁵³ *Ibid.*

⁶⁵⁴ *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States)*, *supra* note 6 at paras 185 & 188 – 193.

⁶⁵⁵ David Fidler, *supra* note 240 at 216 – 217.

⁶⁵⁶ *Ibid.* See also Jonathan I. Charney, *supra* note 240 at 543.

⁶⁵⁷ David Fidler, *supra* note 240 at 220 – 221.

CIL derived from declarations of international entities are an important source for human rights obligations.⁶⁵⁸ Thus, from their points of view, the strength of the modern approach is that it allows decision makers (such as the ICJ) to take into account forms of evidence of CIL that reflect the reality of today's global issues and structures of interstate interactions, in the UN General Assembly, for example. It also accounts for the form of reasoning seen in the ICJ when dealing with these forms of evidence.

Nevertheless, the modern approach has also been criticized. For example, Michael Reisman argues that the modern approach uses custom "to get the international law [individual States] we want without having to undergo the 'give' part of the 'give and take' legislative process" – for example, without needing to compromise in treaty negotiations.⁶⁵⁹ Roberts notes that "deducing modern custom purely from *opinio juris* and substance can create utopian laws that cannot regulate reality".⁶⁶⁰ Simma and Alston have also argued that the modern approach has created an "identity crisis".⁶⁶¹ They particularly deride the elevation of the Universal Declaration of Human Rights of 1948 to the status of CIL in a world where a significant number of States still violate the human rights listed in it, and label it an example of the incompetence of the modern approach.⁶⁶² D'Amato also castigates the modern approach as seen in the *Case Concerning the Military and*

⁶⁵⁸ Lori Bruun, "Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law" (1993) 17:1 Md J Intl L 193 at 216 – 217; Richard B. Lillich, "The Growing Importance of Customary International Human Rights Law" (1995-96) 25:1 Ga J Intl & Comp L 1 at 8; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) 3.

⁶⁵⁹ Michael Reisman, "The Cult of Custom in the Late Twentieth Century", (1987) 17 California Western ILJ 133 at 134-135. For a description of this critique, see Hilary Charlesworth, *supra* note 25.

⁶⁶⁰ Anthea Roberts, *supra* note 14 at 773, 789, relying on Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) at 2.

⁶⁶¹ Bruno Simma & Philip Alston, *supra* note 41 at 88 & 96.

⁶⁶² *Ibid* at 90.

Paramilitary Activities in and against Nicaragua.⁶⁶³ In contrast to Roberts' account of this case, D'Amato views the ICJ as getting CIL "completely backwards" by starting its analysis with a "disembodied rule" found in international resolutions, then finding that state acceptance of that rule demonstrates *opinio juris*, then looking "vaguely at state practice", which it then dismisses as it contradicts the rule.⁶⁶⁴ As an illustration of the modern approach, the *Nicaragua* judgment is, in his view, a "failure" and "collectively naïve".⁶⁶⁵

Clearly, there are inadequacies within, and clashes between, the traditional and modern approaches. As Roberts notes, "[t]he divergence between the descriptive and normative approaches of traditional and modern custom causes problems because the tests and justifications for traditional custom do not apply to modern custom and *vice versa*".⁶⁶⁶ As a result, some commentators have crafted new ways to approach state practice and *opinio juris* and their interaction. Roberts recommends a reconciliation of both elements through what she calls the "reflective interpretive approach", which stresses the "theoretical foundations of custom" – state practice and *opinio juris* - in a more principled and accommodating way.⁶⁶⁷ According to her, this approach is based on the dimensions of 'fit' and 'substance'.⁶⁶⁸ The fit dimension is used to generate eligible interpretations about a practice and there can be many interpretations.⁶⁶⁹ The substance dimension is utilized to

⁶⁶³ Anthony D'Amato, *supra* note 14. In a similar vein, see also Daniel Bodansky, "Customary (and Not SO Customary) International Environmental Law" (1995) 3:1 *Ind J Global Leg Stud* 105 at 116 – 119; Hiram Chadosh, "Neither Treaty nor Custom: The Emergence of Declarative International Law" (1991) 26:1 *Tex Intl L J* 87 at 102; Jonathan I. Charney, *supra* note 240 at 543 & 546 – 547.

⁶⁶⁴ D'Amato, *supra* note 14 at 102.

⁶⁶⁵ *Ibid* at 105.

⁶⁶⁶ Anthea Roberts, *supra* note 14 at 788.

⁶⁶⁷ *Ibid*.

⁶⁶⁸ *Ibid* at 771. Recall the discussion in Chapter 4 of 'fit' and 'substance' as set out by Tasioulas.

⁶⁶⁹ *Ibid*.

choose the best eligible interpretation of the practice in question; this dimension is normative in that it involves “consideration of moral and political ideas, as well as higher-order convictions about how these ideals should be prioritized when they conflict.”⁶⁷⁰ Building on Kirgis’ and Tasioulas’ sliding scale theory of CIL (explained in Chapter 4), she explains that the reflective interpretive approach is a three-tier endeavour which involves: (1) “gathering evidence of state practice and *opinio juris* and then applying the threshold criterion of ‘fit’ to determine if there are eligible interpretations that sufficiently explain the raw data of practice, (2) “interpretation of legality so as to differentiate between legal custom and social practice and if there are multiple interpretations of legality, then, one must weigh the dimensions of fit and substance to determine the best interpretation”, and (3) consideration of “strong statements of *opinio juris* because they represent normative considerations of what the law should be.”⁶⁷¹ But Prosper Weil has criticized the lean towards ‘relative normativity’ in international law.⁶⁷² According to him, it obscures the gap between legal and non-legal norms, particularly by attributing a certain normative force to the acts of international organizations.⁶⁷³

Lepard has also developed what he calls “a redefinition” of CIL which he says provides a comprehensive and consistent theory of CIL.⁶⁷⁴ He recommends that CIL should be taken as the “general belief of States that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting or prohibiting certain

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid* at 788.

⁶⁷² Prosper Weil, “Towards Relative Normativity in International Law?” (1983) 77:3 AJIL 413.

⁶⁷³ *Ibid* at 435 – 436.

⁶⁷⁴ Brian D. Lepard, *supra* note 22 at 8.

conduct.”⁶⁷⁵ According to Lepard, the redefinition prioritizes *opinio juris* and is self-sufficient to create a rule of CIL. He explains that this redefinition does not need state practice to be valid.⁶⁷⁶ Instead, state practice can be used as proof of States’ belief “that a particular authoritative legal principle or rule is desirable now or in the near future.”⁶⁷⁷ He adds that the redefinition requires taking into account certain fundamental ethical principles recognized in contemporary international law and which are related to the ethical principle of unity in diversity.⁶⁷⁸

While Lepard’s approach is attractive for the reasons described in Chapter 4, there are critics. For example, Thirlway has opined that when seeking to identify the existence of a rule of CIL, evidence of state practice should not serve as evidence of *opinio juris*. He says: “there may well be overlap between the ‘manifestations of practice’ and the ‘forms of evidence of acceptance’ of such practice as law; generally, this does not mean that given acts can constitute both, as that would amount to a return of the single-element theory.”⁶⁷⁹ That said, Lepard would respond that his redefinition is more nuanced than the single-element theory, as it requires two interdependent elements, with both having specific

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.* By “unity in diversity”, Lepard means that, morally, humans ought to be united as a “single human family” while still recognizing that diversity in race, nationality, culture, religion, etc. is important. States serve “as practical vehicles” for enriching the “single human family” through their membership in a global community of states, *ibid* at 78.

⁶⁷⁹ Hugh Thirlway, “Human Rights in Customary Law: An Attempt to Define Some of the Issues” (2015) 28:3 *Leiden J Intl L* 495 at 502. See also Maurice Mendelson, *supra* note 621 at 206–207 where he says “What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the ‘mainstream’ view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by ‘real’ practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will).”

roles.⁶⁸⁰ Looking at state practice as an example, Lepard lists circumstances where strong evidence of this element is crucial: when States explicitly rely on both elements to conclude that a norm is desirable to recognize as CIL, where States “believe that a longstanding course of conduct creates legitimate expectations of a continuation of that conduct”, and where States “perceive themselves as facing a coordination problem” and believe an authoritative rule is required to resolve this problem.⁶⁸¹ Even when these circumstances do not exist, Lepard still requires evidence of state practice in connection with *opinio juris*.⁶⁸²

Having examined the main proponents of a revised approach to CIL, what lessons can be drawn? First, Roberts and Lepard both propose theories that allow for dynamic interaction between state practice and *opinio juris* at the domestic level and within the realm of international organizations, allowing for international responses to global problems, including immediate aspirational responses, to inform CIL.⁶⁸³ As Lepard puts it, the process of formation of CIL is “one in which members of the global community of states are incessantly engaged in a dialogue concerning which nascent norms should be recognized as universal and as legally authoritative for all members of that community”.⁶⁸⁴ CIL thus requires some flexibility and fluidity,⁶⁸⁵ in order to be applicable to a wide range

⁶⁸⁰ Brian D. Lepard, *supra* note 22 at 122-139 (on the specific role of state practice) & 112-121 (on the specific role of *opinio juris*); Anthea Roberts, *supra* note 14 at 781.

⁶⁸¹ Brian D. Lepard, *supra* note 22 at 125.

⁶⁸² *Ibid* at 122.

⁶⁸³ *Ibid* at 371. Note, however, that Lepard and Roberts take different approaches to the documents that may be considered for state practice and *opinio juris*. Lepard would allow, for example, acts, declarations, and resolutions of international organizations, including UN General Assembly resolutions, as evidence of *opinio juris*, while Roberts indicates that there may be circumstances in which these documents are useful at the level of substance, they also may not be useful depending on the type of norm being considered: Brian D. Lepard, *supra* note 22 at 181-183, 279-281; Anthea Roberts, *supra* note 14 at 778, 781, 789.

⁶⁸⁴ Brian D. Lepard, *supra* note 22 at 377.

⁶⁸⁵ Anthea Roberts, *supra* note 14 at 789: CIL is “a fluid source of law, which causes the point of equilibrium to vary over time in light of new state practice, *opinio juris*, and moral considerations”.

of current and future universal and inter-state issues. The need for this dynamism is clear: as explained in Chapter 2, the ICJ's case law has shifted over time from dealing with CIL issues related to, for example, delimitation of land or maritime boundaries, to also considering "fundamental ethical principles", where state practice plays a different role.⁶⁸⁶

This dynamism is important, as argued below, as it acknowledges the reality of how CIL develops temporally so as to include the most concentrated crystallization period of growth of both *opinio juris* and state practice, as CIL does not necessarily magically appear at one specific instant of time.⁶⁸⁷ So as to avoid over-inclusiveness, Lepard limits his theory so that it does not capture all *lex ferenda*, but only norms States believe are desirable to implement now or in the immediate near future.⁶⁸⁸ Roberts similarly limits her theory, so that *lex ferenda* might only be useful at the level of substance in cases involving moral issues.⁶⁸⁹

Additionally, both scholars propose approaches to CIL that could resolve, if applied by the ICJ, longstanding critiques (termed "conceptual and practical enigmas" by Lepard)⁶⁹⁰ of custom. Roberts' approach reconciles traditional and modern custom, while Lepard's approach helps to resolve the time paradox, and both integrate the role of ethics or morals.⁶⁹¹ Their approaches to *opinio juris* explain where consideration of consent and/or belief may be important: for Roberts, at the stage of weighing fit and substance,⁶⁹² for

⁶⁸⁶ Brian D. Lepard, *supra* note 22 at 376.

⁶⁸⁷ *Ibid* at 371

⁶⁸⁸ *Ibid* at 376.

⁶⁸⁹ Anthea Roberts, *supra* note 14 at 781-782, 789.

⁶⁹⁰ This avoids the time paradox explained in Chapter 4, and addresses the "relative slowness" and "extremely cumbersome" nature of the traditional approach to the formation of CIL: G.J.H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer Law and Taxation Publishers, 1983) at 114.

⁶⁹¹ Brian D. Lepard, *supra* note 22 at 77-94, 113; Anthea Roberts, *supra* note 14 at 779-784.

⁶⁹² Anthea Roberts, *supra* note 14 at 788.

Lepard when evaluating desirability.⁶⁹³ That said, their approaches differ, for example, they make different use of state practice – for Roberts, it is at the stage of fit, and for Lepard, it is “evidentiary and explains under what circumstances consistent state practice will be more or less important evidence of *opinio juris*”.⁶⁹⁴

Finally, both approaches do not stray completely from traditional approaches to CIL. Therefore, they “build[] on existing jurisprudence rather than rejecting it wholesale”.⁶⁹⁵ Rather, they aim to “clarify this jurisprudence and provide more practical guidance to lawyers and judges on how to identify and apply customary international law in a rigorous fashion”.⁶⁹⁶ Lepard’s redefinition of CIL and Roberts’ reflective interpretive approach intend to prompt the ICJ (and all other decision-makers) to disclose a transparent normative methodology (or, in Roberts’ case, to recognize the facilitative and moral content of customs),⁶⁹⁷ rather than issue “blunt declarations” that a particular norm is CIL.⁶⁹⁸

Thus, this thesis argues that Lepard and Roberts’ approaches are convincing, and, if applied by the ICJ, they could arguably make the ICJ’s findings on CIL predictable, less haphazard and “more rigorous and relevant”.⁶⁹⁹

5.3 Recommendation for an Updated, Modern Approach To CIL

Each chapter of this thesis provided insights that can assist in creating more consistency, predictability, and coherence in the identification of CIL, if adopted by the ICJ. This thesis

⁶⁹³ Brian D. Lepard, *supra* note 22 at 113-117.

⁶⁹⁴ *Ibid* at 373.

⁶⁹⁵ *Ibid* at 373.

⁶⁹⁶ *Ibid* at 373.

⁶⁹⁷ Anthea Roberts, *supra* note 14 at 790.

⁶⁹⁸ Brian D. Lepard, *supra* note 22 at 371.

⁶⁹⁹ *Ibid* at 377.

will term this more consistent, predictable, and coherent approach as a ‘modern’ approach, using that term to mean updated and contemporary (as opposed to reinforcing the divisions between ‘traditional’ and ‘modern’ outlined above).

Chapter 2 demonstrated a current trend toward more “moral custom” cases, resulting in an increased focus on *opinio juris* and consideration of a greater range of types of evidence (particularly evidence gathered from State actions within international organizations). This insight is useful because it is a reminder that a modern approach must work for both “facilitative custom” and “moral custom” cases. It highlights the need for the ICJ to have a clearly articulated conception of *opinio juris*. It also foregrounds the necessity for State litigants to present, and the ICJ to consider, a wide range of evidence from both the domestic and international levels - but with clear consideration of how exactly UN General Assembly resolutions, for example, should be weighed as part of the raw data (see comment on Roberts’ ‘fit’ analysis below).

Chapter 3 illustrated that the ICJ tends to use a mixture of inductive, deductive, and assertion-based reasoning. Ideally, it would assist in increasing coherence if the ICJ could stop using pure assertion except in cases of “notorious custom”. However, the next step should not be to prescribe, for example, that traditional or “facilitative” custom cases only use inductive reasoning and “moral custom” cases only use deductive reasoning. This prescription would likely be too restrictive, particularly for “moral custom” cases: the inductive approach allows the Court to analyze State practice in respect of an issue and the deductive approach enables the Court to determine the normative value of such an issue. Where there are inconsistent State practices, the deductive approach helps to derive general rules (including on fundamental values) on the issue.

There were also several insights gained in Chapter 4. The consent and belief theories do not adequately explain the ICJ's approaches to *opinio juris*, given their uneven and seemingly unpredictable application. Thus, there seems to be value in adopting and applying Lepard's approach to *opinio juris* (which he refers to as a redefinition of CIL), which is based on belief: a requirement that States generally believe that it is desirable now, or in the near future, to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain State conduct. This would help to create a unified understanding of *opinio juris* and would resolve the time paradox. Another insight from Chapter 4 is that, with an increase in the number and type of "moral custom" cases, more forms of evidence may need to be consulted to demonstrate *opinio juris*.

Finally, this chapter approvingly revisited Lepard's redefinition of CIL and also proposed Roberts' reflective interpretive approach (as the most developed of the sliding scale approaches), a three-tier endeavour which involves first gathering evidence of state practice and *opinio juris* and then applying the threshold criterion of 'fit' to determine if there are eligible interpretations that sufficiently explain the raw data of practice, then an interpretation of legality to differentiate between legal custom and social practice. If there are multiple interpretations of legality, fit and substance must be weighed to determine the best interpretation. The third step is to consider strong statements of *opinio juris* because they represent normative considerations of what the law should be.

As it is likely apparent, however, it is not a solution to propose that the ICJ simply adopt both Lepard's redefinition and Roberts' reflective interpretive approach wholesale. While they address similar underlying concerns, they cannot be easily combined as their methodology is structured differently. Lepard's redefinition prioritizes *opinio juris* from

the outset and uses state practice as proof of States' belief that a particular authoritative legal principle or rule is desirable now or in the near future. Roberts' approach requires that both State practice and *opinio juris* have separate identities as part of the raw data considered at 'fit' (with State practice playing an important role), while *opinio juris* alone plays a key role at the third step, if the analysis requires. However, there are insights from both that overlap or could be combined. Both theories help to explain and situate ethical evaluations in *opinio juris*, which is a useful insight that should be made transparent by the ICJ, particularly with the increase of "moral custom" cases on the ICJ's docket in the 21st Century. As well, if part of Lepard's redefinition was applied at Roberts' third step by requiring that State beliefs relate to what the law should be *now, or in the near future*, this would also assist with resolving the time paradox of *opinio juris*. That said, if one was to select an analytical structure as between Roberts and Lepard's approaches to be applied by the ICJ, and keeping in mind the challenges posed by "moral custom" cases, this thesis proposes to use Roberts' reflective interpretive approach with Lepard's clearer time distinction for *lex ferenda* in the *opinio juris* consideration. Keeping in mind the critiques noted above of the potential for the ICJ to collapse state practice entirely into *opinio juris* under a less nuanced application of Lepard's approach, Roberts' structure helps to avoid this type of flattening. While Lepard's ethical analysis is detailed, multilayered, and complex⁷⁰⁰ (based, at its heart, around unity in diversity), Roberts places that analysis at a discrete analytical step to respond directly to "moral custom" cases. It thus provides a more obvious balance between dynamism and structured consideration of the issues at play. The

⁷⁰⁰ Brian D. Lepard, *supra* note 22 at 77-94.

adoption of the combination of Roberts' and Lepard's approaches help to bring order to the lack of predictability, if applied by the ICJ.

The increasing use of the ICJ for "moral custom" issues necessitates an approach to CIL by the Court that provides some flexibility and fluidity, while creating more coherence in the *how* and *why* of the judicial analysis of State practice and *opinio juris*. Therefore, this thesis proposes that the ICJ apply the following approaches, taken from the insights noted above.

First, the ICJ should adopt an updated understanding of the elements of CIL provided in Article 38(1)(b) of the Court's Statute. Given the challenges described in Chapter 4 of the ICJ's different conceptions of *opinio juris*, there is value in adopting Lepard's definition: a requirement that States generally believe that it is desirable now, or in the near future, to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain State conduct. However, this definition is most helpful when applied at Roberts' third stage - which allows for a normative CIL which focuses on value-based interactions among State - given its incorporation of time-limited *lex ferenda*.

Second, a modern understanding of CIL requires that evidence of both State practice and *opinio juris* are present as part of the raw data considered at the level of 'fit'. However, these two elements need not necessarily be proven by entirely different sets of evidence. Evidence of State practice can also be used to support *opinio juris*, but the need for coherence demands that the ICJ must explain where belief is evident, most especially when the analysis proceeds to the third stage of Robert's reflective interpretive approach. As a result, the use of, for example, UN General Assembly resolutions must also be explained: is the Court relying on the text or the voting patterns, or both, and why?

Third, the modern understanding considers that there might be conflicting state practice and, where this is the case, the Court should not necessarily use the conflict to hold that there is no CIL. Instead, this conflicting state practice may need to be considered at the level of 'fit' under Roberts' approach, and again in her steps two and three. Where a number of States are engaged in a consistent and uniform practice on one hand and another (smaller) group of States is engaged in a consistent and uniform but conflicting practice on the other hand, the Court should not forego the establishment of CIL in this instance. Instead, where States are involved in a conflicting practice, the Court should determine which States' practice should be considered as CIL based on the normative character of the practice in question taking into account *opinio juris* as defined above. In *Legality of the Threat or Use of Nuclear Weapons*, the Court refused to establish that the practice of non-recourse of States to nuclear weapons over the past 50 years had become CIL because States were divided on the practice. The Court also noted that General Assembly resolutions on prohibition of nuclear weapon, though they might have normative value, were not sufficient to establish *opinio juris* because the resolutions were adopted with substantive numbers of negative votes and abstentions, thus not evincing *opinio juris*. If this situation had been decided with the proposed modern understanding of CIL, the Court could have decided that the normative value of the General Assembly resolutions outweighed the division of States and held that the non-recourse constituted a near-immediate desirability amongst States that non-recourse to nuclear weapons should be an authoritative rule.

Fourth, the modern approach proposed by this thesis recognizes the importance of the ICJ framing CIL as normative and authoritative rules, that is, a mechanism that states what is

morally ideal, and makes it obligatory. As Lepard recommends, CIL “ought to be defined, identified and interpreted as the social mechanism which lays down fundamental ethical principles that States need to be united in their interactions with one another.”⁷⁰¹ It would therefore be helpful for the ICJ to more overtly articulate the normative aspects of CIL norms at the third stage of Roberts’ approach, thereby providing more precision to the norm.

We already see hints of the above approach in recent ICJ opinions and judgments. For example, in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* the Court had to determine the customary status of the right to self-determination.⁷⁰² The Court reached the conclusion that the right to self-determination had become a rule of CIL by relying on the resolutions of the UN General Assembly.⁷⁰³ The Court particularly noted that one of the resolutions – resolution 1514 (XV) of 1960 – has a normative character with regards to the right to self-determination.⁷⁰⁴ The Court also noted that the resolution reflects customary law because it was adopted by 89 votes 9 abstentions.⁷⁰⁵ The Court found state practice and *opinio juris* from the UN General Assembly resolutions. The Court proceeded to determine that the right to self-determination is normative, and ultimately accorded it a rule of CIL. In addition, in *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*,⁷⁰⁶ in order to establish that the

⁷⁰¹ Brian D. Lepard, *supra* note 22 at 78.

⁷⁰² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 44.

⁷⁰³ *Ibid* at para 150.

⁷⁰⁴ *Ibid* at paras 151 and 153.

⁷⁰⁵ *Ibid* at para 152.

⁷⁰⁶ *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, *supra* note 44.

entitlement of a coastal State to a continental shelf beyond 200 nautical miles may not extend to the 200 nautical miles of another State has become a rule of CIL, the Court relied on submissions made by Coastal States to the Commission on the Limits of the Continental Shelf to derive both state practice and *opinio juris*.⁷⁰⁷ The Court held that the practice of submitting information that does not claim extension into the 200 nautical miles of another State was sufficient state practice and an expression of *opinio juris*.⁷⁰⁸ Though not expressly stated, it could be inferred that the practice of not laying claim to the continental shelf of another State is normative and the practice evidences States' desire that it should constitute an authoritative rule.

In sum, adopting an updated understanding of CIL not only would make it more predictable, coherent, and consistent, if applied by the ICJ, it would solidify the relevance of the Court in addressing *global* and not only state-to-state solutions to difficult problems.

5.4 Proposed Areas of Future Research to Solidify a More Consistent Approach to CIL by the ICJ

The ICJ is arguably the most powerful court in the world, with pronouncements capable of influencing States' behaviour in their interactions with one another. An examination of how the Court approaches CIL, one of the sources of public international law, which is extensive in its reach, is important in order to reveal the approaches of the Court in its work. An exploration into the elements of CIL – state practice and *opinio juris* – provided by the ICJ Statute is fundamental in order to have an idea of whether there is a predictability

⁷⁰⁷ *Ibid* at para 77.

⁷⁰⁸ *Ibid*.

in the way the Court approaches one of the sources of laws it uses in its judgments. In order to find out whether there is certainty in the Court's approach to CIL, this thesis examined the Court's judgments and advisory opinions in the 20th and 21st Centuries. It found that the cases sometimes stressed one element over the other; thereby creating inconsistencies. The thesis also discussed the methodologies that explain what the Court actually does when it decides rules of CIL. The thesis subsequently considered *opinio juris* and the theories the Court reflects in its decisions. The thesis reasoned that the uncertainty in the Court's determination of CIL could be settled if the Court adopted an updated, modern understanding of the elements of CIL.

Notwithstanding the practicality of the proposed modern understanding of elements of CIL, further research is still required. For instance, if it is stated that the ICJ needs to determine whether a practice has normative intent, is the Court not being asked to take on the role of the legislature when its role should be adjudicative? Also, it is possible for States' desire that a practice should be normative and authoritative to change, how can the Court maintain predictability in the face of evolving state practice? Further, if CIL should be seen as an expression of States' desire that a practice should be an authoritative rule, what are the criteria to assess the effectiveness of the rule and its continued suitability as an authoritative rule? Lastly, how might a Court continually tasked with addressing some of the most pressing issues known to humankind need to further adapt its evidentiary requirements, methodology, and underlying understanding of CIL?

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