

A CRITIQUE OF THE MODERN INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

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

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

Sir Robert Y. Jennings¹

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