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# The legitimacy of customary international law: Legal, moral, and social perspectives

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## Abstract

This article explores the legitimacy of customary international law (CIL) from legal, moral, and social perspectives. The analysis questions the legal legitimacy of CIL based on the prisms of consent and sovereignty found in international law. The analysis confirms the moral legitimacy of CIL, however, based on the rapid development of international law. Lastly, the analysis also confirms the social legitimacy of CIL based on its overall acceptance as a source of law.

*Keywords:* legitimacy, customary international law, CIL, public international law

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## 1. Introduction

Customary International Law (CIL) is one of the primary sources of the contemporary international legal system.[1] It consists of numerous rules that uniformly bind states and other entities.[2] Furthermore, CIL can be a valuable tool to govern relationships between states when no specific treaty governs the matter at issue.[3] Different international bodies have applied CIL on a variety of occasions to adjudicate various disputes between states.[4]

However, despite the current use of custom in international law, it has been suggested that CIL is a rather unnecessary element of the international legal system.[5] Some have argued that it is more sensible to rely on treaty law and abandon customary law as a needless relic of the past.[6] Following up on this uncertainty about the value CIL contributes to international law, this article will address the fundamental question of whether CIL is an essential part of the international legal system. To do so, this article will focus on the merits of legitimacy both as both a subjective and as an objective criterion of the right to govern.

The first section of this article will provide an overview of the concept of CIL. It will explore the legal nature and development of CIL. Using a variety of sources, it will describe the contemporary state of CIL in detail, including the process of assessing state practice and *opinio juris*. The analysis will rely on certain judgments by the International Court of Justice, a study of CIL by the International Law Commission, and several academic contributions.

The second section will address the theoretical framework of legitimacy, its reflection in international law, and the different concepts and notions of legitimacy. The importance of legitimacy will be analyzed in light of the legal, moral, and social perceptions of legitimacy. These concepts will lay the foundation for assessing the legitimacy of CIL.

The last section will assess CIL on the merits, using each of the concepts of legitimacy. It will start with the question of the legal legitimacy of CIL and then turn to assessing the moral and social legitimacy of CIL. The conclusion will address the implications of this assessment.

### *1.1. Customary international law: Overview of the concept*

To assess the legitimacy of CIL, it is sensible to start with a comprehensive overview of custom as a source of international law. The international law system is substantially different from classical national legal systems.[7] National systems usually each operate within a framework of legislatures that enact laws, with executive and judicial organs that act in the established legal framework.[8] In contrast, no central

[1] David Kennedy, *The Sources of International Law*, 2 Am. U. Int'l L. Rev. 1, 1–2 (1987).

[2] It is not precisely clear if CIL can bind international organizations. *See generally* Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 Harvard Int'l L. J. 301, 323–27 (2010).

[3] *See generally* Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 Brit. Y.B. Int'l L. 273–285 (1976).

[4] *See*, *e.g.*, North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 3 (20 Feb.); Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. Rep. 13 (3 June).

[5] Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l L. 115, 116–75 (2005).

[6] *Id.* at 116-17; *see also* David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Y.B. Int'l L. 198 (1996).

[7] Godefridus J. H. van Hoof, Rethinking the Sources of International Law 173 (1983).

[8] *See generally* M.J.C. Vile, Constitutionalism and the Separation of Powers (2d ed. 1998).

authority enacts laws in the sphere of international law.[9] Furthermore, international law embraces the supremacy of a state's sovereignty, and its consent is a prerequisite to being bound by law.[10] Accordingly, such qualities directly affect the sources of international law and their application.

One of the consequences is that the sources of international law are not embodied in any universally binding documents.[11] The most widely recognized list of sources of international law is in the Statute of the International Court of Justice.[12] Article 38 of the Statute provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[13]

The concept of customs is reflected in paragraph "b" of Article 38(1).

From a theoretical standpoint, it would appear impossible to find any society that does not have general rules and norms of behavior. These customs are one of the oldest ways to regulate lives of different communities.[14] Customs are unwritten rules. The Merriam-Webster dictionary defines "custom" as "an action or way of behaving that is usual and traditional among the people in a particular group or place."[15] In the legal sphere, customs go farther: they represent a notion of legally binding rules rather than a pattern of behavior. A pattern of behavior that possesses the characteristics of a legally binding rule can be found not only at the local level, but also within the system of international law. At the level of international law, such a concept is represented by the term customary international law.

To an extent, CIL can be considered a last resort in disputes over international law. When there is no applicable, legally-binding treaty, it is always possible to argue that a certain rule has crystallized within CIL. However, it is a rather complicated task to prove the existence of a customary rule because to do so requires strong evidence of the existence of two fundamental elements.[16] Those elements can be derived

[9] *See generally* Malcolm N. Shaw, International law 49 (7th ed. 2014). It has been argued that the Security Council was turned into a world legislature after SC Resolutions 1373 and 1540 imposed obligations on all member states. On the other hand, the practice of the Security Council is rather minimal.

[10] *Id.*; *see generally* David Held, *The Changing Structure of International Law: Sovereignty Transformed? in* The Global Transformations Reader: An Introduction to the Globalization Debate 162–176 (David Held & Anthony McGrew eds., 2003); *see also* Vienna Convention on the Law of Treaties, art. 26, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980).

[11] Kennedy, *supra* note 1, at 1–2; For example, one can imagine a State that is not a party to the U.N. Charter/I.C.J. Statute and, therefore, not bound by Article 38 of the Statute.

[12] United Nations, Statute of the International Court of Justice, 18 Apr. 1946, http://www.icj-cij.org/documents/?p1=4&p2=2.

[13] *Id.* at art. 38(1).

[14] *See, e.g.*, Manjushree Pathak, Tribal Customs Law and Justice (2005).

[15] *Custom*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/custom (last visited 12 Jan. 2015).

[16] *See generally* Int'l Law Comm'n, Identification of customary international law, http://legal.un.org/ilc/guide/1_13.shtml (last updated 3 May 2017); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Judgment, 1986 I.C.J. Rep. ¶ 188 (27 June).

from the Article 38 of the I.C.J. Statute, and they are State practice and o*pinio juris*, as was affirmed in the *Libya/Malta* case.[17]

The meaning, content, and sources of state practice and *opinio juris* will be further examined in the next sub-sections.

### *1.2. State practice in customary international law*

State practice is the first element of CIL. State practice constitutes a "material or objective" component of CIL that consists of past actions of states.[18] Those actions can take a variety of different forms and can be derived from a number of sources. *Brownlie's Principles of Public International Law* provides a general list of possible sources of State practice, including:

> diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement).[19]

All of the above-mentioned sources can be used to support the existence of a State practice. Going further, Sir Michael Wood, Special Rapporteur to the International Law Commission, has provided a list of possible physical actions that can constitute State practice. According to Wood, events like the passage of ships in international waters, conduct during a warfare, diplomatic asylum practice, and others events can be used as evidence of State practice.[20]

The foregoing lists of practices and acts, however, are non-exhaustive, and there is, furthermore, a broad range of other types of sources that can be used to argue State practice. In a report to the I.L.C., for example, Wood identified sources for authoritative views on the existence of CIL norms *per se*. The list includes:

> the case law of the International Court of Justice and other courts and tribunals; the work of other bodies, such as the International Law Association; and the views of publicists, in particular as to the general approach to the formation and evidence of customary international law.[21]

This list provides, not the sources of State practice, but rather a list of places where CIL norms can be found or reflected.

When arguing for the formation of a CIL norm, there are four main factors that can be used to assess State practice: "duration, consistency, repetition, and generality."[22]

Generality and repetition refer to a strong, common pattern of state behavior. More specifically, in most of the cases, establishing State practice requires demonstrating a similar pattern of behavior by multiple

[17]Libyan Arab Jamahiriya v. Malta, 1985 I.C.J. Rep. at ¶ 27.

[18]Int'l Law Comm'n, Second report of the *Special Rapporteur* Sir Michael Wood on identification of customary international law, U.N. A/CN.4/672, at 15 (2014) [hereinafter, Wood, Second Report]; *see also* Nicar. v. U.S., 1986 I.C.J. Rep. ¶¶ 97–98, 184.

[19]James Crawford, Brownlie's Principles of Public International Law 24 (8th ed. 2012).

[20]Wood, Second Report, *supra* note 18, at 21; *see also* Right of Passage over Indian Territory, Judgment, 1960 I.C.J. Rep. 6, 40–41 (12 Apr.); Asylum (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 277 (20 Nov.).

[21]Int'l Law Comm'n, First report of the *Special Rapporteur* Sir Michael Wood on formation and evidence of customary international law, U.N. Doc. A/CN.4/663, 19 (2013).

[22]*See* Shaw, *supra* note 9, at 54; Nout van Woudenberg, State Immunity and Cultural Objects on Loan 40 (2012); *see also* Fisheries (U.K. v. Nor., 1951 I.C.J. Rep. 116 (18 Dec.); North Sea Continental Shelf Case, 1969 I.C.J. Rep. at 43.

states.[23] Wood has also argued that the practice should be "extensive or, in other words, sufficiently widespread."[24]

An assessment of the weight of State practice therefore generally should be conducted on a case-by-case basis.[25] As part of this approach, the behavior of certain states may have more weight than the behavior of others. These so-called "specially affected States" are "affected or interested to a higher degree than other States."[26] An example of the specially-affected States approach can be seen by an opinion of International Court of Justice Judge Petrén, when he argued that "It would be unrealistic to close one's eye to the attitude, in that respect, of the State with the largest population in the world."[27] According differing weights to the practices of different states it not necessarily a valid approach, though, because it is also important to pay attention to the sovereign equality of states. On the other hand, one can think of many instances in which one state may be more concerned with certain issues than another state.

Another essential factor to support a State practice argument is consistency. This criterion was addressed in the 1950 *Asylum* case heard by the I.C.J.[28] The court stated that State practice should be "uniform usage practiced by States in question."[29] The criterion of consistency has been further developed to now require that a customary rule should have "a core meaning that does not change."[30] This factor is essential to keep a custom from too broad or too vague a meaning.

However, there is no requirement for State practice to be absolutely universal.[31] As was suggested by the I.C.J. in the *Nicaragua* case, a state action contrary to a common pattern of State practice may be considered not as reflecting inconsistency in the practice, but rather as a breach of an already crystallized rule.[32] On the other hand, it is also important to keep in mind that CIL can evolve in its meaning over time.

The duration of State practice factor generally concerns the amount of time needed to establish the existence of a customary rule. The classical approach required the passage of a long amount of time before a state can claim the existence of a CIL norm.[33] However, the more contemporary view places no specific requirements on the amount of time for the crystallization of a CIL norm.[34] As was stated in the *North Sea Continental Shelf* case, "the passage of only a short period of time is not necessarily, or of

[23] *See generally* Mark A. Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. Penn. J. Int'l L. 295 (2009).

[24] Wood, Second Report, *supra* note 18, at 7; *see also* Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 45, 52 (25 July).

[25] U.K. v. Ice., 1974 I.C.J. Rep. at 52; Wood, Second Report, at 36.

[26] Wood, Second Report, *supra* note 18, at 36; William Thomas Worster, *The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*, 31 B.U. Int'l L.J. 1, 63 (2013); North Sea Continental Shelf case, 1969 I.C.J. Rep. ¶ 73; U.K. v. Ice., 1974 I.C.J. Rep. at 47.

[27] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, 306 (20 Dec.).

[28] Asylum (Colom./Peru), 1950 I.C.J. Rep. at 266.

[29] *Id.* at 275.

[30] Wood, Second Report, *supra* note 18, at 7.

[31] *Id.* at 34; North Sea Continental Shelf, 1969 I.C.J. Rep. at 104.

[32] Nicar. v. U.S., 1986 I.C.J. Rep. ¶ 186.

[33] Mark Eugen Villiger, Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties 24 (1985).

[34] Wood, Second Report, *supra* note 18, at 40; North Sea Continental Shelf, 1969 I.C.J. Rep. ¶ 76.

itself, a bar to the formation of a new rule of customary international law."[35] Therefore, it appears that the time requirement should be assessed on a case-by-case basis.

The foregoing criteria and sources have offered guidelines for assessing State practice. It is now time to turn to the second element of CIL: *Opinio Juris*.

### *1.3.* Opinio juris *and customary international law*

*Opinio juris*, or *opinion juris sive necessitates*, is the subjective or psychological element of CIL. The precise definition of *opinio juris* was provided by the I.C.J. in the *North Sea Continental Shelf* case. According to the court, *opinio juris* exists when states "believe ... themselves to be applying a mandatory rule of customary international law"[36] or "felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so."[37] In essence, *opinio juris* is the subjective perception of a certain rule as legally binding under CIL.

There are several ways to prove the existence of *opinio juris*. In certain circumstances, state actions *per se* can show the presence of *opinio juris*. According to one of Wood's reports, it can be argued that "acceptance as law" can be derived from the conduct of states.[38] Accordingly, sources of State practice can play a role in the argument over *opinio juris*. However, careful assessment is necessary because certain actions can be "only a statement of political intention and not a formulation of law."[39]

In addition, the International Law Commission has proposed a list of possible sources of evidence of *opinio juris*. It consists of the following:

> A non-exhaustive list of such materials includes positions of States before international organizations (including written comments and responses to questionnaires) or international conferences; pronouncements by municipal courts; statements before international courts and tribunals; stipulations in arbitration agreements; diplomatic practice and notes; a State's actual conduct (as opposed to its stated positions); a State's treaty practice; multilateral treaty practice; as well as a variety of international instruments.[40]

Furthermore, assessing *opinio juris* requires high awareness of "fact, degree and value."[41] In-depth research is necessary to convincingly argue the presence of *opinio juris*. Accordingly, any sources used should be carefully and comprehensively analyzed.

It is essential to stress that the frequency of conduct does not reflect the presence of *opinio juris*. As was stated by the I.C.J., "the frequency, or even habitual character of the acts is not in itself enough."

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[35]North Sea Continental Shelf, 1969 I.C.J. Rep. ¶ 76.

[36]*Id.*

[37]*Id.* ¶ *78.*

[38]Wood, Second Report, *supra* note 18, at 57; The International Court of Justice, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.), Judgment, 1984 I.C.J. Reports 246, 299 (12 Oct.).

[39]Official Records of the General Assembly, Twentieth Session, First Committee, Agenda Item 107, A/C.1/SR. 1423, December 1965, p. 436.

[40]Int'l Law Comm'n, Memorandum prepared by the Secretariat on Formation and evidence of customary international law, U.N. A/CN.4/659, at 21 (2014).

[41]C. L. Lim & O.A. Elias, *Proving Opinio Juris, and Customary International Law* 7 (Geneva, Discussion Paper, June 2013), https://law.duke.edu/cicl/pdf/opiniojuris/panel_3-lim_and_elias-_proving_opinio_juris_and_customary_international_law.pdf (criticising the Nicaragua case on the merits of CIL assessment).

To add some more confusion to the matter, in certain circumstances even a lack of any action can be considered as evidence of *opinio juris*.[42]

Brian D. Lepard has offered an additional possible factor in considering *opinio juris*. He has suggested that the legal standing of the authority in question should play an important role.[43] For example, he has argued that the decisions of the U.S. President or the U.S. Congress should have more value as evidence of *opinio juris* because they are made by elected officials and, therefore, have a bigger claim to reflect the will of people in comparison to the decisions of appointed officials.[44] However, the importance of the will of the people as a consideration is not clearly recognized as a factor in determining international law. Therefore, Lepard's proposal, while interesting, is not compelling in its logic.

To summarize, it is a rather complicated and demanding process to prove the existence of a customary rule. Numerous examples of actual practices will have to be offered. Furthermore, in-depth analysis of the states' intent is required to make a strong argument. Finally, while *opinio juris* must be argued, certain aspects of *opinio juris* are still rather unclear.

To continue its appraisal of CIL, this article will now turn to defining the concept of legitimacy.

## 2. Legitimacy and international law: An overview

It is widely argued that legitimacy can foster compliance with the law.[45] In general terms, a sense of duty to obey a rule can convince entities to submit to a rule in question. For example, legitimacy can play a crucial role when it is not within a state's interests to obey a certain rule. The notion of a legitimate obligation may nonetheless push such a state toward compliance with the undesired rule.[46]

As will become evident from the discussion here, however, the concept of legitimacy can be understood in many different ways. Furthermore, the question of legitimacy is a relatively new topic in international legal discourse.[47] Thomas M. Franck introduced the argument over this issue at the end of the Cold War in his article *Legitimacy in the International System*.[48] In his work, Franck raised the concern that the academic literature of the time was giving all its attention to the concept of legality and had almost forgotten the concept of legitimacy.[49]

Franck's work sparked an ongoing dialogue on the question of legitimacy.[50] Over time, however, the major focus in the legitimacy discussion has shifted somewhat from general international law to individual

[42]Wood, Second Report, *supra* note 18, at 63; Asylum (Colom. v. Peru), 1950 I.C.J. Rep. at 266.

[43]Brian D. Lepard, Customary International Law: A New Theory with Practical Applications 171–191 (2010).

[44]*Id.* at 175.

[45]*See generally* Hyeran Jo & Catarina P. Thomson, *Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991–2006*, 44 Brit. J. Pol. Sci. 323–55 (2014); Jonathan Jackson et al., *Compliance with the law and policing by consent: notes on police and legal legitimacy*, *in* Legitimacy and Compliance in Criminal Justice 29–49 (Adam Crawford & Anthea Hucklesby eds., 2012).

[46]*See generally* Jo & Thomson, *supra* note 46; Jackson, *supra* note 46. One can explain such a consequence by strong political pressure or other variables.

[47]Daniel Bodansky, *Legitimacy in International Law and International Relations* 2 (Am. Pol. Sci. Assoc. 2011 Annual Meeting Paper), http://ssrn.com/abstract=1900289 (last revised 26 Jan. 2012).

[48]Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705 (1988).

[49]*Id.* at 706-07.

[50]*See generally* Jean d'Aspremont & Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 Fordham Int'l L.J. 190 (2011); John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 Am. J. Juris. 1 (2013).

governments and to democracy as a criterion of legitimacy.[51] The question of the legitimacy of governments within states, however, is far removed from the question of legitimacy of the primary sources of international law *per se*.[52] The shift in focus has led to an absence of general criteria for legitimacy under international law. This part of this article will therefore provide insights and propose possible criteria of legitimacy for international law and, in particular, for CIL.

The starting point of this investigation is the definition of legitimacy. The Oxford Dictionary provides that legitimacy is "Conformity to the law or to rules."[53] Beetham has proposed a slightly different approach, arguing that legitimacy is the "justification and acceptance of political authority."[54] Beetham's definition has been broadly accepted in political science and international law.[55] It can be argued that justification of authority can flow from conformity with certain rules, and thus bring together the Oxford and Beetham definitions. From this viewpoint, the justification of a political authority can be based on positive law. In other words, in a narrow sense, if an authority complies with the positive law it can be considered legitimate. However, this is only one out of many possible views of legitimacy. In particular, acceptance as a qualifier for legitimacy requires some clarification. Furthermore, such a narrow criterion for legitimacy is problematic.

In his work *The Concept of Legitimacy and International Law*, Chris Thomas stressed that it is hard to adopt a universal definition of legitimacy because legitimacy usually varies according to context.[56] He argued that legitimacy can be understood in three different ways, as legal legitimacy, moral legitimacy, and social legitimacy.[57] Legal legitimacy can be perceived as legal validity from the perspective of positive law.[58] This perception of legitimacy largely reflects the general definition of legitimacy that was provided above. In essence, legal legitimacy depends on compliance with a certain set of relevant, positive rules.

Moral legitimacy generally can be perceived as the "right to rule."[59] As Thomas further explained, moral legitimacy is "a property of an action, rule, actor or system which signifies a moral obligation to submit to or support that action, rule, actor or system."[60] This property can vary based on the rule in question. The essence of this approach lies in the sense of a moral obligation to act in a certain way. This approach to legitimacy stands far away from the positivist perception of the law. From the standpoint of moral legitimacy, the obligation to obey certain rules flows not from their status concerning legally binding law but instead, from the moral value of rules in question. As to the concept of moral values, for the purpose of this article, they will be perceived as certain factual and significant benefits that can result from a state or the international community obeying the rule in question.

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[51] *See generally* Democratic Governance and International Law (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Democratic Governance]; Brad R. Roth, Governmental Illegitimacy in International Law (1999).

[52] Generally speaking, governments *per se* are not considered to be subjects of international law. A state and a government are two distinct bodies in terms of international law, and only a state is a subject of that law.

[53] *Legitimacy*, Oxford Living Dictionaries, http://www.oxforddictionaries.com/definition/english/legitimacy (last visited 4 June 2017).

[54] David Beetham, The Legitimation of Power (2d ed. 2013); *see also* Bodansky, *supra* note 48, at 5.

[55] *See* Bodansky, *supra* note 48, at 4–5.

[56] C.A. Thomas, *The Concept of Legitimacy and International Law* 7 (London Sch. Econ., Law, Soc'y & Econ. Working Papers, Dec. 2013).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 11.

[60] *Id.*

Lastly, there is the concept of social legitimacy. Social legitimacy is not based on the objective values of the entity in question. Social legitimacy is a mere "*belief* that action, rule, actor or system is morally or legally legitimate."[61] Accordingly, such legitimacy is not necessarily based on the actual qualities of a discovered object, but rather on the perception of the object by others. Therefore, social legitimacy is a subjective rather than objective judgment: if something is perceived as legitimate it is socially legitimate.[62]

Accordingly, the legitimacy of international law and, in particular, the legitimacy of CIL can be discussed in light of the foregoing concepts of legitimacy. Legal and moral legitimacy fit within the methodological framework of normative legitimacy.[63] Normative legitimacy assesses the objective reasons why a certain concept exists based on its moral, political, or legal standing.[64] Social legitimacy, on the other hand, must be discussed as a matter of descriptive legitimacy, an approach that evaluates the opinions of the ruled rather than the objective qualities of the ruler.[65]

Furthermore, it is necessary to stress that there is no one determinant of legitimacy. In principle, it can be said that only social legitimacy will determine compliance with a rule. The subjective perception of a rule as legitimate or not will, in practice, affect the behavior of the entity in question. If something lacks legal or moral legitimacy but is still perceived as legitimate, the objective legitimacy indicators become somewhat irrelevant. An entity may act based on its subjective belief in legitimacy even though the objective indicators may be absent.

On the other hand, it is necessary to stress that the concepts of legal and moral legitimacy are not irrelevant; they are inherently linked to social legitimacy. Subjective views on legitimacy can be significantly affected by the objective factors. For example, legal illegitimacy of a certain action may trigger the subjective (social) perception of such an action as illegitimate. In other circumstances, however, moral legitimacy might prevail over legal illegitimacy, with the result that certain *illegal* actions are subjectively perceived as legitimate. One example is the NATO operation in Kosovo that was widely perceived as illegal but legitimate.[66]

To summarize, the most recognizable outcomes of legitimacy are based on the concept of social legitimacy. Entities will construct their behavior based on their subjective perception of legitimacy. However, legal and moral legitimacy often build up social legitimacy. Consequently, social legitimacy affects the behavior of international actors as to the compliance or non-compliance with rules in question. Therefore, the legitimacy of CIL can affect the level of compliance and general views on the latter.

The next sections will assess the legitimacy of customary international law based on each of the three proposed types of legitimacy.

### *2.1. Legal legitimacy of customary international law*

This section will assess CIL through the prism of the legal legitimacy. Thomas Franck has suggested a comprehensive list of criteria to assess legal legitimacy.[67] The proposed list includes "determinacy,

[61] Thomas, *supra* note 56, at 14.
[62] *Id.*
[63] Bodansky, *supra* note 47, at 8.
[64] *Id.*.
[65] *See* Thomas, *supra* note 56, at 14–15.
[66] *See generally* Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?, in* Human Rights, Intervention, And The Use Of Force (Philip Alston & Euan Macdonald eds., 2008), http://ssrn.com/abstract=1518290.
[67] Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 Am. J. Int'l L. 93 (2006).

symbolic validation, coherence, and adherence."[68] Determinacy refers to the clarity of the content, and Franck perceived it as one of the most important criteria.[69] Symbolic validation refers to compliance with certain figurative procedures that give legal power to a rule. Coherence of the law looks to "[t]he quality of being logical and consistent."[70] Lastly, adherence is measured as "conformity with the legal system's secondary rules about norm creation."[71]

It is sensible to start with the first and most important criterion: determinacy. Customary international law, as with any other hard law, requires certain clarity of the content as a pre-condition for its effective implementation and use. As was briefly mentioned above, even the primary existence of customary rules relies on the presence of a core meaning that stays the same over a period of time.[72] Accordingly, this core meaning should be considered as part of assessing determinacy.

At first glance, there are examples of clear and straightforward CIL norms. Customary international humanitarian law is a good example of CIL that fulfills the criterion of determinacy.[73] A study by the International Committee of the Red Cross provided an extensive list of rules that arguably can be considered as CIL. The list includes, with great precision, the prohibition of indiscriminate attack, precautions, and other fundamental principles of humanitarian law.[74]

A series of other fundamental rules can be found in the case law of international judicial bodies. For instance, certain aspects of the law on the use of force were addressed by the I.C.J. in terms of CIL. The court stressed that the right to self-defense and the prohibition of interventions reflect customary international law.[75] The court was quite straightforward with the wording of the rules in question.[76] Accordingly, certain fundamental aspects of the law on the use of force are reflected in CIL with more or less clear meaning.[77]

Additionally, CIL can be codified in treaties.[78] Subsequently, such treaties can provide further guidance on the content of CIL. Furthermore, treaties can expand obligations of states in comparison with CIL. However, the rules of CIL still remain in power even for states that joined a treaty that codifies certain rules of CIL.[79]

Therefore, it is possible to conclude that there are certain CIL rules that can comply with the criterion of determinacy. The meaning and the content of those rules can be understood with a high degree of precision. However, there is a strong agreement about meaning only for part of CIL. There is constant tension and a lack of clarity over emerging rules of CIL and certain highly-contested concepts. For

[68] *Id.*
[69] *Id.*
[70] *Coherence*, Oxford Living Dictionaries, http://www.oxforddictionaries.com/definition/english/coherence (last visited 4 June 2017).
[71] Bodansky, *supra* note 47, at 13.
[72] *See* Wood, Second Report, *supra* note 18, at 36.
[73] *See* Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, (Vol. I 2005; reprint Vol. II 2009).
[74] *Id.*, Vol. II, at Rules 11 & 14.
[75] Nicaragua v. U.S., 1986 I.C.J. Rep. at ¶ 174.
[76] *Id.* ¶¶ 183–187.
[77] *Id.*
[78] James Harrison, Making the Law of the Sea: A Study in the Development of International Law 17 (2011); *see also* North Sea Continental Shelf Case, 1969 I.C.J. Rep. at ¶ 60.
[79] Nicar. v. U.S., 1986 I.C.J. Rep. ¶ 174.

example, it is unclear whether there is a right to democracy, a right to the truth, or even a right to political participation under CIL.[80]

Going further, there is even a lack of clarity under CIL with regard to certain fundamental international concepts. For example, there is continuing disagreement over which parts of UNCLOS constitute CIL.[81] The same problem arises for the "Draft Articles on State's Responsibility" or even the Vienna Convention on the Law of the Treaties. There is no definitive conclusion on which part(s) of those fundamental documents are reflected in CIL.

In essence, it is always possible to argue that something has crystallized as a rule of CIL. However, such an approach makes the entire branch of CIL too ambiguous. It is true that there are some well-established rules that fall within the concept of determinacy. On the other hand, there is constant change and tension for other CIL norms that, consequently, fall outside the concept of determinacy of the content.

This is not to say that these differences make the entire branch of CIL illegitimate in the legal sense. However, a substantial part of CIL is open to overly broad interpretation or prompts questions about its binding nature. It is true that there are guidelines on how to assess if a rule has crystallized as CIL; the rules provided in the first section of this article can give certain guidance. However, it is still rather hard to provide strong arguments for such subjective terms as *opinio juris* or to provide a fully convincing overview of state practice.

Furthermore, the issue of consent to be bound by CIL is a significant problem. International law can be considered a product of state consent.[82] Yet some authors have argued that in certain circumstances it is hard to find the evidence of even a tacit agreement to be bound by CIL.[83] For example, what if a state is unaware of an emerging rule or a state has no means to object to an emerging rule? It is possible to argue that CIL sometimes bypasses the fundamental requirement of consent.

From another perspective, it can be argued that the practice of specially-affected states undermines the notion of equality of sovereign states. For example, the practice of specially-affected states can bind all other states that at the moment had no interests or resources to operate in certain fields.[84] States can be bound by CIL just because other more affected entities started to conduct various new activities. It can be argued that such an approach frustrates the sovereign equality of states in international law, the fundamental basis of that law. It can be further viewed as a lack of balance of contributing value when it comes to the formation of CIL.

Therefore, many aspects of CIL can be considered legally illegitimate. In short, the vague content of CIL, a partial lack of consent, and the diminished importance of the sovereign equality of states deprives CIL of a viable claim to legal legitimacy. This conclusion suggests various negative outcomes. One of the most obvious is the possibility that states will refuse to comply with CIL. However, the reason for this can be found in the ambiguity of CIL rather than in the absence of legal legitimacy. But legal illegitimacy can

[80] *See generally* Democratic Governance, *supra* note 52; Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms* (Nw. L., Faculty Working Papers No. 88, 2010), http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88 (last visited 12 Jan. 2015).

[81] Jan Klabbers, International Law 236 (2013).

[82] *See* Vienna Convention on the Law of Treaties, *supra* note 10, art. 26; Duncan B. Hollis, *Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int'l L. 137 (2005).

[83] *See generally* Niels Petersen, *The Role of Consent and Uncertainty in the Formation of Customary International Law* (Preprints Max Planck Inst. for Research on Collective Goods, 2011), https://www.coll.mpg.de/pdf_dat/2011_04online.pdf.

[84] The example of Space Law comes to mind. A number of states that have just started to develop the capacity to operate in space are already bound by the law that was established by a very few nations.

also draw a lot of criticism to CIL as a part of international law. Indeed, it is possible to explain the skepticism of various scholars based on the fundamental legal flaws of CIL that have been addressed here.

### 2.2. Moral legitimacy and its impact on social legitimacy in customary international law

A different conclusion results from basing the analysis on moral legitimacy. It is, admittedly, rather hard to define moral legitimacy in precise terms. This article will address the moral standing of CIL by assessing the practical benefits of CIL's contribution to the general system of international law.

The problems with CIL legal legitimacy identified above should be perceived in light of the need for international law to develop rapidly and be more consistent. For example, in *Accelerated Formation of Customary International Law,* Scharf has argued in favor of CIL due to its practical value.[85] According to Scharf, the rules of CIL are more widespread in their binding power than treaty provisions.[86] CIL is an essential addition to the body of international law in terms of its binding power. For example, in certain circumstances, CIL will fill in gaps in the obligations of states that do not want to join certain treaties. The moral value of CIL flows from its ability to govern *all* with no distinction.[87]

In addition, the lack of withdrawal clauses in CIL adds consistency and stability to the applicable international obligations.[88] While CIL is a flexible branch of international law, it imposes certain fundamental customary obligations that allow no withdrawal, in contrast with certain treaties.[89] It should be noted, though, that human rights law is less clear-cut in this regard. The law secures certain human rights norms that are widespread and legally binding, and the norms have no withdrawal clauses. But it is not clear which human rights are protected by CIL.[90]

Lastly, in some instances, CIL can fill in gaps in international law and govern new relationships between states while the often lengthy process of negotiating a treaty proceeds.[91] Scharf has provided an example of this situation: UNCLOS negotiations started in 1973 and the convention was not concluded until 1982.[92] In contemporary practice, CIL can develop and crystallize much faster than such classical treaty-making processes.[93] CIL thus adds substantial value as an efficient stop-gap during treaty-making or when there is no intent to conclude a treaty at all.

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[85]Michael Scharf, *Accelerated Formation of Customary International Law*, 20 Int'l L. Student Assoc. J. Int'l & Comp. L. 305, 309 (2014).

[86]*Id.*

[87]Note the exception of persistent objectors. However, it is a rather academic concept that is not precisely reflected in the primary sources of international law. Going further, it is not well reflected in the I.L.C. study on CIL.

[88]Scharf, *supra* note 85, at 309.

[89]The example of *Jus Cogens* norms comes to mind. While a state can withdraw from ICCPR, CAT or ECHR, there is no way to withdraw from the prohibition of torture in the sense of custom. Additionally, the same principle will apply to the norms in UNCLOS, the Vienna Convention, and other treaties.

[90]*See generally* D'Amato, *supra* note 83; Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust'l Y.B. Int'l L. 82, 102-06 (1988–89); Reservations to Convention on the Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Reports 15, 23 (28 May).

[91]Scharf, *supra* note 85, at 309.

[92]*Id.*; U.N. Office of Legal Affairs, *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

[93]*See generally* Michael P. Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments (2013).

To summarize, CIL brings many practical challenges in the strictly legal sense. On the other hand, its existence seems to be morally justified due to the value it contributes to international law. First, CIL can establish more widespread obligations than can treaties. Second, it can start to govern new relations between states faster than treaties, and it does not require an agreement on particular wording or on a particular treaty. Third, the lack of withdrawal clauses can substantially contribute to moral legitimacy in the protection and consistency of international obligations. Therefore, CIL is arguably morally legitimate due to its positive contribution to international law.

What are the outcomes of this assessment? While the legal legitimacy of CIL is problematic, its social legitimacy can be demonstrated by the *de facto* acceptance of CIL as a primary source of international law. This acceptance can be proven with the reference to the Statute of the I.C.J., several cases that were adjudicated based on CIL, and the common acceptance of CIL in the academic literature.[94] Even though there are a few scholars that argue that CIL should be divorced from contemporary international law, it is still a matter of a common agreement that CIL forms a part of the international legal system. Following this widespread acceptance of CIL it can be concluded that it is socially legitimate.

Furthermore, the moral legitimacy demonstrated above can explain the social legitimacy of CIL. Considering the benefits of CIL for the efficiency of the international legal system, its moral legitimacy significantly contributes to social legitimacy and the general acceptance of CIL. Overall, CIL is morally and socially legitimate.

The question of whether or not states will submit to such legitimate authority is rather more complicated. On the one hand, there are strong reasons to obey CIL because it does bring practical benefits to the international legal system. On the other hand, a lack of legal legitimacy and clarity can make compliance with CIL somewhat more complicated. In the end, however, the general compliance with the most fundamental CIL rules is undisputable.

## 3. Conclusion

This article has assessed CIL based on legitimacy concepts. Section One provided a comprehensive overview of the current state of CIL. Two fundamental aspects of CIL were presented: State practice and *Opinio Juris*. A brief description of their core elements and the ways to prove their existence was provided, with reference to case law and academic literature. Part Two described the concept of legitimacy in international law. It defined the concept of legitimacy and then divided it into the three concepts of legal, moral, and social legitimacy, explaining each through the prism of theoretical knowledge. Part Three applied the legitimacy concepts to assess whether CIL can be considered legitimate.

This analysis has led to several conclusions. CIL may not be legally legitimate because it can be too ambiguous, bypasses the requirement of tacit consent, and breaches the principle of sovereign equality of states. However, CIL is morally legitimate due to the benefits it provides for international law. The moral value of CIL lies in its ability to be widespread, avoid withdrawal from obligations, and fill in gaps in international law. Lastly, CIL is socially legitimate because it is *de facto* accepted by the international community.

For CIL, the practical effect of such mixed legitimacy is rather unclear. It is possible to argue that States will comply with CIL due to its partial legitimacy. However, the lack of legal clarity and the resulting legal illegitimacy may cause certain complications when it comes to compliance with CIL.

[94] *See, e.g.*, Nicar. v. U.S., 1986 I.C.J. Rep., para. 71–73; North Sea Continental Shelf, 1969 I.C.J. Rep. 3; Asylum (Colom. v. Peru), 1950 I.C.J. Rep. 266; *see also* basic international law textbooks such as Shaw, *supra* note 9.