The Legitimacy of Rules of Customary International Law and the *Right to Justification*

*Julian Kulaga**

Abstract

This contribution submits that although customary international law emanates from the free will of States, it is not State consent alone from which this source of international law draws its legitimacy. The common critique against the legitimacy of customary international law, focussing on the consent aspect, neglects that the legitimacy of customary international law derives also from its reciprocal nature and its generality. For this reason, this contribution explores whether the justice theory of the political philosopher *Rainer Forst*, the so-called *Right to Justification*, can provide a plausible ex-

* Research and teaching assistant at the Chair for Public Law and Public International Law, Humboldt University of Berlin, *Prof. Dr. Georg Nolte* and associated researcher at the Berlin/Potsdam research group "The International Rule of Law – Rise or Decline?". The author would like to thank *Janina Barkholdt*, *Dr. Malcolm Jorgensen* and *Prof. Dr. Keun-Gwan Lee* for their most valuable feedback and comments on earlier drafts of this paper. Any errors remain the author's sole responsibility.

planation for the legitimacy of customary international law. According to this *Right to Justification* only norms that can be reciprocally and generally justified enjoy moral validity. These two features make it normatively acceptable for States to recognize the authority of customary international law.

Introduction

International law appears to be in stagnation. Since the beginning of this millennium, fewer treaties have been concluded than one may have expected.[1] What is more, the continuous growth in the number of international organizations and their offshoots since the end of World War II has stopped by the middle of the present decade.[2] At the same time, it is often suggested that new developments and current challenges make more and new modes of cooperation at the international level necessary.[3] A potential candidate for bridging the gap in those fields where more or new norms are needed, is customary international law – at least as the natural fallback position when the conclusion of new treaties seems out of the question. This suggests an enhanced significance for the source of customary international law, which the International Law Commission (ILC) has defined as "unwritten law deriving from practice accepted as law".[4] But even as of today, customary international law enjoys an enduring relevance as demonstrated by the frequent references of the International Court of Justice (ICJ) to this source of international law.[5]

---

[1] *J. Pauwelyn/R. A. Wessel/J. Wouters*, When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, EJIL 25 (2014), 733 et seq.; *H. Krieger/G. Nolte*, The International Rule of Law – Rise or Decline? – Approaching Current Foundational Challenges, 3 et seq., in: H. Krieger/G. Nolte/A. Zimmermann (eds.), The International Rule of Law: Rise or Decline?, 2019, 11.

[2] *T. Hale/D. Held*, Beyond Gridlock, 2017, 3 et seq.

[3] *J. P. Trachtman*, The Future of International Law, 2013, 2; *T. Aalberts/T. Gammeltoft-Hansen*, The Changing Practices of International Law, 2018, 6.

[4] ILC, Conclusions on Identification of Customary International Law, Report of the ILC, 70th Session (A/73/10), 122, adopted by UN General Assembly Res. A/Res/73/203, 20.12.2018.

[5] *S. D. Murphy*, What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence, Journal of International Dispute Settlement 4 (2013), 539 et seq.; *O. Sender/M. Wood*, Custom's Bright Future: The Continuing Importance of Customary International Law, 360 et seq., in: C. A. Bradley (ed.), Custom's Future: International Law in a Changing World, 2016, 365.

However, apart from its obvious structural disadvantages, such as the long time it takes before a rule of customary international law crystallizes from general practice and *opinio juris*, custom is often said to lack the necessary legitimacy.[6] Traditionally, the legitimacy of customary rules is understood to derive first and foremost from (implicit) State consent.[7] Yet some commentators suggest that customary international law could never be explained fully on this basis.[8] Thus the source appears to be in need of a theory that can justify the authority of its rules.

In this contribution, it is submitted that although customary international law does indeed emanate from the free will of States, it is not State consent alone from which this source draws its legitimacy. The common critique, focussing exclusively on the consent aspect, overlooks the legitimacy that customary international law also derives from its reciprocal nature and its generality. For this reason, this contribution explores whether the justice theory developed by the political philosopher *Rainer Forst*, the *Right to Justification*, can provide a plausible explanation for the legitimacy of custom. According to this theory, only norms that can be reciprocally and generally justified enjoy moral validity.[9] In this view, reciprocity and generality make it normatively acceptable for States to recognize the authority of international customary law.

The argument proceeds in three parts. The first part explores the concept of legitimacy. To this end, a special focus is put on the distinction between normative and sociological legitimacy (section 1.) and on how the legitimacy of customary international law is conventionally explained (section 2.).

---

[6] *A. Buchanan*, The Legitimacy of International Law, 79 et seq., in: S. Besson/J. Tasioulas (eds.), The Philosophy of International Law, 2010, 92; *J. Tasioulas*, Custom, Jus Cogens, and Human Rights, 95 et seq., in: C. A. Bradley (note 5), 100.

[7] *D. Anzilotti*, Cours De Droit International, 1928, 68; *H. Lauterpacht*, Sovereignty over Submarine Areas, BYIL 27 (1950), 376 et seq. (395 f.); *M. Kumm*, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, EJIL 15 (2004), 907 et seq. (914); *R. Dworkin*, A New Philosophy for International Law, Philosophy & Public Affairs 41 (2013), 2 et seq. (5 et seq.); a rudimentary expression of this idea can already be found in *H. Grotius*, On the Law of War and Peace, 2012, 5; in the context of Roman law *Julian* is said to have argued that "since statutes themselves bind us only because they have been accepted by the judgment of the people, it is right that what the people has approved without any writing should be binding on all. For what does it matter whether the people declares its wishes by vote or by its actual conduct?" (*Julian*, D.1.3.32.1, Book 84, translated in: H. F. Jolowicz, Lectures on Jurisprudence, 1963, 200).

[8] *A. Clapham*, Brierly's Law of Nations, 7th ed. 2012, 43 et seq.; *N. Krisch*, The Decay of Consent: International Law in an Age of Global Public Goods, AJIL 108 (2014), 1 et seq. (2 et seq.); *P. Dumberry*, The Formation and Identification of Rules of Customary International Law in International Investment Law, 2016, 24 et seq.

[9] *R. Forst*, The Right to Justification, 2012, 20.

These sections are followed by a presentation of some points of legitimacy-based critique that custom has received in the academic discourse (section 3.). Thereafter, the second part begins by outlining the justice theory of the *Right to Justification* (section 1.). The next section then explores whether the *Right to Justification* is suitable for application to the source of customary international law (section 2.). After this assessment, the third section assesses whether the *Right to Justification* can answer certain criticisms of the legitimacy of customary international law (section 3.). Finally, the argument presents some concluding thoughts on the implications for the theory on the source of custom.

I. The Legitimacy of Customary International Law

Legitimacy is not a technical legal term known to positive international law.[10] Nonetheless, understanding this concept is important primarily for two reasons. For one thing, legitimacy may sometimes serve an implicit function within systems of law. In hard cases, for example, it can be a pertinent consideration when interpreting a given rule's object and purpose or when assessing the normative weight that should be attributed to a rule in a balancing exercise.[11] In this context, it may be one of the factors relevant for the determination of a given rule's content or for resolving norm conflicts.[12] Nevertheless, it is more common to use the concept of legitimacy as an analytical lens for looking at law from outside of the respective legal system. In this context, legitimacy seeks to assess whether and to what extent a moral obligation exists to submit to or support the respective system of law, the rules entailed therein, or specific actions and actors.[13] This is the second important reason and also the one this contribution will focus on.

[10] *A. Bianchi*, International Law Theories, 2016, 53.

[11] *S. R. Ratner,* The Thin Justice of International Law: A Moral Reckoning of the Law of Nations, 2015, 20 et seq.

[12] *H. L. A. Hart*, Positivism and the Separation of Law and Morals, Harv. L. Rev. 71 (1957), 593 et seq. (627 et seq.).

[13] *M. Kumm* (note 7), 908; *C. A. Thomas*, The Uses and Abuses of Legitimacy in International Law, Oxford J. Legal Stud. 34 (2014), 729 et seq. (738).

1. Normative and Sociological Legitimacy

Allen Buchanan has distinguished further between two kinds of legitimacy, namely legitimacy in a normative sense and legitimacy in a sociological sense.[14] Legitimacy in the normative sense is concerned with the question of whether persons or entities have the moral right to do what they do or what they are supposed to do.[15] Thus an institution, which is designed to rule "is legitimate in the normative sense if and only if it has *the right to rule*".[16] Conversely, in *Buchanan's* view, legitimacy in a sociological sense is concerned with the question whether someone is widely believed to have the right to do what this person does or is supposed to do.[17] This contribution will focus primarily on customary international law's moral *right to rule*, or its legitimacy in the normative sense, so to speak.

Yet the present author is not convinced that drawing a clear-cut distinction between legitimacy in the normative sense and legitimacy in the sociological sense is particularly helpful for understanding the moral authority of rules of international law, such as the ones derived from the source of customary international law. By denying that inter-subjectively shared beliefs have something to do with normative legitimacy, the concept becomes detached from the subjects who are addressed by the rules in question. But such a detachment weakens one of the functions of legitimacy commonly associated with legitimacy. The existence and extent of a moral obligation to submit to a rule can depend on a number of factors, which may individually or cumulatively enhance or reduce the legitimacy of a given norm. Thus for example, the procedure by which a rule emerges (procedural legitimacy), the aims it serves (substantive legitimacy), or the outcomes it produces (outcome legitimacy) may all have an impact on its legitimacy.[18] Against this background, the external analytical lens of legitimacy affords a useful tool for assessing the current state and potential flaws of a given legal order.[19] By the same token, it can provide a means for explaining or even solving potential tensions between positive law and morality on the one hand, and law

[14] *A. Buchanan* (note 6), 79; *J. Tasioulas*, The Legitimacy of International Law, 97 et seq., in: S. Besson/J. Tasioulas (note 6), 97 et seq.

[15] *A. Buchanan* (note 6), 79; *J. Tasioulas* (note 6); *J. d'Aspremont/E. De Brabandere*, The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise, Fordham Int'l L. J. 34 (2011), 190 et seq. (190); *C. A. Thomas* (note 13).

[16] *A. Buchanan* (note 6), 79.

[17] *A. Buchanan* (note 6), 79.

[18] *C. A. Thomas* (note 13), 749 et seq.

[19] *H. Krieger/G. Nolte* (note 1), 22.

and power on the other hand, both of which may induce contestations of existing positive legal rules or even of the legal order in entirety.[20] In this context, legitimacy is often associated with a compliance pull.[21] Due to the relative paucity of modes of compulsion, the international legal system requires also voluntary compliance in order to be effective.[22] When a rule of international law is perceived as legitimate, this can imply that it deserves voluntary compliance by those to whom it is addressed.[23] This function of legitimacy is especially useful in times of contestation and backlash, as the recognition of the legitimacy of legal rules may reduce the likelihood of contestations based on political or moral grounds.[24] The compliance-pull of legitimacy becomes less plausible, however, when the beliefs of the actors concerned are disregarded.

Moreover, the two meanings of legitimacy are not necessarily mutually exclusive.[25] In certain cases, the normative legitimacy of a rule can derive from its sociological legitimacy, even though this by itself may not be sufficient. Hence someone can have the right to rule, *inter alia*, because this person is widely believed to have the right to rule. We know examples of these kinds of cases from the debate on the democratic legitimacy of statutes at the domestic level.[26] Consequently, the better view is to treat sociological legitimacy as relevant, but not sufficient for explaining the normative force of legitimacy.[27]

This insight provides the background for the explanation why the requirement of generality of rules of customary international law is necessary for conferring legitimacy to the legal source of custom, but not sufficient without the additional criterion of reciprocity. This will be discussed in Part II. However, before the justice theory of the *Right to Justification* will be addressed, it is expedient to analyze first how the legitimacy of customary

---

20 *A. Hurrell*, On Global Order, 2007, 78 et seq.

21 *T. M. Franck*, Legitimacy in the International System, AJIL 82 (1988), 705 et seq. (712); *J. Brunnée/S. J. Toope*, Legitimacy and Legality in International Law, 2010, 53; *S. Besson*, State Consent and Disagreement in International Law-Making. Dissolving the Paradox, LJIL 29 (2016), 289 et seq. (301).

22 *T. M. Franck*, Fairness in International Law and Institutions, 1995, 26.

23 *T. M. Franck* (note 22).

24 *L. L. Fuller*, Positivism and Fidelity to Law – A Reply to Professor Hart, Harv. L. Rev. 71 (1957), 630 et seq. (642); *T. Nagel*, Equality and Partiality, 1991, 35.

25 *T. Marauhn*, The International Rule of Law in Light of Legitimacy Claims, 277 et seq., in: H. Krieger/G. Nolte/A. Zimmermann (note 1), 283.

26 *C. A. Thomas* (note 13), 744; *T. Marauhn* (note 25); see for example, *Jürgen Habermas'* democratic principle states that "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted" (*J. Habermas*, Between Facts and Norms, 1996, 110).

27 *A. Hurrell* (note 20), 78.

international law is conventionally explained (section 2.) and why this theory is often criticized (section 3.).

2. The Consent Rationale

The legitimacy of customary rules of international law is traditionally understood to derive primarily from the consent given by States.[28] This is a procedural legitimacy argument. The famous *Lotus* case of the Permanent Court of International Justice (PCIJ) is often adduced as evidence for this proposition.[29] In this case, the PCIJ held that:

> "International 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 and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[30]

According to this reasoning, the free will of States could either be expressed by usages, which suggests that it can also take a tacit form, or find expression in acceptance that the usages "express principles of law". Yet it is not clear from the wording in this passage whether the requirement of usages and the requirement of being generally accepted as expressing principles of law, represent two separate expressions of will, or whether they can be considered to reflect the will of States only when taken together. In any case, it should be emphasized that the PCIJ did not use the term consent in this passage. Only in the *Barcelona Traction* case, the ICJ introduced this term in its explanation of how rules of international law develop. There it proclaimed in the context of general international law[31] that: "Here, as elsewhere, a body of rules could only have developed with the consent of

[28] See (note 7).

[29] *C. A. Bradley/M. Gulati*, Withdrawing from International Custom, Yale L. J. 120 (2010), 202 et seq. (214) (note 45); *J. Klabbers*, International Legal Positivism and Constitutionalism, 264 et seq., in: J. Kammerhofer/J. d'Aspremont (eds.), International Legal Positivism in a Post-Modern World, 2014, 286; *S. Besson* (note 21), 290 et seq.; *N. Petersen*, The Role of Consent and Uncertainty in the Formation of Customary International Law, 111 et seq., in: B. D. Lepard (ed.), Reexamining Customary International Law, 2017, 113 et seq.

[30] *S. S. Lotus Case* (*France v. Turkey*), Judgment of 7.9.1927, Reports of the PCIJ, Series A–No. 10, 18, para. 44.

[31] In this contribution the term general international law is used in contradistinction to particular international law.

those concerned."[32] Intriguingly, the ICJ chose the formulation "with" the consent of those concerned. Thereby it left the question open what role exactly the condition of consent was supposed to play and what the consent has to be directed at. The only definite conclusion that can be drawn from the statement is that consent must be involved in some undefined capacity.

Moreover, since the case involved an investment law issue, the vague reference to "the consent of those concerned" raises the question whether also other subjects, such as individuals or international organizations, would have a say in the development of international law. However, in its *Military and Paramilitary Activities in and against Nicaragua* decision the ICJ ostensibly clarified in passing that the States concerned have to accept the respective rules of international law in one form or another:

> "[…] in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception."[33]

Due to the auxiliary verb "may" in connection with the acceptance, the claim that "in international law there are no rules, other than such rules as may be accepted by the State concerned" could mean pretty much anything, from express consent to a more general acceptability of the rule in question, or imputed consent. Especially when read against the background of the *Barcelona Traction* case, it remains theoretically possible that the consent of an international organization could express the member States' acceptance.[34] Accordingly, the remarks in the *Military and Paramilitary* decision are not much more conclusive than the statement in the *Barcelona Traction* case.

In summary, this cursory analysis of jurisprudence confirms that the will of States is involved in the development of custom. However, both the PCIJ and the ICJ have so far abstained from enunciating the function consent performs in this process and the kind of consent that is required for this purpose. Moreover, neither the PCIJ nor the ICJ have made any explicit references to the concept of legitimacy when describing how customary international law emanates from the free will of States. Hence it is not quite clear whether the two Courts actually sought to propose a legitimacy theory, or whether the statements were confined to an elaboration on the rea-

[32] *Barcelona Traction, Light and Power Company, Limited*, (*Belgium v. Spain*) ICJ Reports 1970, 49, para. 89.

[33] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ICJ Reports 1986, 135, para. 269.

[34] See also Conclusions on Identification of Customary International Law (note 4), Conclusion 4(2).

sons underlying the validity criteria for custom. This opens the door for alternative legitimacy narratives.

3. Criticisms of the Consent Rationale

Despite lacking any unequivocal confirmation of its validity through legal practice, the theory according to which the legitimacy of customary international law is derived from State consent has received much criticism. This section will therefore examine five of the arguments commonly raised in this connection.

a) The Sovereignty Paradox

One point of critique is concerned with the ostensible paradox that once a State has consented to a rule of customary international law, it can no longer unilaterally withdraw its consent. Thus it could be argued that a State can be bound even against its will.[35]

Georg Jellinek's so-called "*Lehre von den Staatenverbindungen*" (Theory of International Federation) offers a partial response to this argument. According to this theory, rules of international law are binding upon States due to their latent will to be acknowledged as equal members of the international legal community of sovereign States, which requires compliance with the legal obligations voluntarily assumed in this capacity.[36] In a world where no alternative to international cooperation exists, the legal rights and privileges attached to the status of being a sovereign State constitute an indispensible prerequisite for States to preserve their ability to act and shape their future. Thus on balance, the more general will to remain a member of the international community will in the vast majority of cases prevail over the more specific will to abrogate from a previously accepted rule.[37] Hence the argument compels us to differentiate between the will of States, within the

[35] *L. Le Fur*, Règles générales du droit de la paix, RdC 54 (1935), 1 et seq. (198); *A. A. D'Amato*, Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law, Va. J. Int'l L. 10 (1963), 1 et seq. (6); *M. Virally*, Panorama du droit international contemporain: cours général de droit international public, RdC 183 (1983), 9 et seq. (181 et seq.); *A. Pellet*, The Normative Dilemma: Will and Consent in International Law-Making, Austr. Yb. Int'l L. 12 (1989), 22 et seq. (38); *M. Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, 2005, 417.

[36] *G. Jellinek*, Die Lehre von den Staatenverbindungen, 1882, 93 et seq.

[37] *G. Jellinek* (note 36), 100.

meaning of what a State wishes in a world according to its liking, and the will expressed in the consent of a State in practical contexts. A State may very well want to abrogate an international legal rule and at the same time remain a member of the international community. But since it cannot have it both ways, it will either have to consent to upholding the rule or to defend its conduct by appealing to legal justifications.

Nonetheless, the argument stills needs to overcome two more hurdles. First, exercising pressure in order to extract consent can amount to duress when it is designated to impede the autonomy of the decision maker.[38] Thus it has to be shown that by making the recognition of a sovereign State conditional upon compliance with the accepted international legal obligations, the international legal community does not invalidate the consent. This is indeed the case, as it is not the international legal community but the State itself, which imposes this condition ("*Selbstverpflichtung*"). By denying that it had to comply with the international legal rules it has accepted, a State would also deny other States bound by these rules the legal rights and privileges that come with the status of being equal members of the international legal community of sovereign States. But by denying that these rights were bestowed on States by virtue of their legal status, a State would also deny its own rights attached to this status. Thus non-compliance would run afoul of a State's will to be acknowledged as an equal member of the legal community with the indispensible rights and privileges that come with this status.[39] Second, it has been argued that since it is possible to consent to morally wrong actions and norms, consent alone is insufficient for conveying legitimacy to legal rules, unless the rules in question satisfy an independent test of legitimacy and respect the autonomy of the subjects.[40] For this reason, an additional ground for the legitimacy of customary rules is called for.

b) The Critical Theory Challenge

Another argument challenges the consent rationale from a critical theory perspective. It has been maintained that the substantive contents of customary rules reflect existing power imbalances, as courts and academics tend to

[38] *J. Raz*, The Morality of Freedom, 1986, 88 et seq.; *A. Buchanan* (note 6), 91.

[39] The argument may be based on a fiction, but still no State has so far dared to declare that it was not bound by international law (see *R. P. Anand*, Sovereign Equality of States in International Law, RdC 197 [1986], 9 et seq. [36]; *C. Tomuschat*, Obligations Arising for States Without or Against Their Will, RdC 241 [1993], 195 et seq. [306]).

[40] *S. Besson* (note 21), 300.

ignore less powerful voices and States in the process of rule formation.[41] Publicity and availability of evidence for customary rules, lack of foreign language skills on part of the decision makers, or limited resources can amplify such biases.[42] Yet when interpretative authorities neglect relevant practice and *opinio juris*, consent as a legitimacy-conferring factor, becomes but a fiction. To the extent, however, that this criticism takes issue only with the way rules of customary international law are frequently ascertained on the basis of insufficient evidence, this aspect poses primarily a problem of correct application. Yet such a problem can hardly be alleviated on a theoretical level. Suffice to say that much more has to be done in order to make the evidence of custom more readily available and to curtail the impact of power on the formation of customary rules – a task that practitioners take seriously.[43] But academics can also discharge their duties by drawing attention to relevant practices and by elucidating the associated implications for the subjects concerned. Nevertheless, two aspects entailed in the critical theory challenge warrant a closer look for the purpose of the current contribution. These are addressed immediately below.

c) General Recognition

One of these aspects is reflected in the criticism that international law does not require the participation of all States for a general rule of customary international law to crystallize.[44] As the ICJ observed in its *North Sea Continental Shelf* judgment:

---

[41] *J. P. Kelly*, The Twilight of Customary International Law, Va. J. Int'l L. 40 (2000), 449 et seq. (517 et seq., 526 et seq.); *A. Roberts*, Traditional and Modern Approaches to Customary International Law: A Reconciliation, AJIL 95 (2001), 757 et seq. (767 et seq.); *G. R. B. Galindo/C. Yip*, Customary International Law and the Third World: Do Not Step on the Grass, Chinese Journal of International Law 16 (2017), 251 et seq.; *O. Yasuaki*, International Law in a Transcivilizational World, 2017, 157 et seq.; *B. S. Chimni*, Customary International Law: A Third World Perspective, AJIL 112 (2018), 1 et seq. (20 et seq.).

[42] *G. R. B. Galindo/C. Yip* (note 41), 259 et seq.; *B. S. Chimni* (note 41).

[43] See for example the Memorandum prepared by the Secretariat of the ILC, in: ILC, Identification of Customary International Law: Ways and Means for Making the Evidence of Customary International Law More Readily Available, A/CN.4/710/Rev.1, 14.2.2019; *G. Nolte*, How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018), Japanese Yearbook of International Law 62 (2019), 6 et seq., 18 et seq.

[44] *A. A. D'Amato* (note 35), 3; *A. T. Guzman*, Saving Customary International Law, Mich. J. Int'l L. 27 (2005), 115 et seq. (142 et seq.); *M. Koskenniemi* (note 35), 417; *N. Krisch* (note 8), 36; *O. Yasuaki* (note 41), 157 et seq.

> "State practice, including that of States whose interests are specially affected, should have been both extensive and *virtually* uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a *general* recognition that a rule of law or legal obligation is involved." [emphasis added][45]

Since the practice only needs to be virtually uniform and the recognition only general, it could be argued that custom binds States that have not consented to the rule in question. This is not to say that the will of States was irrelevant. The persistent objector rule stipulates that where a State has objected to a rule of customary international law, while that rule was in the process of formation, the rule cannot be invoked against the State for so long as it maintains its objection.[46] By virtue of the possibility to object, a failure to oppose an emerging rule could be understood as acquiescence or implicit consent.[47] As *Liam Murphy* has argued:

> "Despite the fact that objecting is no doubt onerous, to infer implicit consent from the failure to object is hardly absurd in the context of the relations among states, not to be compared to Locke's idea that my presence on the king's highway counts as implicit consent."[48]

Nevertheless, it could reasonably be demurred that not to object is something conceptually different than to consent.[49]

d) New States

The second aspect entailed in the critical theory takes issue with custom binding States that did not exist at the time when the rules in question were emerging.[50] Thus new States can be said to have been denied the opportunity to object to particular rules of customary international law in conformity

---

[45] *North Sea Continental Shelf*, ICJ Reports 1969, 44, para. 74.

[46] Conclusions on Identification of Customary International Law (note 4), Conclusion 15.

[47] *J.-A. Carrillo-Salcedo*, Droit international et souveraineté des états, RdC 257 (1996), 35 et seq. (92 et seq.).

[48] *L. Murphy*, What Makes Law, 2014, 175.

[49] *R. Kolb*, Selected Problems in the Theory of Customary International Law, NILR 50 (2003), 119 et seq. (144).

[50] *J. P. Kelly* (note 41), 523 et seq.; *A. A. D'Amato* (note 35), 4 et seq.; *A. T. Guzman* (note 44), 172 et seq.; *M. Koskenniemi* (note 35), 312 et seq.

with the persistent objector rule.[51] Admittedly, this interpretation of the law is not undisputed. In his separate opinion in the *North Sea Continental Shelf* cases Judge *Ammoun* expressed the view that

> "[…] the right of countries becoming independent, which have not participated in the formation of rules which they consider incompatible with the new state of affairs, is preserved"

under international law.[52] Yet international law has so far not recognized a right for new States to object to pre-existing rules of customary international law.[53] Accordingly consent cannot explain the legitimacy of customary rules in respect to new States.

e) The *Opinio Juris*-Paradox

The last point of critique addressed here is based on transparency. For a customary rule to crystallize the relevant practice it must be accepted as law (*opinio juris*), meaning that it must be undertaken with a sense of legal right or obligation. Only then custom can be distinguished from mere usage or habits.[54] In its *North Sea Continental Shelf* judgment, the ICJ has described what it understands by this requirement, when observing 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 obligation."[55]

Descriptions like this have led to the assertion of the so-called *opinio juris*-paradox. The requirement of *opinio juris* ostensibly demands that at the beginning of the process a considerable number of States feel that they are

---

[51] *A. Buchanan* (note 6), 92; *G. R. B. Galindo/C. Yip* (note 41), 254. For the recognition of the persistent objector rule by the ICJ, see *Fisheries* case (*United Kingdom v. Norway*), ICJ Reports 1951, 138.

[52] *North Sea Continental Shelf* (note 45), Separate Opinion of Judge *Fouad Ammoun*, 131, para. 31.

[53] See *H. Thirlway*, The Sources of International Law, 2014, 54; *M. Wood*, Third Report on Identification of Customary International Law (A/CN.4/682), 27.3.2015, 65; *J. A. Green*, The Persistent Objector Rule in International Law, 2016, 173 et seq.

[54] Conclusions on Identification of Customary International Law (note 4), Conclusion 9.

[55] *North Sea Continental Shelf* (note 45), 45, para. 77; *Military and Paramilitary Activities* (note 33), 109, para. 207.

conforming to what amounts to a legal obligation, even though no such rule exists *de lege lata* at this time.[56] Yet erroneous beliefs are difficult to reconcile with genuine consent.

One way of circumventing the problem is to equate the requirement of *opinio juris* with consent.[57] Accordingly, States would not have to feel that they are conforming to what amounts to a legal obligation, but they only have to consent to what in their estimation ought to become a legal obligation. Yet the question remains what it is then that gives custom the character of law and makes it distinguishable from mere usages and habits that States accept otherwise, if it is not the recognition of States that the requirements of custom have been fulfilled.[58] A way around this dilemma is to acknowledge that the requirement of *opinio juris* presupposes two distinct normative statements: i) consent, which conveys an acceptance of what should amount to a legal obligation (the ought), and ii) a recognition that the requirements for the rule to become law have been fulfilled (the is), which can also be expressed at a later point in time.[59] Understood this way, the *opinio juris*-paradox does not pose much of a problem for the legitimacy of custom.

II. The *Right to Justification*

To the extent, however, that the sovereignty paradox, the sufficiency of general recognition and the inapplicability of the persistent objector rule in respect to new States pose a challenge to the legitimacy of rules of customary international law, the source appears in need of a legitimacy theory capable of explaining the way custom is dealing with these cases. A candidate

[56] *H. Kelsen*, Théorie du droit international coutumier, Revue Internationale de la Théorie du Droit 1 (1939), 253 et seq. (263 et seq.); *J. A. Barberis*, Réflexions sur la coutume internationale, A.F.D.I. 36 (1990), 9 et seq. (26 et seq.); *S. Yee*, The News That Opinio Juris Is Not Necessary Element of Customary [International] Law Is Greatly Exaggerated, GYIL 43 (2000), 227 et seq.; *J. Kammerhofer*, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, EJIL 15 (2004), 523 et seq. (533 et seq.).

[57] *O. Elias*, The Nature of the Subjective Element in Customary International Law, ICLQ 44 (1995), 501 et seq.; *O. Sender/M. Wood*, A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law, Isr. L.R. 50 (2017), 299 et seq. (301).

[58] *S. Yee* (note 56), 233; *J. Kammerhofer* (note 56), 535.

[59] *J. Finnis*, Natural Law & Natural Rights, 2nd ed. 2011, 238 et seq.; *J. Tasioulas,* Opinio Juris and the Genesis of Custom: A Solution to the Paradox, Austr. Yb. Int'l Law 26 (2007), 199 et seq.

for such a theory is the *Right to Justification*, which the political philosopher *Forst* has developed. In order to assess the cogency of this proposition, this part will first present the justice theory following from the *Right to Justification* (section 1.). As a next step, it will explore whether customary international law meets the requirements that the *Right to Justification* postulates (section 2.). Finally, it will be assessed whether the *Right to Justification* is better equipped for explaining the way custom deals with those cases, where the consent rationale has been subjected to critique (section 3.).

1. The *Right to Justification* in Political Philosophy

Forst's justice theory of a *Right to Justification* represents an interpretation of *Immanuel Kant's* second formulation of the categorical imperative,[60] which is often associated with "contractualism",[61] "possible consent"[62] or "quasi-voluntariness which legitimacy aims at".[63] As rational and in this sense also autonomous beings, individuals possess a unique dignity. This dignity demands that human beings should treat other human beings always as ends in themselves and not merely as means for the discretionary use of others.[64] Accordingly, the categorical imperative demands that you should "*act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means*".[65] On this basis, *Forst* interprets the categorical imperative as formulating an essential demand of justice, namely opposition to arbitrary rule, which he defines as rule that arises from domination of other human beings, while lacking legitimate grounds.[66] Human beings subjected to domination without being provided with sufficiently legitimate grounds are being treated merely as means. His theory is therefore concerned with the identification of those grounds, which cannot be reasonably rejected by the affected human beings and hence, may legitimize the exercise of power. Such grounds could then justify acceptable categorically binding norms of a morally un-

60 *R. Forst* (note 9), 2, 21, 37, 43, 67.
61 *T. M. Scanlon*, Contractualism and Utilitarianism, 103 et seq., in: A. Sen/B. Williams (eds.), Utilitarianism and Beyond, 1982.
62 *O. O'Neill*, Between Consenting Adults, Philosophy & Public Affairs 14 (1985), 252 et seq. (260 et seq.).
63 *T. Nagel* (note 24), 37.
64 *I. Kant*, Groundwork of the Metaphysics of Morals, 2012, 41, 4:429.
65 *I. Kant* (note 64), 40, 4:428.
66 *R. Forst* (note 9), 2; *R. Forst*, Normativity and Power, 2017, 51.

conditional character – even in cases of actual dissent.[67] For this purpose, the so-called *Right to Justification* formulates two requirements for the legitimacy of norms and actions.

The first requirement is reciprocity. Being moral requires one to cognize the human dignity in the other human being. By cognizing the other human being as a rational and autonomous being, a person is also re-cognizing its own dignity as a human being. As rational and autonomous beings, human beings are on an equal footing.[68] Yet when interfering with the autonomy of another human being, one does not treat the other as an equal, but merely as a means for one's own purposes. Hence the recognition as rational and autonomous persons culminates in a responsibility to the other human being: "Their 'face' […] is what calls one to an awareness of the duty to justify, the duty one 'has' as a moral person, and thus, as a human being."[69] Therefore, norms and actions affecting other autonomous and moral persons require a justification, so that the affected others can find the norms and actions acceptable and do not perceive them as an interference with their autonomy. On this basis, the requirement of reciprocity demands that in justifying a norm, one cannot raise any specific claims while rejecting like claims of others (reciprocity of contents). In doing so, one cannot simply assume that others share one's perspectives, evaluations, convictions, interests or needs (reciprocity of reasons).[70] By this means, the requirement of reciprocity underscores the equal status of, and the imperative of concrete respect for, human beings as moral persons.[71]

The second requirement is generality, which prevents the marginalization of certain persons or groups who are affected by the respective norm.[72] The determination of whether a person is treating another human being also as an end requires a moral authority to which the acting person owes moral action and responsibility. The natural candidates for such an authority are all affected human beings.[73] This follows from the idea that one is recognizing oneself "as a human being among human beings that are on an equal footing", all of which possess the dignity of rational and autonomous human beings.[74] Consequently, the community of all human beings represents

67 *R. Forst* (note 9), 21.
68 *R. Forst* (note 9), 37 et seq., 54 et seq.
69 *R. Forst* (note 9), 36, 59.
70 *R. Forst* (note 9), 6, 49, 214.
71 *R. Forst* (note 9), 20.
72 *R. Forst* (note 9), 20.
73 *R. Forst* (note 9), 54.
74 *R. Forst* (note 9), 37.

the relevant authority for the justification of categorically binding norms.[75] The acceptability of a norm is hence constituted by the inter-subjectively, discursively redeemable generality created by the involvement of all affected human beings.[76] To this effect, generality demands that the objections of any person that is affected cannot be disregarded[77] and that the reasons adduced in support of a norm must be capable of being shared by all persons.[78] In this way, a generally and reciprocally justified claim becomes a moral, "universalizable" claim.[79] The requirement of generality thus makes it possible to distinguish between solely ethical justifications, which are justifications of values and ideals regarding the good life for oneself or a particular community, and moral justification, which are justifications of categorically binding norms valid for all morally affected human beings.[80]

When a norm does not conform to the criteria of reciprocity and generality, it cannot be imposed onto others, as long as the affected human beings have not consented to the rule in question.[81] Accordingly, the exercise of the *Right to Justification* amounts to a veto right against norms that cannot be reciprocally and generally justified. Yet this veto right also needs to observe the requirements of reciprocity and generality.[82] But if a norm meets the criteria of reciprocity and generality and cannot be reasonably rejected by reciprocal and general reasons, the rule can be said to be categorically binding.[83] The norm is acceptable in the sense that it cannot be reasonably rejected.

2. The *Right to Justification* as Expressed in Customary International Law

Evidence for the proposition that the *Right to Justification* could be used as a legitimacy narrative for the source of custom can be found in the extra-judicial writings of two former ICJ judges. *Christopher Weeramantry* has

75 *R. Forst* (note 9), 19, 38.
76 *R. Forst*, Contexts of Justice, 2002, 38.
77 *R. Forst* (note 9), 49, 214.
78 *R. Forst* (note 9), 6, 49, 214.
79 *R. Forst* (note 9), 20; see also *Kant's* first formulation of the categorical imperative: "*so act as if the maxim of your action where to become by your will a universal law of nature*" (*I. Kant* [note 64], 34, 4:421).
80 *R. Forst* (note 9), 15 et seq.
81 *R. Forst* (note 76), 39.
82 *R. Forst* (note 9), 214.
83 *R. Forst* (note 9), 21.

suggested that the irresistible logic of the categorical imperative dictates a similar rule for States,[84] and *Hermann Mosler* found an international legal community only conceivable, if:

> "a certain number of independent societies organised on a territorial basis exist side by side, and the psychological element in the form of a general conviction that all these units are partners mutually bound by *reciprocal, generally applicable*, rules granting rights, imposing obligations and distributing competences." [emphasis added][85]

The latter thereby implied that the legitimacy of general international law presupposed the concept of sovereign equality of States and that the rules applicable between States had to fulfil the criteria of reciprocity and generality. These statements warrant an inquiry into whether the *Right to Justification* finds expression in international law. Such an inquiry presupposes that the rules of customary international law display the criteria of reciprocity (a) and generality (b) and most importantly, that the *Right to Justification* can be applied to the relations between States (c).

a) The Reciprocity of Rules of Customary International Law

In its different variations, the concept of reciprocity can be found in most cultures and religions of the world in the form of the so-called "Golden Rule" (*Quod tibi fieri non vis, alteri ne feceris*),[86] which although not identical with the categorical imperative, shows some resemblance.[87] Against this background, *Robert Kolb* has noted that the moral reciprocity of norms of international law culminates in *Kant's* categorical imperative.[88] This may be one of the reasons why many commentators have identified expectations of

---

[84] *C. G. Weeramantry*, Universalising International Law, 2004, 124; see also *P. G. Staubach*, The Rule of Unwritten International Law, 2018, 204, who confines this proposition to customary international law.

[85] *H. Mosler*, The International Society as a Legal Community, 1980, 2.

[86] *Mahābhārata*, XIII, 5571 et seq., in: J. Muir, Religious and Moral Sentiments, 1875, 107; *Confucius,* Confucian Analects, XV, 23 in: J. Legge, The Four Books: Confucian Analects, the Great Learning, the Doctrine of the Mean, and the Works of Mencius, 229; *Tobit* 4:15; *Matthew* 7:8; *Luke* 6:31; *J. Parrott*, Al-Ghazali and the Golden Rule: Ethics of Reciprocity in the Works of a Muslim Sage, Journal of Religious & Theological Information 16 (2017), 68 et seq.; *R. Kolb*, Theory of International Law, 2016, 406.

[87] *Kant* himself criticized the "Golden Rule" for neither including duties for oneself, nor duties of love. What is more, he found it also insufficient for explaining the duties owed to others (*I. Kant* [note 64], 42).

[88] *R. Kolb* (note 86), 402 et seq.

reciprocity to be a fundamental concept underlying customary international law.[89]

On the one hand, rules of customary international law need to be acceptable for the States concerned. A custom will most likely emerge only when the rule in question conforms to the convictions, interests and needs of the society of States.[90] For this purpose, it will usually be justified in accordance with the requirement of reciprocity of reasons. Expectations of reciprocity therefore facilitate the acceptance of the respective claims, especially by those States that find themselves in similar situations.[91]

On the other hand, expectations of reciprocity tend to exert a tempering effect on the legal claims put forward by those States that initiate the lawmaking process.[92] States have to expect that other States will make similar claims in comparable situations – potentially in a way detrimental to the interest of those States that proposed the rule in question in the first place.[93] In doing so, expectations of reciprocity shape the content of rules of customary international law.[94] The tempering effect of considerations of reciprocity in the formation of custom reflects *Forst's* notion of reciprocity of contents. It follows from the insight that a State cannot raise any specific claims while rejecting like claims of other States. As *Michel Virally* famously stated:

> "C'est parce qu'il s'attend à être traité comme il a été traité lui-même, et ne saurait protester contre un tel traitement sans se mettre en contradiction avec lui-même, que l'Etat est amené, dans beaucoup de cas, à apporter une certaine retenue dans ses relations extérieures, ce qui lui permet de réclamer une retenue réciproque de la part des Etats étrangers."[95]

---

89 *M. Virally*, La réciprocité: principe général du droit international?, RdC 122 (1967), 1 et seq. (51); *F. Parsi/N. Ghei*, The Role of Reciprocity in International Law, Cornell Int'l L. J. 36 (2003), 93 et seq. (120 et seq.).

90 *M. E. Villiger*, Customary International Law and Treaties, 1985, 38.

91 *B. Simma*, Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts, 1970; *B. Simma*, Reciprocity, MPEPIL (2008), margin number 3; *M. Byers*, Custom, Power and the Power of Rules, 1999, 90 et seq.

92 *B. Simma* (note 91); *M. Byers* (note 91).

93 *B. Simma* (note 91); *M. Byers* (note 91).

94 *B. Simma* (note 91); *M. Byers* (note 91).

95 *M. Virally* (note 89); 48 et seq.

b) The Generality of Rules of Customary International Law

According to the *Right to Justification*, the community of justification must include all those affected by the norm, while the reciprocal claims, which are conducive to the formation of custom, must be capable of being shared by all subjects for whom the respective norms claim to be valid.

In respect to the first condition, it follows from the sovereign equality of States that all States participate as equals in the formative process of customary law.[96] The persistent objector rule then ensures that the objections of any State that is affected by the customary rule cannot be disregarded.[97]

In respect to the second criterion, the ILC has confirmed that for a customary rule to emerge the required "practice must be general".[98] Similarly, the ICJ found it to constitute an indispensable requirement for the formation of custom that State practice should have been both extensive as well as virtually uniform, and "should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[99] The necessary minimum threshold of general acceptance is reached only when all major groups of States have, through their practice, shown that a given pattern of conduct encapsulates an equitable balance of interests, capable of being shared by all subjects.[100] Since every State has also the opportunity to participate in the formation of customary international law, *Terry Nardin* considered custom to define and perpetuate common moral standards of international conduct.[101] Hence it does not come as a surprise that *Andreas Paulus* found himself in a position to note that:

> "It is this reciprocal process – namely the formulation of a balanced and generally acceptable regime and its acceptance by other States – that characterizes successful customary law-making."[102]

---

96 *M. E. Villiger* (note 90), 39; *M. Byers* (note 91), 36, 75; *L. R. Helfer/I. B. Wuerth*, Customary International Law: An Instrument Choice Perspective, Mich. J. Int'l L. 37 (2016), 563 et seq. (569).

97 Conclusions on Identification of Customary International Law (note 4), Conclusion 15.

98 Conclusions on Identification of Customary International Law (note 4), Conclusion 8.

99 *North Sea Continental Shelf* (note 45).

100 *C. Tomuschat* (note 39), 291.

101 *T. Nardin*, Law, Morality and the Relations of States, 1983, 308.

102 *A. Paulus*, Reciprocity Revisited, 113, in: U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), From Bilateralism to Community Interest, Essays in Honour of Bruno Simma, 2011, 119.

c) The Application of the *Right to Justification* to Inter-State Relations

Since customary international law displays the requirements of reciprocity and generality, the question can be pursued whether it is possible to apply the reasoning behind the *Right to Justification* to States. For this purpose, there are two options that could be explored. The first option consists in a translation of the justice theory to States by way of an analogy. If by reasons of their sovereignty States possessed a moral autonomy sufficiently comparable to the moral autonomy of human beings, the *Right to Justification* could be applied to norms and actions at the international level as well. The second option, in contrast, entails a bottom-up approach that explains the *Right to Justification* in inter-State relations by drawing inferences from the moral autonomy of human beings at the domestic level.

The first option faces a major difficulty, however. Due to the *Kantian* premise, *Forst* has deduced that

> "morality remains a specifically human institution that is founded on the practice of human beings mutually according each other the status of moral persons".[103]

This theoretical foundation militates against the reasoning by analogy. Moreover, in the context of the international rule of law, *Jeremy Waldron* has rejected the proposition that States could possess sufficient moral autonomy to justify the application of the categorical imperative at the international level. In his view, absence of regulations represented an opportunity for the individual autonomy of human beings. Yet a comparable autonomy for States did not represent a moral value, but a defect of the legal system, as such freedom of action posed the risk of States abusing it to the detriment of individuals. Consequently, *Waldron* has come to the conclusion that States were "not ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves". In this view, States are nothing more than "trustees for the people committed to their care."[104]

Jürgen Neyer has come up with a similar line of reasoning in the context of the European Union (EU). Yet in contrast to *Waldron*, he thought it justified to apply the *Right to Justification* to the relations between States. Since in his opinion it is practically impossible to involve all affected individuals in the process of rule formation at the international level, States must act as guardians or trustees of their citizens' *Right to Justification*. In

---

103 *R. Forst* (note 9), 261.

104 *J. Waldron*, Are Sovereigns Entitled to the Benefit of the International Rule of Law?, EJIL 22 (2011), 315 et seq. (325).

the EU, this task is delegated to States through the process of domestic democratic elections.[105] Yet although the argument of democratic delegation has certainly merit for a number of instances, it is not a moral argument that could explain whether, and if yes why, all States – including undemocratic ones – ought to be treated as moral persons.

For the sake of completeness, it should be noted that several theories exist explaining why at least many States could be considered to be moral persons – although not the same sort of moral persons that human beings are.[106] Examples include the proposition mentioned above that many States legitimately represent the interests or wills of their respective peoples.[107] Other theories build on the communitarian argument that States are vessels in which individual identity is created.[108] Still others submit that an international legal system consisting of States is in fact the next best available structure for the purpose of advancing individual welfare.[109] Although none of these theories could justify a moral autonomy of States in all events, they nevertheless make a *prima facie* case for a State system in international law on grounds of individual autonomy. On this account, States appear to be capable of complementing the autonomy of human beings – a consideration that is implicit in the second option of justifying the application of the *Right to Justification* in the relations between States. To this *Mathias Risse's* epistemic argument should be added, according to which to the best of our understanding there is no alternative global political system with moral or prudential advantages outweighing those of an international system consisting of States.[110]

Be this as it may, *Forst* has not pursued the path of arguing that States possessed a moral autonomy analogous to the one of human beings. Instead he explained the application of the *Right to Justification* in inter-State relations by means of the necessity to protect the autonomy of human beings at the domestic level. In his view, the primary context of justice where the *Right to Justification* is to be applied remains the domestic context. It is this context in which human beings are primarily subjected to immediate legal and political authority and power.[111] But unjust relations towards other States or obstructions ensuing from the international system may impede

105 *J. Neyer*, The Justification of Europe: A Political Theory of Supranational Integration, 2012, 110.
106 *S. R. Ratner* (note 11), 85 et seq.
107 *S. R. Ratner* (note 11), 85 et seq.
108 *S. R. Ratner* (note 11), 85 et seq.
109 *S. R. Ratner* (note 11), 85 et seq.
110 *M. Risse*, On Global Justice, 2012, 324; *S. R. Ratner* (note 11), 85 et seq.
111 *R. Forst* (note 9), 261 et seq.

the individuals' exercise of the *Right to justification* at the domestic level.[112] For this reason, *Forst* has proposed an international structure of participation for the justification and adoption of binding international rules, which is based on the principles of political autonomy and equality of human beings. To this end, the *Right to Justification* is supposed to effectuate this structure. In order to counterbalance asymmetries between stronger and weaker States and to inhibit external domination, it must apply in the relations between States as well.[113]

Understood this way, *Forst's* argument resembles *John Tasioulas'* proposition that the principle of collective self-determination could justify State sovereignty, since

> "the primary responsibility for bringing about the democratic reforms necessary for that value to be adequately realized falls on the members of the society in question",

while

> "intervention by external agents except in extreme cases is likely to be either counter-productive or to have destabilizing consequences for the global state system."[114]

Against this backdrop, the law-creating capacity of States could then be deduced from *John Rawl's* pledge for liberal tolerance at the international level: confidence in the ideals of constitutional liberal democratic thoughts and the importance of preserving sufficient room for a people's self-determination call for maintaining mutual respect among peoples and the recognition of "non-liberal societies as equal participating members" in the international arena.[115]

This line of reasoning is for the most part reflected in international law. The idea of a self-determined autonomy of the peoples is deeply engraved in the modern United Nations Charter (UN Charter) system of international law. The principle of self-determination of peoples has been enshrined in the UN Charter and reaffirmed by the General Assembly in resolution 2625 (XXV), as well as in common Art. 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The latter treaties impose upon States parties the obligation to respect and to promote the realization of the right to self-

112 *R. Forst* (note 9), 263.
113 *R. Forst*, Normativity and Power (note 66), 167.
114 *J. Tasioulas*, Human Rights, Legitimacy, and International Law, Am. J. Juris 58 (2013), 1 et seq. (20 et seq.); *S. Besson* (note 21), 306.
115 *J. Rawls*, The Law of Peoples, 1999, 59 et seq. (122 et seq.).

determination in conformity with the provisions of the UN Charter.[116] By virtue of this fundamental human right all peoples may freely determine their political status and pursue their economic, social and cultural development.[117] In the case of *Western Sahara*, the application of the principle to self-determination even required the free and genuine expression of the will of the peoples concerned.[118] In addition, the arbitral tribunal in the *Norwegian Shipowners' Claims* case has proclaimed that both international law and international justice were based upon the principle of equality between States.[119] As a corollary of the principle of sovereign equality of States, the ICJ has recognized the principle of non-intervention as part and parcel of customary international law, which involves the right of every sovereign State to conduct its affairs without outside interference.[120] This principle has been described as "the favourite norm of the weak and the small, an expression of their equality as well as a safeguard of their independence and autonomy".[121]

But *Forst* appears to have more than this in mind. In order to protect the individuals' autonomy from oppression by their respective States, he advocates an – albeit more restricted – role for non-State actors, such as domestic opposition groups, in the law creation process at the international level.[122] This postulation, however, is difficult to reconcile with the current state of international law. Certainly, international law does accord individuals a limited capacity to participate in the norm creation process at the international level.[123] In general international law, for example, certain specific individuals may participate in the construction of international legal rules directly, such as in the case of subsidiary means for the determination of rules of international law (Art. 38 para. 1 lit. d ICJ Statute). Many more may participate indirectly, as for instance via the creation of norms in the domestic legal or-

116 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 171 et seq., para. 88.

117 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25.2.2019, paras. 144-152, available at <https://www.icj-cij.org>.

118 *Western Sahara*, ICJ Reports 1975, 32, para. 55.

119 Permanent Court of Arbitration, *Norwegian Shipowners' Claims (Norway v. USA)*, Award, 13.10.1922, Reports of International Arbitral Awards Vol. I, 307 et seq. (338).

120 *Military and Paramilitary Activities* (note 33), 106, para. 202.

121 *L. Henkin*, International Law: Politics, Values and Functions, RdC 216 (1989), 9 et seq. (143).

122 *R. Forst*, Normativity and Power (note 66), 167; see also *M. Zürn*, A Theory of Global Governance, 2018, 30 et seq.

123 For an extensive study on this question, see *A. Peters*, Beyond Human Rights: The Legal Status of the Individual in International Law, 2016.

ders eventuating in general principles of international law.[124] Yet more extensive opportunities for participation are almost exclusively left to the constitutive rules of specific regimes or international organizations. Examples include, *inter alia*, the involvement of employers and workers in the Governing Body of the International Labour Organization (ILO) (Art. 7 ILO Constitution) or the representation of the citizens in the European Parliament (Art. 10 para. 2 and Art. 14 Treaty on the European Union).

One of the reasons why in many cases general international law assigns the stipulation of rules regarding the involvement of non-State actors to specific regimes is that the inclusion of individuals poses the risk of reinforcing power imbalances among individuals and arbitrary domination by privileged non-State actors. As a matter of practicality, not all human beings can be involved in the norm creation process at the international level. This raises the question which individuals should be permitted to participate in order to represent the respective civil societies. Those private actors, who have the means and influence to shape international norms, are not necessarily the ones who are willing and able to represent the concerns of their fellow citizens. Therefore, it is necessary to stipulate particular procedures for selecting these individuals who possess the legitimacy for representing the affected communities for the relevant purposes, which will often require a context sensitive approach.

This being said, customary international law does not seem to be a particularly suitable source for the involvement of individuals. This is neither to downplay the relevance of customary international human rights law nor to dispute the common phenomenon that human rights standards originally introduced to the international realm by other sources can subsequently evolve into rules of customary law. The point is rather that the autonomy of individuals – who are not simultaneously State officials – will rarely be directly affected by rules originating from the source of custom. The main reason is that an element of reciprocal State interaction is intrinsic to State practice leading to customary rules.[125] A State interfering with the autonomy of individuals under its jurisdiction will scarcely have to rely on a permissive rule of international law for doing so. With the exception of interna-

[124] See the inference of human rights from the domestic legal orders of the Member States in the case law of the Court of Justice of the European Union since ECJ Case C-29/69 ECR 1969, 419 margin number 7 – *Erich Stauder v. City of Ulm – Sozialamt*.

[125] *B. Simma/P. Alston*, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, The Normative Dilemma: Will and Consent in International Law-Making, Austr. Yb. Int'l L. 12 (1989), 82 et seq. (99); *T. Kleinlein*, Customary International Law and General Principles: Rethinking Their Relationship, 131 et seq. (158), in: B. D. Lepard (note 29), 151.

tional criminal law, a rule of customary international law will in most cases affect an individual's autonomy only indirectly.[126] Usually such indirect restrictions of autonomy will then result from the rule's implementation into the domestic legal order, its invocation by the individual's State, or follow from the rule's detrimental impacts on the States in question, which may have repercussions on individuals.[127] But such scenarios point to a lack of accountability of the respective State organs and insufficient involvement of individuals at the domestic level, rather than to a systematic flaw in the international legal order.[128] To the contrary, international law seeks to militate against such scenarios. In order to protect individuals from arbitrary interference, international human rights standards seek to hold States accountable.[129] In extreme cases, the UN Security Council may even get involved pursuant to Chapters VI and VII of the UN Charter.[130]

If this analysis is found to be convincing, then it should provide credibility to the assertion that *Right to Justification* is already inherent to the procedure leading to rules of customary international law and potentially, to international law in general.[131]

3. Advantages of the *Right to Justification*

But is there anything to gain from using the *Right to Justification* as a legitimacy theory for customary international law? The litmus test is whether

126 *A. Peters* (note 123), 71, 113 et seq.

127 *S. Besson*, Sovereignty, International Law and Democracy, EJIL 22 (2011), 373 et seq. (378).

128 *J. Tasioulas* (note 114).

129 *C. Tomuschat*, Grundpflichten des Individuums nach Völkerrecht, AVR 21 (1983), 289 et seq. (307).

130 UN General Assembly Res. A/RES/60/1, 2005 World Summit Outcome, paras. 38-40.

131 The extension of the argument to international law in general would not only require demonstrating that the rules of customary international law represent reciprocally and generally acceptable norms applicable between States, but also that the source of general principles protects these norms, which are reciprocally applicable (e.g. at the domestic level), but generally recognized around the world. According to the logic of this argument, there would still remain space for particular international law applicable only among certain States. This particular international law could include, for instance, the rules deriving from regional custom (see Conclusions on Identification of Customary International Law [note 4], Conclusion 16) or non-universal treaties. In the terminology of *Forst*, the particular international legal rules would then represent ethical values and ideals, which the States in question consider to be furthering their conceptions of the ethical good, and which are therefore worthy of legal protection in the respective contexts of justice. Such a comprehensive argument is, however, beyond the scope of this paper.

it is capable of providing additional explanations for those cases where the legitimacy of customary international law has been criticized (Part I section 3), without however undermining the established solutions offered by the consent theory.

To this end, it has been demonstrated in section 2 of this Part that the *Right to Justification* is capable of providing an additional legitimacy theory for the source of customary international law that also respects the autonomy of human beings. Thus it can be adduced in order to explain why the consent to uphold an accepted rule of customary international law is not unjust. The theory therefore helps to solve the sovereignty paradox.

Moreover, the *Right to Justification* can aid critical theories in detecting arbitrary rule that lacks legitimate grounds. *Forst's* justice theory does not only constitute a principle of autonomy, but also a principle of critique. It empowers its subjects to demand justifications for rules and actions and fosters participation in the creation of legal rules in compliance with the criteria of reciprocity and generality.[132] This idea is also expressed in the international legal system. By virtue of its status, a State is a legal subject under international law and thus also a potential participant in the process of rule formation. For this reason, a State dissatisfied with the *status quo* can initiate an international discourse and push for reform of the existing customary rules by convincing other States of its views – ideally by means of the better argument.

In addition, the *Right to Justification* can explain why virtually uniform practice and a general recognition among States are sufficient for a customary rule to crystallize. The requirements of reciprocity and generality make rules of customary international law acceptable for the affected States. When these requirements are not met, the affected States can exercise a veto right. A State may not invoke a customary rule without accepting that this rule also binds itself, since the principle of reciprocity under general international law estops a State from violating the requirement of reciprocity of content.[133] By the same token, a State can exercise the persistent objector rule when a customary rule is still emerging, as the rule in question has not been generally accepted. To this end, the persistent objector rule entails the reciprocal and generally acceptable claim that the respective State will neither comply with the rule in question nor demand of other States to do so. Furthermore, pursuant to the requirement of reciprocity of reasons, other

132 *R. Forst*, Justification and Critique, 2014, 6 et seq.

133 *B. Simma*, Reciprocity (note 91), margin number 2; *H. Krieger*, Conclusion, 504 et seq., in: H. Krieger (ed.), Inducing Compliance with International Humanitarian Law, 2015, 521.

States may not assume from that point on that the persistent objector shares the perspectives, evaluations, convictions, interests or needs underlying the rule in question. Hence, the *Right to Justification* can explain why a persistent objector is not bound by a customary rule even when it is generally recognized.

The scenario is different, however, in respect of new States. Since rules of customary international law display the criteria of reciprocity and generality, a new State cannot object to existing rules of customary international law. Its veto would not meet the requirement of generality.

Finally, the two requirements of the *Right to Justification* can elucidate why only two distinct normative statements can solve the *opinio juris*-paradox. As a State's assertion of a customary rule entails a reciprocal claim, it also expresses the State's consent to the rule in question. Hence the requirement of reciprocity implicates the statement of consent, which conveys an acceptance of what should amount to a legal obligation (the ought). But according to the *Right of Justification*, the acceptability of a moral claim is only constituted by the inter-subjectively, discursively redeemable generality created by the involvement of all affected States.[134] Hence a customary rule may only emerge once it is generally recognized. The requirement of generality postulated by the *Right to Justification* implicates the necessity for a statement of recognition that the requirements for the rule to become law have been fulfilled (the is).

Consequently, while also being compatible with the consent theory, *Forst's* theory of the *Right of Justification* happens to justify the legitimacy of customary rules even in those cases where the consent theory has been claimed to be insufficient for conferring legitimacy to rules emanating from this source of law.

III. Conclusion

This contribution has sought to make the claim plausible that the justice theory of the so-called *Right to Justification*, which the political philosopher *Rainer Forst* has developed, can explain the legitimacy of rules of customary international law. Building on *Kant's* categorical imperative, the *Right to Justification* provides a theory for the legitimacy of norms and actions in cases of dissent. It states that norms or actions will only be morally justified if they observe the criteria of reciprocity and generality. When a norm meets

134 *R. Forst* (Anm. 76), 38.

these criteria and the normative claim underlying the norm cannot be rebutted by other reciprocal and general reasons, the norm is justified in the sense that it cannot be reasonably rejected. The preceding argument has demonstrated that the source of custom meets these criteria – at least in inter-State relations. Using the *Right to Justification* as a legitimacy theory has the advantage of offering a moral explanation in those cases where the consent rationale has been criticized. This makes it appealing as a legitimacy theory for the source of customary international law.

For the purpose of clarity, a caveat is called for. It has not been suggested that the *Right to Justification* as a theory for the legitimacy of rules of customary international law stands in opposition to the consent rationale. When a State freely consents to a customary rule, the consent obviously contributes to the legitimacy of the rule in question. Moreover, since legitimacy is not a genuinely legal concept, but primarily a concept that looks at law from outside of the respective legal system, then legally speaking, there can be more than one legitimacy theory for the norms of that legal system. This contribution has thus offered a supplementary theory for the legitimacy of the substantive rules emerging from custom. It made a case for vindicating this source at a time when the international legal order is confronted with legitimacy based contestations and deconstructions. On this account, the arguments presented here might appear somehow apologetic. This is not to say, however, that the *Right to Justification* is itself apologetic. Just the opposite is the case. It provides a critical theory that seeks to expose unjustified practices of domination and strives to invigorate the emancipatory force of self-determination.[135] It is therefore to be hoped that this contribution provides a credible legitimacy narrative that is attractive for both, conventional internationalists and progressives who are willing to defend the *status quo* under the current circumstances of backlash[136] – if only as a basic prerequisite for bringing about reforms at a later point in the future. After all, what would be the alternative for the protection of the vulnerable against arbitrary domination in the international realm, if not justified legal rules within a system based on the international rule of law?

[135] *R. Forst* (note 132), 6 et seq.

[136] *J. Crawford*, The Current Political Discourse Concerning International Law, M.L.R. 81 (2018), 1 et seq.; *M. R. Madsen/P. Cebulak/M. Wiebusch*, Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts, International Journal of Law in Context 14 (2018), 197 et seq.; *H. Krieger/G. Nolte/A. Zimmermann* (note 1); *C. McLachlan*, The Assault on International Adjudication and the Limits of Withdrawal, ICLQ 68 (2019), 499 et seq.