Marrying Lon Fuller to Customary International Law: Is Customary International Law, a form of Law?

An exploration focusing on the status and desirability of Customary International Law with a focus of Lon Fuller’s legal principles

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An exploration of Customary International Law through jurisprudence spectacles. It will focus on Fuller’s eight principles of law and seek to discover whether Customary International Law is conducive of these principles.
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Synopsis
The aim in writing this dissertation is to enable a reader with no knowledge of Customary International Law to gain an understanding and appreciation of its position in the international legal system, its benefits and problems. For readers who are well educated in Customary International Law, it is hoped that this dissertation will provide a new perspective and approach to their opinions of Customary International Law.

The validity of Customary International Law is a well-versed topic within the international legal field. This dissertation does not seek to duplicate the works of other authors but to determine whether Customary International Law can be married to Fullers eight principles of law in order to determine whether it is a valid form of law.

The question posed, is whether Customary International Law fits into Fuller’s eight principles of law.

The motivation behind the title is the author’s interest in the theological perspectives of law; why it has been created, why it is followed and how it is developed as a form of order in an otherwise chaotic society. Whilst studying at Uppsala University, the discussions surrounding the, at times, ad hoc and inconsistent nature of Customary International Law sparked an interest in whether it forms the profile of law. As will be discussed later in this dissertation, the law should provide predictable results and yet Customary International Law is unable to provide this. This formed the consideration of whether Customary International Law is really a form of law or something else altogether.

The foundations for this dissertation has stemmed from the author’s International Comparative Law degree at Uppsala University, Sweden. The rest has derived from research of theological perspectives of law and the role of Customary International Law in International Law.

The conclusions reached when researching this topic and writing this dissertation were surprising, considering the stance taken when this project initially commenced. This project was set to follow the view that Customary International Law is not law and is not a desirable entity at all. However the further this project delved into the purpose of customary law and the more consideration taken to the difficulty of co-ordinating each of the nearly 200 states, it became clear that Customary International Law is desirable. It provides the flexibility needed for changing governments and the increase of state interaction. However, it is still considered that Customary International Law is not a form of law, in accordance with Fuller’s principles, but something else entirely.
1.0 Introduction

The Law is a founding notion of society. As that Natural Law thinker, Aristotle said:

‘At his best, man is the noblest of all animals; separated from law and justice he is the worst.’¹

This is a founding principle of Fuller’s work. Fuller believed that the law is a medium to do ‘good’² and to do so it must fit within his principles. He considers that it is integral that the law is clear and structured³.

It is no surprise that there is a substantial amount of literature debating the function and creation of law. These debates have taken a new turn following the increase in International law, especially law that is not completely codified and goes against current legal norms; such as Customary International Law.

International practices have traditionally revolved around the notion that states are sovereign and cannot be subjected to the jurisdiction of another state, without its consent. This principle has been adapted to the doctrine that sovereign states may act in any way they wish so long as it does not contravene an explicit prohibition.⁴ This has been taken one step further, as under the rule of Customary International Law, states are bound to comply with provisions that are not explicit. This is because Customary International Law is largely un-codified and can be unpredictable.

However, despite this, Customary International Law is considered to be a binding form of law. Ian Brownlie wrote that:

‘Custom is not a special department or area of public international law: it is international law’.⁵

This dissertation seeks to explore how Customary International Law is created and whether, under Fuller’s principles, it should be considered to be law. It will seek to answer whether all states are bound to Customary International Law and if so, how it occurs. Further, we will consider whether Customary International Law has a place in the international legal system and whether it can be considered to be law. In order to assess this, this dissertation will use Fuller’s eight legal principles as a guideline.

Jorg Kammerhofer stated that there are three different levels to Customary International Law, each one of them having their own rules and problems. These three ‘elements’ are the substantive rules,

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¹ Singh (2006)p.26
² Fuller (1964) p.207-214
³ Fuller (1964)
⁴ S.S Lotus (1927)
⁵ Brownlie (1998) p.18
or the Customary Law itself, secondly, the norms that regulate the making of the law and finally the issue of whether it is a valid form of law. These three elements have become the backbone of this dissertation and will be discussed in turn throughout.

We will begin with an introduction of what Customary International Law is and the distinction between general practice and Customary International Law, before looking at how it is formed. This is to serve the purpose of fitting it into Fuller eight principles, which cannot be done without an understanding of the particular elements that make Customary International Law. Once the criteria for Customary International Law have been dissected it is possible to consider whether it is an effective form of law, in its creation and application.

A natural follow from the discussion of Customary International Law and its creation is its problems and criticisms. To fully appreciate whether Customary International Law can fit into Fuller’s eight principles, we will discuss the problems of Customary International Law before moving onto a discussion as to why Customary International Law is followed by sovereign states.

We will then move onto the jurisprudence aspect of this dissertation, Fuller’s eight legal principles. These will be discussed in turn and compared to the elements of Customary International Law to determine whether Customary International Law fits into these criteria.

In the hopes of providing a well-rounded perspective to the question of whether Customary International Law is a form of law, we will then consider whether Fuller’s principles are truly representative of the law. Other theorists will therefore be briefly considered regarding their opinions on Fuller’s principles.

We will then answer the question posed in this dissertation, whether Customary International Law is law.

As for the housekeeping, this dissertation will not address doctrines of individual states, even states mentioned. Instead this dissertation aims to be an overview of general state practice in matters of Customary International Law, with reference to legal doctrines. Therefore, this dissertation is not fully representative of any state and reflects the writer’s opinions.

This dissertation will refer to ‘non-binding’ conduct as general practice. They are regularly referred to, in other dissertations, as customary rules, however, this dissertation would like to clearly distinguish between something that is a standard behaviour, that has not become Customary International Law and another act that a state is legally bound to comply with. Therefore any mention of general practice refers to the non-binding acts or omissions of states; while Customary

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International Law is the binding obligations of states. There will not be much emphasis on rules that have not become Customary International Law.
2.0 What is Customary International Law?
There is no universally accepted definition of customary law\(^7\) and there have been debates as to what it actually is. The traditional approach follows that Customary International Law occurs from the practice of states while the modern approach requires state practice but places emphasis on *opinio juris sive necessitati* (*opinio juris*), which requires the state to believe they are acting under a legal obligation. The modern approach, or two-element theory, is recognised by most legal writers\(^8\) and the judiciary\(^9\) and will be followed in this dissertation.

Customary International Law, quite frankly, stems from customs. It is separate from norms of general practice, which consists of acts that states are not obliged to perform. Customary International Law is recognised by the International Court of Justice as one of the binding sources of international law\(^10\) alongside treaty law. Customary International Law does not always have the same content as treaty law\(^11\), even though they can sometimes overlap, however there is no evidence that treaty law ‘supervenes’ customary law if the content is the same.\(^12\)

Customary International Law, unlike treaty law and applies to all states whether or not they have expressly agreed (how states show agreement will be discussed later on), states are unable to withdraw from Customary International Law, once they have consented to it. Therefore it is integral that customary norms are identified properly in order to prevent unwanted norms becoming customary. This is where the uncertainty begins; what constitutes Customary International Law and what is merely courtesy or tradition? This has led Customary International Law to be described as the most important and complex aspect of international law.\(^13\)

Article 38(1)(b) ICJ states that the courts may use international custom, as evidence of a ‘general practice accepted as law’ indicating that general state practice and acceptance are the requirements for the formation of Customary International Law. This is further confirmed by the International Law Association which describes Customary International Law as being created through constant and uniform practice, of a representative number of states, which gives rise to a legitimate expectation of similar conduct in the future.\(^14\)

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\(^7\) Abass (2011) p.34  
\(^8\) Evans (2010) p. 102  
\(^9\) The North Sea Continental Shelf Case(1969) 44  
\(^10\) Article 38(1)(b) ICJ  
\(^11\) Nicaragua (1984) 176  
\(^12\) Nicaragua (1984) 177  
\(^13\) Tunkin (1961) p.419  
\(^14\) International Law Association (2000)
Therefore, in theory, Customary International Law can simply be described as custom which is generally practiced by states and states consider it to have the same consequences a law. However, in practice, Customary International Law has been found under different circumstances.

2.1 Customary International Law vs. General Practice

Unlike Customary International Law, acts of courtesy are not legally binding and can be distinguished by the aspect of *opinio juris*, which will be discussed in further detail later. Lefkowitz’s analogy of a bus rider\textsuperscript{15} provides the clearest demonstration of this. He states that a regular bus rider may sit on the same seat of their bus, out of habit. This would fulfil the criteria of ‘long standing use’ for Customary International Law, as discussed in detail later. However, the bus rider is not bound to continue to use that seat; if the rider chooses to use another seat, or another bus/method of transportation, there would be no repercussions. Therefore this analogy is a perfect example of general practice; it is tradition for the rider to choose that seat however he is not duty bound.

This can be compared to, again using Lefkowitz’s analogy, a cricket player\textsuperscript{16} who refuses to stand down despite missing his shot and being ‘out’. If a cricket player does not act in the way he is supposed to, there are repercussions. The player may be banned from playing for his team or punished by loosing points. The cricket player does not play in reference to his own traditions or customs but out of universal rules.

The difference, therefore, is down to two factors, firstly rules and secondly repercussions that ensue from the custom; if there are rules and repercussions it is Customary International Law, if there aren’t it is merely form of general practice. In order for there to be Customary International Law there must be general practice, and *opinio juris*, or a legal obligation to act in the particular manner. This may seem clear however not all acts fit into these neat boxes. In reality, things are not so black and white; grey areas appear. The confusion arises, in the simplest and basic form, when determining the element of *opinio Juris* or the belief that the act bears a legal obligation.

As previously stated, Customary International Law can be created without express consent therefore it is integral to determine how it is formed, especially in determining its effectiveness. It is disconcerting to think there is a possibility of unfavourable norms or traditions to become law without a good vetting process. As already mentioned, the cricket player follows universal rules, however what must be considered is whether these rules were formed for the purposes of being binding or whether they are formed as tradition. This is where the aspect of *opinio Juris* comes in.

\textsuperscript{15} Lefkowitz (2008) p. 6
\textsuperscript{16} Lefkowitz (2008) p. 7
This vetting process or the process of creation of Customary International Law will be explored, with the view of determining whether Customary International Law is desirable and effective, once we have considered the position of Customary International Law in regards to domestic law.

2.2 Customary International Law vs. National Law
The majority of states, particularly states in the British Commonwealth, accept Customary International Law as an integral part of National Law.\(^{17}\) This can be evidenced in the Scottish case of John v Donnelly\(^{18}\) where it was held that a rule of Customary International Law is a rule of Scottish Law. A similar approach was held in the English case of Trendex Trading Corporation Ltd v Central Bank of Nigeria\(^{19}\) however English courts are still reluctant to follow International rules, which have not been incorporated into national law.

Despite the reluctance of English courts, many writers have suggested that Customary International Law is capable of overriding contrary domestic law.\(^{20}\) This provides a greater need for Customary International Law to be carefully applied and created.

\(^{17}\) Denza (2010) p.424
\(^{18}\) John Donnelly (1999)
\(^{19}\) Trendex Trading (1977)
\(^{20}\) Meron (1989) p. 4-9
3.0 The creation of Customary International Law

As already mentioned, Customary International Law is one of the binding forms of International Law. Therefore how it is created is integral. It is undesirable for a state to be bound to a form of law that it has not expressly consented to, which has the potential to occur within the provisions of Customary International Law. The aspect of acceptance is, in a sense, a complicated one. It is discussed in further detail under heading number 4.2. In a nutshell, acceptance can be found through the criteria of state practice and/or opinio juris, the acceptance will be in the form of conduct, or by silence.

As mentioned in the introduction, it is integral that there is a clear structure to the creation of law in order to prevent undesirable acts becoming legally binding and to allow states to regulate their behaviour. If there is a clear structure to the formation of Customary International Law, states will have a clear indication of their obligations and how they can create or avoid the creation of Customary Law.

It is unclear whether general practice can develop into Customary International Law or whether Customary International Law can be created without a general practice foundation, provided there is a belief that they are bound to act in that particular way. Going back to the cricket analogy, did the cricket rules develop out of a tradition, which if not satisfied had no repercussions, or was it intentionally created as a law.

Traditionally, it has been believed that Customary Law forms out of long standing practice of the act, which indicates a clear intention for the act to be followed; whether this intention is for it to be legally binding or not, is another matter. This criteria, or belief, that an act bears a legal responsibility is the criteria of opinio juris necessitate (opinio Juris).

Article 38(1)(b) ICJ defines Customary International Law as containing elements of state practice and state acceptance. This is the view which is followed by most legal writers. Therefore there must be a subjective and an objective element in place. The objective element requires that the custom is subject to general practice while the subjective element is the element of opinio juris, which requires knowledge of the custom, or belief that the custom exists. This has been clarified in case law, for example the Nuclear Weapons Case, where it was held, by the ICJ, that to evidence Customary International Law the courts must look for state practice and state acceptance.

When discussing the elements of Customary International Law, i.e. state practice and opinio juris, reference will be made to judgments of the ICJ. Despite the principles of star decisis not applying to

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21 icrc.org (2013)
22 Threat of use of Nuclear Weapons (advisory opinion) (1996)
23 Threat of use of Nuclear Weapons (advisory opinion) 254
the generation of International Law\textsuperscript{24}, it is considered to be the ‘principal’ judicial organ for International Law\textsuperscript{25}. It has been described as being ‘highly persuasive\textsuperscript{26}’ and of ‘crucial importance\textsuperscript{27}’ in the establishment of Customary International Law.

Therefore, after discussing the element of state practice, we will determine whether Customary International Law can be created without clear intention or whether there must be a form of \textit{opinio juris}.

\textbf{3.1 State Practice}

In order for Customary International Law to be formed, there must be a long-standing usage of the custom that it stems from, or repetition of the custom. This element of repetition brings the transition between the practice and the law. Therefore, it must be determined what is long-standing custom or state practice. It has been noted that state practice must be both extensive and representative, however, general practice can suffice.\textsuperscript{28} This does not provide much clarity. It does not explain whether the custom will need to be repeated continuously over a certain time frame, repeated a certain amount of times or by a certain number of states? These are all questions which will need to be answered starting with what acts are considered to be state practice.

\textbf{3.1.1 Acts of State Practice}

To determine whether a state is acting in accordance with the first element of state practice, what actions are considered to be sufficient must be determined. On the face of it, all that states do or omit can be considered to be ‘state practice’.\textsuperscript{29} However, as will later be discussed, state practice is an important factor in determining the beliefs of states and therefore it is vital to be able to distinguish between ‘official acts’ which should build precedent and acts that do not truly represent state opinion.

The ICJ has considered both physical and verbal acts of states can be considered as evidence of state practice however there are criteria that must be considered.\textsuperscript{30}

\begin{flushleft}
\textsuperscript{24} Article 59 ICJ \\
\textsuperscript{25} United Nations Charter Article 92 (1945) \\
\textsuperscript{26} Damrosh (2001) p.134-135 \\
\textsuperscript{27} Cassesse (2001) p.159 \\
\textsuperscript{28} International Law Association (2000) \\
\textsuperscript{29} Kammerhofer (2004) p. 525 \\
\textsuperscript{30} Gabčikovo-Nagymaros (1997) p.39–46
\end{flushleft}
Firstly, as discussed, the state’s acts must be official. An example of this is ‘Official Statements’. These have been considered to be sufficient acts of state practice. However, statements by individual state officials or other bodies are unlikely to be considered.

State legislation, draft bills, battlefield conduct and court judgments are some of the official sources which account for acts of state practice. International court judgments are not considered to be state practice however state pleadings can be considered.

This list is not exhaustive and more, perhaps not so traditional sources are continuously being developed. An example of this is the increase in multilateral forums, which states can use to discuss their views and opinions on law. There are many of these forums available such as the United Nations General Assembly or for members of the European Union, committee meetings. This provides a clear insight into the acts of states and beyond that of legislation.

### 3.1.2 Uniformity

State acts should be ‘uniform’. This means that more than one state should be acting in the same or similar way. A clear divide in states acceptance or rejection of the norm or rule should prevent the formation of a Customary International Law to that effect. However a few uncertainties or contradictions in states acts, or opinions surrounding a particular norm, are not considered to be a bar to the creation of a Customary International Law.

Determining uniformity is a mammoth task; there are nearly 200 states in the international community, who in theory will need their actions analysed for purposes of the creation of Customary International Law. This has amounted to the ICJ being highly selective in the practice that it analyses. This has lead authors to state that the ICJ should only take into account the most affected states. This can be evidenced in the *North Sea Continental Shelf Case*, which will be discussed in greater detail under the heading number 3.1.5, parties.

There are no distinct rules outlining the bar between a few contradictions and sufficient contradictions to render something non-uniform. However, a few in-discrepancies are generally not considered to be material.

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31 Nicaragua (1986)  
32 icrc.org (2013)  
33 Prosecutor v Dusko Tadic (1995)  
34 icrc.org (2013)  
35 Asylum Case (1950)  
36 Anglo-Norwegian Fisheries Case (1951)  
37 Wolfke (1964) p.81  
38 North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands) (1969)  
39 Fisheries Jurisdiction Case (1974)
3.1.3 Continuity
Some legal writers follow the view that there must be continuity of practice in order to create a Customary International Law, however, there is increasing evidence to suggest that this ‘continuity’ can be broken. An example of this is the *Lotus Case*\(^{40}\), where it was held that the sporadic use of the ‘norm’ in question did not prevent state practice being formed, it merely indicated that states had chosen not to enforce their ‘power’ in that manner. The ICJ came to this conclusion, as there was no evidence of any protests from other states, when a state had chosen to enforce this norm, indicating that the other states accepted it as general practice.

It should be noted, that despite discontinuity not preventing the formation of Customary International Law, it can destroy the formation. This may sound contradictory; however a break from a certain act or provision provides evidence that it is unsuitable. In order to determine whether a breakage will prevent the formation of Customary International Law, the reason for the breakage must be considered, along with its replacement and state reaction. It can therefore be determined how desirable and suitable the provision is.

This will be discussed further, under the heading ‘Time’, which will now be discussed.

3.1.4 Time
There is no comprehensive rule regarding the amount of time that a custom needs to be practiced before it can become Customary International Law. There is no judicial requirement for the customary rule to be long standing\(^{41}\) however it is a strong indicator of states intentions to follow this rule. This rule can be best summarised by borrowing a passage from the *North Sea Continental Shelf Case*:

“The passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of Customary International Law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be\(^{42}\).”

What this passage is demonstrating is that Customary International Law can metastasise within a short period of time. Logically, the more often a rule is followed the more likely it is to be considered to be ‘practice’, however this is not always the case. Customary International Law has, albeit it rarely, been formed over a short period of time, including from singular acts.

\(^{40}\) S.S Lotus (1927)  
\(^{41}\) Tunkin (1961) p.419  
\(^{42}\) North Sea Continental Shelf (1969) p. 43
An example of Customary International Law being created from a singular act can be found in the case *Yugoslavia, Cases before the ICJ*\(^4^3\), also known as the *Bosnia Genocide Case*, which has been described as showing *coutume grande vitesse* or high-speed custom.

Therefore Customary International Law can be created through acts which do not have a long-standing tradition however the longer the history of the act the greater the assumption of law. This has caused writers such as Karol Wolfke to question the need for a history of ‘state practice’ provided that there is evidence of intention for the state act to form a part of Customary International Law.

### 3.1.5 Parties

It is clear that state practice must be uniform and continuous. Further, it can consist of acts or omissions that are verbal or physical. What must now be determined is who must be participating in these State practices.

Overall, provided that the act is ‘generally’ practiced among states, it can suffice as being valid state practice for the purposes of the creation of Customary International Law\(^4^4\). However there are some parties whose opinions are far more ‘weighty’. This can be evidenced in the *North Sea Continental Shelf Case*\(^4^5\), which will briefly be discussed.

This case involved a disagreement between Denmark, Germany and the Netherlands regarding the drawing of sea line boundaries for areas rich in oil and gas. One of the questions posed to the court was regarding the international practice or Customary International Law regarding the drawing of boundaries. The Court followed the opinion that the state practice relied upon for a particular act or rule, must include that of states whose ‘interests are specifically affected’\(^4^6\).

This means that the practices of states that have an explicit interest in a matter carries greater weight than the practices of states that do not. Referring back to the *North Sea Continental Shelf Case*, the practice of other states with close sea line boarders are to be considered over practice of states which may be landlocked, or have sea boundaries which manifest in a different way.

Similarly, this requirement can be filled despite practice from many parties, if they have not objected to it. This is evidenced in the *Lotus Case*\(^4^7\) where there were few precedents of state practice of the norm. However there were no protests by other states when they did. The fact that many states had

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\(^4^3\) *Yugoslavia case (2007)*  
\(^4^4\) *International Law Association (2000)* p.723-726  
\(^4^5\) *North Sea Continental Shelf (1969)*  
\(^4^6\) *North Sea Continental Shelf (1969)* p.43  
\(^4^7\) *S.S Lotus (1927)*
not acted in this way was considered to be evidence that they chose not to enforce their power rather than the fact that they had a duty not to.

3.1.6 Summary
The role of state practice is an integral part of the formation of Customary International Law however writers such as Karol Wolfske, has noted that in modern society the requirements are less stringent. In a constantly changing and evolving international sphere the need for practice to be uninterrupted and consistent is less important.\(^{48}\) It has been stated that there is no longer a need for state practice in the formation of Customary International Law provided that \textit{opinio juris} is clearly established.\(^{49}\) This is because \textit{opinio juris}, indicates a states intention to possibly act in that manner. This statement seems far too strong.

It is true that the requirement for state practice can be relaxed, as evidenced in the Nicaragua judgment however this is the exception and not the rule. Frederic L Kirgis stated, regarding the Nicaragua judgment, that there is a sliding scale regarding the need for state practice.\(^{50}\) He theorised that the less practice there is of the norm the more reliance there is upon \textit{opinio juris}. This also means that if there is a lot of state practice the element of \textit{opinio juris} is not necessary.

Customary International Law will be created if it is the intention of states; state practice is one of the strongest indicators of this. Further, state practice’s purpose is not just for proving \textit{opinio juris}, which will now be discussed.

3.2 Opinio juris
\textit{Opinio juris} or \textit{opinio juris necessitates} translates to an opinion of law or necessity. It basically means that there must be a belief that the law exists and they have a duty to follow it. It is not a principle that is solely bound to Customary International Law however it is one of the necessary components for it to function. It is unclear as to what this actually means, and there is a plethora of case law debating as to whether \textit{opinio juris} is a belief of the presence of law or actual acceptance of the law. This is further confused as the ICJ appears to have accepted that opinio juris can stem from acceptance or a belief. Therefore it must be determined whether ‘words’ of believe suffice or whether there must be actions of acceptance to create Customary International Law. Further it must be determined what the purpose of \textit{opinio juris} is.

\(^{48}\) Wolfe (1964) p.81
\(^{49}\) Cheng (1965) p.23
\(^{50}\) Kirgis (1987) p.24
Opinio Juris is considered to be a filter that prevents unwanted practice becoming Customary Law.\textsuperscript{51} It is not supposed to be sufficient by itself to create Customary International Law; therefore state practice should also be present.\textsuperscript{52} However opinio juris can work as a decisive factor when determining if there is sufficient evidence to prove the existence of Customary International Law.\textsuperscript{53} Most importantly, opinio juris acts as a medium for states to express their acceptance, which is quite contradictory considering that states are bound by Customary International Law regardless of acceptance.

The key to opinio juris is the understanding that the law exists. This can be a problem as states do not generally publish their views on Customary International Law and what they perceive to be legal or not. It is therefore a matter of ‘trust’ and ‘faith’ on the words of states that compromise opinio juris, however, there are factors that can be used as evidence, which will be discussed after further introduction.

Historically the acceptance theory has been the most dominant theory regarding the creation of Customary International Law. It follows that Customary Law is created through general practice and acceptance, by states, of these acts. A perfect example of this is the North Sea Continental Shelf Case.\textsuperscript{54}

The ICJ held that frequent performance of certain actions does not, by itself, establish opinio juris and there must be clear intention to follow the law. As Germany had not ratified the convention, it is clear that there was no opinio juris as they had chosen not to follow this particular rule. This rule becomes unclear when a state has ratified a treaty, to later pull out of it. As already mentioned, states cannot withdraw from Customary International Law, but they may withdraw from Treaties. This could mean that a state is still bound to a custom despite withdrawing from the treaty. This questions the place of Customary International Law alongside treaty law. Without going into further depth on the matter, there is a clear overlap between Treaties and Customary International Law which causes difficulties in them working side by side.

It is worth noting that the North Sea Continental Shelf Case does not, by itself, establish opinio juris. This is also indicated in the Nicaragua judgment where it was held that state attitudes towards certain rules of law can be indicative of opinio juris but does not create opinio juris itself.
The next question is, when can *opinio juris* be formed? It is easier to answer this with another query: what prevents *opinio juris*? Firstly, it must be noted that there can be no *opinio juris* if members of the international community are ‘profoundly’ divided on the matter. Therefore *opinio juris* is not solely focused on the beliefs of individual states, there must be general acceptance by the community, or alternately, there cannot be clear rejection by the community of the norm. For the purpose of this dissertation *opinio juris* can be formed if there is clear acceptance or belief in the legal status of the norm.

*Opinio Juris*, like the other elements of Customary International Law, has been subject to a lot of criticism. Writers have described the use state opinion or beliefs as ‘artificial’ as there is no real method of gauging it. However, this will be discussed under heading 4.0 Problems with Customary International Law.

### 3.3 The persistent objector

It may seem unreasonable that Customary International Law binds all states, regardless of whether they expressly agree to be bound by it. However, there is a get out clause for states that have particularly strong objections. This anomaly is called the ‘persistent objector’. It occurs when a state continuously rejects a provision of Customary International Law. When this occurs the state is said to have objected out of the provision. However there is a time limit to this objection, as indicated by the Restatement of the Foreign Relations Law of the United States.

The draft articles to the *Restatement of the Foreign Relations Law of the United States (third)(1987)* has outlined this perfectly. Section 102 comment (d) states that ‘in principle’ if a state indicates its dissent whilst the law is still in formation they have contracted out of it; if a state objects once the rule of law has ‘ripened’ or matured, they are still bound to it.

However, in practice, it is not as easy as stating your objection. States have been required to show persistent objection to it, despite section 102 suggestions. Akehurst wrote that a state must maintain its ‘opposition’ to the rule of law once it has been formed. Therefore, it is not sufficient that the state indicated its disagreement before the rule became practice. The state must maintain its disagreement.

This has been cemented in case law in the Anglo Norwegian Fisheries case. The case involved a boundary dispute between areas of water that were ‘high seas’ and areas that were Norwegian

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56 Nuclear weapons advisory case (2006) 254
57 Greenwood (2008)
58 Akehurst (1977) p.24
59 Anglo-Norwegian Fisheries Jurisdiction (1951)
water space. Norway had continuously protested against any fishing boats fishing within its boundaries. The ICJ held that as Norway ‘has always opposed’ any fishing in its areas, it had opposed the new law allowing it.\(^6\)

It is however, worth noting that Norway had a very long-standing history of opposing any fishing off its waters. This history dated back hundreds and hundreds of years. It is unclear how long the states must ‘oppose’ the rule of law for, what is clear is that in order for a state to take advantage of the persistent objector rule, they must oppose the law when it is in its initial stages and continue to actively show their disagreement. Thereby, effectively, allowing a state to choose which aspect of Customary Law that it is bound to.

\(^6\)Anglo-Norwegian Fisheries Jurisdiction (1951) pp116 at p 131
4.0 Problems with Customary International Law

As can be determined from the brief exploration of Customary International Law, there are many contradictory and unclear rules surrounding its creation and usage. For the purposes of this dissertation, with the view of lightly touching the deeper issues surrounding Customary International Law, there are four main issues. These are the creation, consent, codification and disclosure.

4.1 Creation

As indicated, the problem with Customary International Law is the uncertainty in its creation and content. The formation of legislation should be a clear and predictable process, instead of a jungle of conflicting methods. States cannot be certain of their obligations and rights if they can be formed on a misguided belief of another state or after a single use of the ‘custom’.

Kirgis has justified this through his sliding scale analogy however it does not consider why writers seem adamant that both elements must be present.

Further, it has been argued by Karol Wolfke that only the practice and opinions of major powers are considered. Thereby questioning whether Customary Law is based on the wants and needs of the larger more powerful states to the detriment of smaller states.

The element of opinio juris is extremely hard to determine. This element has been greatly criticised by writers and the judiciary, however the majority of judicial criticisms come in the form of dissenting judgments.

A perfect example of this is Judge Sorensen judgment in the Fisheries Jurisdiction case where he stated that opinio juris is unnecessary and practically impossible to produce conclusive evidence of. This has also been questioned by Judge Tanka in Germany v Denmark, who stated that the diverse legislative and executive organs of government make it impossible to ascertain the motives of it. It is therefore questionable how the judiciary finds evidence of opinio juris.

The evidential aspect of opinio juris is not the only issue; since opinio juris requires adherence to an existing rule, a new practice can ever develop into customary law, if a state has to believe that the rule already exists, is questionable.

62 Wolfke (1964) p.81
63 Anglo-Norwegian Fisheries Case (1951)
64 Nicaragua (1986) 128
65 North Sea Continental Shelf (1969)
66 Nicaragua (1984) 176
This is further confused by the Lotus judgment. If there are no protests in response to acts or omissions the states are acquiescing to a new customary rule.\(^{67}\) This questions whether a state that acts in a certain way without protest can claim it as a general practice or whether it is merely evidence that those other states have not acted on their right or their permissive rule to protest.

Finally, it has been questioned whether Customary International Law is something which is only found in primitive societies. Perreau-Saussine and Murphy argue that modern societies do not depend on customary habits but reasoned principles. They state that customary law only grows where legislators have failed in preventing a gap in the law\(^{68}\). Therefore a coherent legal system will not have a need for customary law. Therefore the creation of Customary International Law indicates a lacuna in the law, which needs to be resolved. This is an issue as it will be resolved on an ad hoc basis, where states act in the way that they see appropriate. There is no debate on the creation of these rules, and it is likely that ineffective elements will develop.

Some jurists would argue that customary law is the only democratic mode of law making as it reflects the convictions of the states that practice it, unlike treaty law, which potentially reflects the opinions of the more powerful states\(^{69}\). This being said, a state has the option to ratify a treaty however it is automatically bound to Customary International Law.

### 4.2 Express Consent

John Austin stated that custom only becomes law, and can only bind states, if it has been adopted by the state or applied in the states courts,\(^{70}\) which indicates that a state will have consented to the norm.

States may not expressly agree to the provisions of Customary International Law. There are no meetings between states negotiating the terms of customary law and the parties to it are not required to ‘sign’ or expressly agree to it. That being said, the requirement of *opinio juris*, means that the state must believe that they are bound to act in the particular way. Therefore the state will have shown their compliance with the rule, unless they have persistently objected to it.

Further, the act of state practice indicates that states have accepted the practice as they conform to it. That being said, the criterion of state practice does not require the state in question to have practiced it, even though this is a strong indicator of *opinio juris*. It requires that there has been generally been practice of the act by states. Therefore the criteria of state practice can be satisfied

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\(^{67}\) Aust (2010) p.6  
\(^{68}\) Perreau-Saussine & Murphy (2007) p.1  
\(^{69}\) Perreau-Saussine & Murphy (2007) p.2  
\(^{70}\) Austin (1885) p.536-537
without the state in question having completed the act, which indicates that they have not accepted the provision.

It is arguable that this is undesirable as it detracts from state sovereignty. However it can be said that this allows for desirable laws to be passed quickly and bind all states. The issue is whether state practice, which becomes Customary International Law, is actually desirable. It is unlikely that they all are.

4.3 Codification
As briefly touched upon, a sovereign state may act in any way they wish so long as it does not contravene an explicit prohibition.\(^{71}\) This principle is now a long-standing form of International Law. The key phrase in that sentence is that it cannot contravene an explicit prohibition. This indicates that a state is only bound by rules that are clear.

Rules of Customary International Law are only codified in case law. Before a rule has come under the scrutiny of the ICJ there is no written indication of what these rules are. How can a state be expected for follow rules that have no concrete evidence of their existence?

The only aspect of Customary International Law that is codified in statute is article 38(1)(b) of the ICJ, which outlines the position of Customary International Law as a form of International Law.

It is worth considering whether Article 38(1)(b) ICJ is ‘authoritative’. The majority of authors do not question the nature of article 38(1)(b) ICJ, however, there have been discussions as to whether it is a mere guideline or something more. Pathak describes article 38 ICJ as the ‘repository’\(^{72}\) for Customary International Law. It is a guideline and not the source of it. These details dive too deep for the purposes of this dissertation and therefore we will consider article 38(1)(b) and the aspects of opinio juris and state practice as definitive to Customary International Law.

4.4 Disclosure
One final, yet considerably important factor when considering State Practice and the acts of states is the matter of disclosure. States can be notoriously secretive regarding their actions and may avoid the disclosure of certain state acts. This causes problems as if verbal or physical acts are not disclosed they cannot contribute to the shaping and development of Customary International Law\(^{73}\).

This causes a huge problem in the development of Customary International Law. States that do not publish their opinions and actions will not have them form into Customary International Law.

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\(^{71}\) S.S. Lotus (France v Turkey) (1927)  
\(^{72}\) Patak (1979) p.484  
\(^{73}\) International Law Association (2000) p.726
Further, it begs the question whether Customary International Law is truly representative of state acts and intentions.

4.5 Summary
It can be argued that the elements of Customary International Law provide the judiciary with the ability to make a face value judgment as to the existence of a rule of Customary International Law. This is because there are no clear guidelines as to the interpretation of Customary International Law outside of the requirement of state practice and opinio juris. As this dissertation has shown, these criteria are extremely open and have been subject to various interpretations.

This allows for inconsistent decisions and further vagueness as to what is Customary International Law. However this approach and the approach of the modern theory can produce the most logical results, especially as opinio juris depends on individual circumstances. The counter argument, and arguably the strongest one, is that this approach can leave states uncertain on what their obligations and rights are and how they can act. This reduces the value and goes against the purpose of Customary International Law.

Despite all these problems, why is Customary International Law followed and accepted by states? This will now be discussed before moving onto whether it fits the profile of Law based on the writings of Lon Fuller.

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74 Akehurst (1977) p.41
75 Shaw (2008) p. 84
5.0 Why do States follow International Law?
This dissertation does not seek to answer why states follow law however this will be briefly explored to provide understanding as to why Customary International Law is followed. This will provide clarity to Fuller’s eight principles and help to later answer and understand why Customary International Law has developed the profound status that it has.

Louis Henkin, one of the most influential Contemporary International Law scholars wrote "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."76 This statement does little to explain why this phenomenon occurs; further evidencing that the question why states follow International Law is an extremely complex issue.

There are two forms of International law, treaty and Customary International Law77. State’s voluntarily become members of a treaty by signing to it, while, as discussed, states can become subject to Customary International Law without any prior agreement. Customary International Law lacks a centralised lawmaker, executive or judicial function and yet it is arguably one of the most powerful sources of law.

Customary International Law is rarely enforced but is usually obeyed.78 This is for many reasons namely fear of provoking hostility, losing reputation, to ensure that other customs which are beneficial to the state are also complied with and to promote relations and trade. If a Customary International Law is breached the state becomes internationally responsible for the act, as it would, if it breached a treaty obligation.79 This being said, as previously stated, breaches are rarely enforced.

However, if a state breaches a matter of Customary International Law, it could be subjected to countermeasures by the other states. The Articles of State Responsibility (ASR), which is a form of Customary International Law, of which the remedies are codified, provides that counter-measures may be permitted. This is provided that they are proportionate,80 are in response to a pervious international wrongful act81 and only continue until the breach is resolved.82

Further State liability arises under the ASR83 where there has been an internationally wrongful act or omission which is attributable to the state under international law and constitutes a breach of an

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76 Henkin (1979) p.47
77 Goldsmith and Posner (1998)
78 Morgenthau (1954) p.249-52
79 Article 1 ASR (2001)
80 Article 51 ASR (2001)
81 Gabcikovo- Nagymaros (1997)
82 Article 53 ASR (2001)
83 Articles on State Responsibility for Wrongful Acts (2001)
international obligation of that state.\textsuperscript{84} This allows for ‘wronged’ states to seek compensation. The ASR allows for reparation to take form of restitution, compensation and satisfaction.\textsuperscript{85}

However, as discussed, these measures are rarely enforced in the event of a breach of Customary International Law. Further, states, as sovereign entities, can theoretically act in any way they want. If a state does not want to act in accordance with customary law, provided they are prepared for counter-measures, the simply do not have to.

This has brought to life many theories as to the rationale behind state co-operation. In the hope to provide a clear overview we will be undertaking a ‘crash course’ in the following political theories: Realism, Neorealism, Structuralism and Constructivism; beginning with the most aggressive of these, Realism.

Realism, in a nutshell focuses around the mantra that world politics is driven by the competitive self-interest of states.\textsuperscript{86} It centres on four main principles: that the international system in lawless, individual states view themselves as the most important actors, all states are singular and rational and finally all states primary interest is its own survival and development\textsuperscript{87}. What this all means is that there is no body above states, they cannot be regulated, their actions are always voluntary. Further, states are not immune to the basic human instincts. They will always act in their own best interests. International politics centre around ‘mutual benefit’. States will not act in a way that is detrimental to themselves unless they receive something for it. To sum it up, states work on a cost vs. gain manner. They will only act in their own best interests and only follow International Rules or customary law, which follows that interest. In other words states follow international law for self-preservation and self gain.

Neorealism, is a similar concept to realism. However it denies the existence of ‘human traits’. Instead, structural constraints affect international politics over human desire to self-preserve. These structural constraints can be a multitude of considerations such as military power and resources. However, the basic principle of self-interest still remains. A state will still put its own interests first. Interestingly, Neorealists believe that a founding element in international politics is lack of trust and scepticism between states. States realise that other states can change their policies and views, with the change of government, industries and their interests. Similarly they realise that their own interests may change. Customary law fits particularly well into this dynamic, it provides the

\textsuperscript{84} Article 2 ASR (2001)
\textsuperscript{85} Article 34 ASR (2001)
\textsuperscript{86} Rourke (2010) p.16
\textsuperscript{87} Donnelly (2008) p.150
reassurance that other states will act in a particular way yet maintains the flexibility that it is not absolute.

Structuralism, similarly to Neorealism, notes the affect of factors outside of human nature on the landscape of International Politics. It follows that world economics plays an important role in the political, cultural, social and economical life of states.

Finally, we have the theory of Constructivism. This theory places emphasis on the importance on social and historic constructions rather than human nature.88 Alexandra Whet, one of the most known advocates of Social Constructivism, emphasises the social aspect of international relations. He states that:

‘The structures of human association are determined primarily by shared ideas rather than material forces, and that the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature’89

This clearly demonstrates the belief that international relations are founded on social factors rather than the individual, intrinsic need for self-preservation. It follows that the natural human behaviours do not apply to the collective; rather a new social consideration is formed, even if it is cross boundaries. Constructivists look at international relations by analysing ‘social realities’ such as current social goals, cultures and threats.90

As these theories show, there are many factors that could possibly influence the creation, abidance and development of international relations and Customary International Law, as the product of them.

This brings us back to the question as to why Sovereign States often endeavour to comply with Customary International Law.

Fernando Teson writes that this question has three focal points: what in fact motivates states to obey international law, the prudential reason for states to obey international law and finally, if there is a moral reason for states to obey international law.91 He states that in order to answer these questions one must consider the social implications of why states follow law, their national interests and the moral perspective of law. It follows that there is an aspect of each of the theories behind state compliance.

89 Wendt (1999) p.1
90 Katzenstein (1996)
91 Teson (1998) p.74
5.1 Why is Customary International Law followed

There have been many debates as to the purpose of Customary International Law and whether it holds a place in the international arena. That being said, it is clear that unwritten norms such as Customary International Law play a crucial part in the international legal system. This is evidenced by the plethora of case law and the importance of un-codified state practice in the maintenance of international relationships.

Niels Peterson, writes that the limited body of written laws and norms cannot, by themselves, serve as basis for a coherent legal system. Therefore this cavity must be filled by flexible principles i.e. unwritten rules and principles.

Using this principle, it could be said that Customary International Law plays an important part. It allows for international rules and law to come together by bridging gaps that otherwise would take years to heal.

In order to sum this position up, we can refer to Michael J Glennon who argued in his article ‘How International Rules Die’ that we can never really know why States follow International Law. He stated that:

‘There is not and never will be a “field theory” of international law and relations that succeeds in explaining individual or state conduct so completely as to permit the reliable prediction of specific state actions that will occur in distant, concrete circumstances.’

This statement indicates that we can never predict state relations; there is no set formula. States are organic unpredictable beings that, quite frankly, have minds of their own. However, for the most part, a state will follow international law, out of fear of repercussions and to benefit themselves.
6.0 Lon Fuller’s Eight Principles

Now that we have an idea as to how Customary International Law can be formed in practice, the next element of our investigation must be considered. This is whether, in theory, Customary International Law can be considered to be a form of law. As mentioned, Customary International Law is considered by the ICJ to be one of the recognised international forms of law. This dissertation, however, is concerned with whether Customary International Law theoretically meets Fuller’s criteria for law. To determine whether Customary International Law fits these theoretical criteria, we must first consider what these criteria are.

In order to do this, we will have to put our jurisprudence hats on and consider Fuller’s perspective, and the implications of it, on the position of Customary International Law. To determine whether something is law, we must consider how law is created and how law is developed.

The position of law in society has been much debated; whether law should have a moral perspective, whether law is organic or manmade. This dissertation does not seek to determine what law is or to redefine the theory surrounding law; rather, this dissertation will use Fuller’s theory as a guide. Therefore we will attempt to determine whether Customary International Law fits into the matrix of law from a jurisprudence perspective.

The theological exploration of the creation of law is necessary, as it will show us whether the basis for Customary International Law, i.e. opinio juris and long standing tradition, is sufficient. We will be focusing on the writings of Lon Fuller, as a foundation to determining what characteristics must be present for something to be considered to be law, beginning with a brief introduction on Lon Fuller.

6.1 Lon Fuller: A Brief Introduction

Lon Fuller has been chosen as the founder of this dissertation for a few reasons. Firstly, and perhaps quite a biased manoeuvre, the writings of Lon Fuller have been the subject of quite a bit of personal interest. Further, his writings on law have generally been well received. Fuller’s criticisms stem from the thought that his writing is incomplete indicating general acceptance of his principles.

Further, Fuller was educated and wrote his book The Morality of Law during an extremely interesting time for International relationships. His book was published in 1964 after the European Coal and Steel Community and the ‘Three Communities’ had begun to flourish. Fuller lived through the first and Second World War therefore in his writings he was able to draw experiences from the beginning of the spur in the growth of the International Community, as we know it, which followed.

95 Article 3(1)(d) ICJ (1949)
As for the introduction, Lon Fuller is a positivist writer who has followed and expanded Positivism from a Natural Law viewpoint. These viewpoints will be summarised in greater detail later. For now Legal Positivism’s position on law can be summarised by Leslie Green’s statement:

‘Positivism is the view that law is a social construction.’

This means that law is dependent on what society finds authoritative, for example legislation or social customs. While Natural Law considers that the law is something which is universal and naturally instilled with human beings. As stated, Fuller, who classes himself as a Modern Natural Law thinker, seems to take an approach somewhere between the both theories. A comparison will be made between Fuller and the natural law and legal positivist approach under heading 7.1.

Fuller identifies eight requirements for the rule of law: Laws must be general, widely promulgated, be prospective, clear, non-contradictory, possible, be constant and finally there must be consistency in the written law and how it is dealt with in practice. If these rules are applied to Customary International Law, one can hope that we can determine whether it can be considered to be law.

Fuller described that law as ‘the enterprise of subjecting human conduct to the governance of rules.’ He believed that these eight principles would allow for citizens to understand the law and thereby follow it. This can be evidenced by the running theme throughout the principles, that the law must be predictable.

6.2 Lon Fuller’s Eight Principles

Lon Fuller believed that there are eight characteristics that are needed to create a ‘perfect’ piece of law. Fuller wrote that:

‘A total failure in anyone of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.’

Fuller believed that his principles not only created the perfect law but actual law itself. These principles are internal to law itself. Now that they have been introduced, the principles are that the law must be:

1. The rules must be completed to prevent them being applied on an ad-hoc or inconsistent basis

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96 Greene (2013)
97 Strauss, (1968) p.137-146
98 Fuller (1964) p.39
99 Fuller (1964) p.106
100 Fuller (1964) p.39
2. The rules must be publicised. The ‘subjects’ must be aware of their legal obligations.
3. The rules must be clear
4. They must not be retrospective
5. They must not contradict another piece of legislation, or itself
6. They cannot demand something beyond the power of the ‘subject’
7. They must be stable
8. There must be no divergence between adjudicators, administrators and legislators.

Fuller, quite creatively, explains these eight principles using the example of an imaginary King named Rex. This King has attempted to pass Law across his Kingdom; however he comes across many problems in doing so. Each of the problems that occur occurs as a result of one of these principles.

Each of these eight criteria will now be discussed in turn. It is unlikely that each of these elements will be missing in our topic, Customary International Law; however each element is still worth discussing. This is because each element intertwines with each other and in order to fully understand the reasoning behind each element it must be considered as a whole unit.

We will therefore briefly discuss the elements that do not apply to our discussion on the theoretical validity of Customary International Law; we will delve further into detail on the elements that are controversial, in regards to Customary International Law.

6.2.1 Consistency
Consistency is a difficult thing to master. Some may perhaps argue that it is impossible for the law to always be consistent as no situation, bringing rise to the application of the law, is ever the same. As Customary International Law is un-codified, the issue of consistency comes into play in the implementation and interpretation of it.

Taking a look back at the case law that has already been discussed, there is a clear pattern emerging. There is inconsistency in the way that the ICJ reaches its judgment. For example, in the Nicaragua judgment it was discussed that the element of state practice is important however they solely focused on opinio juris to reach their judgment. Further, in the Lotus case, the element of state practice was stretched and opinio juris was ascertained from the fact that states had not previously commented on the matter. Basically, there is no clear pattern in the judgments, allowing for the outcome of a case to be predictable.

This predictability is extremely important. Fuller writes that unpredictability leads to confusion as to the law, providing ‘false leads’ to the subjects of the law, in our case states and further confusing the

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101 Nicaragua (1984)
102 S.S Lotus Case (1927)
judiciary in further cases.\textsuperscript{103} The ICJ will struggle with its future judgments if it has no clear basis to proceed on and if its judgments are previously inconsistent. Further, it prevents states being aware if their actions breach Customary International Law and hinders how they can act. It goes without saying that it is undesirable for a subject, or state, to be unaware of which actions they are allowed to take.

It is clear from the judgments of the ICJ and the un-codified nature of Customary International Law, that there is no consistency in the interpretation and creation of Customary International Law. However, there is an argument for this. It is arguable that this inconsistency allows for flexibility of the law and aids the ICJ in making the correct decision. However, this cannot overshadow the fact that states cannot predict the application and outcome of the law.

\textbf{6.2.2 Publicised}

Similarly to the criteria of consistency, the issue stems from the fact that Customary International Law is un-codified.

In Fuller’s imaginary King Rex’s kingdom, Rex decided that statute was to be made a state secret, thereby preventing his subjects from knowing what was legal or illegal. This angered King Rex’s subjects who were unhappy with the fact that they would have their cases determined by rules that they are unaware of.\textsuperscript{104} It is impossible for the subjects to prevent breaking the law, if they are unaware of what it is and further it is difficult for them to defend themselves if they are unsure of the criteria for the breach of law.

The fact that Customary International Law can only be found in previous case law, prevents states from realising which rules they are bound to, making it almost impossible for them to avoid breaking these laws.

However there is one redeeming factor to Customary International Law, which is the fact that its elements are clearly laid out in article 38(1)(b) ICJ. Despite there being problems with the consistency in interpretation of these elements, these elements provide a guideline for states to determine how to plead their cases and more importantly, an aid to determine what is legal.

A state seeking to act in a particular way can investigate previous state practice and state opinion however, due to the inconsistent interpretation by the ICJ, it is still unpredictable as to whether it would be considered to be Customary International Law.

\textsuperscript{103} Fuller (1964) p.34
\textsuperscript{104} Fuller (1964) p.35
Further, the ASR, which stems from Customary International Law, clearly lays out the repercussions of a breach. However this only helps once it has been determined that there has been a breach of Customary International Law. It does not assist in preventing a breach, or assisting states in realising their obligations.

Therefore it is problem that Customary International Law is not codified.

6.2.3 Clear
This requirement requires the law to be jargon free and understandable. A state cannot be expected to follow a rule that it cannot understand.

Customary International Law is riddled with jargon. Despite consisting of two elements, state practice and *opinio juris*, the meaning of either term is really unclear. To further muddy the water it is uncertain to what extent each element is required, or whether both elements must be present. It is not intentional to repeat ground which has already been covered, however the unclarity with state practice and *opinio juris* will be briefly touched upon, again, to further evidence this point.

It is unclear what is required to fulfil the element of state practice, in terms of which acts can be considered, the duration of the practice and whether the practice can be ‘broken’. As discussed, there have been varied results from the ICJ, in terms of what it considers to be important. Taking this back to the *Nicaragua*\(^{105}\) case, the ICJ neglected to consider state practice and focused on *opinio juris*. Again, referring back to Kirgis, this can be ‘change’ in criteria occurs due a sliding scale of criteria. Where state practice is long and clear, which is an indication of *opinio juris*, less emphasis needs to be placed on this criterion (*opinio juris*). Further, in cases where there is clear *opinio juris*, for example the state has ratified a treaty to the same effect; the weight on state practice is reduced, if not removed.

There is also no consensus as to what *opinio juris* actually means. There are debates as to whether actual acceptance is needed or whether a belief is sufficient. Further it is an element that is practically impossible to produce conclusive evidence of.\(^{106}\)

This muddled or uncertain nature of Customary International Law means that states cannot know what is required of them, or how the law is formed. They cannot make reasoned opinions on the status of an act if they cannot guarantee that the elements used to determine Customary International Law are correct. Basically, states cannot modify their behaviour to create, or prevent the creation of Customary International Law, if they cannot be certain how it is created. Further,

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\(^{105}\) *Nicaragua* (1984)

\(^{106}\) *Nicaragua* (1984) p.128 Judge Sorensen
they cannot assume that something is already a form Customary International Law, making it difficult for states to regulate their behaviour.

Fuller stated that law is invalid if it is not reasonably clear what it prohibits\textsuperscript{107} and therefore Fuller’s criterion of clarity is not satisfied.

\subsection*{6.2.4 Retrospective}

Like the majority of the other elements discussed, retrospective legislation is a subject, which has far too many components within it to discuss within this paper. There have been many discussions as to whether retrospective legislation is valid or should be valid.

It could be argued that the very nature of Customary International Law, paves a way for retrospective legislation as a state is subject to a matter which is held to be customary law, by the ICJ, once the breach has already occurred.

However, this argument is extremely weak. The Custom breached was a custom before the breach occurred. The Custom in question would have come into being when there has been a sufficient amount of state practice and \textit{opinio juris} was present. Therefore the state would have, unknowingly, breached the custom rather at the time of the act rather than the breach being formed retrospectively.

Further, Article 13 ASR (Articles of State Responsibility) provides a guarantee against retrospective legislation. It provides that:

\begin{quote}
‘An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs’\textsuperscript{108}
\end{quote}

This can be evidenced, in practice, by the decision by Arbitrator Asser, in a case involving the seizure of an American seal hunting boat outside of the territorial waters of Russia, by Russian authorities.\textsuperscript{109}. Asser stated that the dispute had to be settled by the principles under force at the time of the seizure of the boat.

This being said, a state will still be liable for acts which breach Customary International Law, even if the law is no longer applicable at the time a remedy is sought.\textsuperscript{110}

There is an exception to the rule under Article 13 ASR, as a state can agree that responsibility will be assumed retrospectively. In practice, this is extremely rare and will be dealt with under article 55

\begin{footnotes}
\footnote{107} Fuller (1964) p.102
\footnote{108} Article 13 ASR
\footnote{109} James Hamilton Lewis (1902)
\footnote{110} Rainbow Warrior (1990) p 265 - 266
\end{footnotes}
ASR, which refers to the principle of *Lex Specialis*. This principle will allow for the determination of applicable rules, when more than one applies.

Therefore Customary International Law satisfies Fuller’s principle in that it does not allow for retrospective legislation. Despite Customary International Law being largely uncodified and subject to change, it will not later condemn a state, for an action it has already committed, which is now considered to be contrary to Customary International Law. However this changes if the act is still ongoing, however there will be a cut off period for liability, or alternatively article 55 ASR will apply.

Therefore Customary International Law complies with the fourth of Fuller’s principles.

### 6.2.5 Contradiction

The ‘Perfect’ or ‘ideal’ law should not contradict itself. This links in with the obligation that law should be clear. This is easier said than done. With the mixture of legal systems, interests and opinions running throughout the international sphere, it can be difficult to control and prevent contradictions occurring.

An analysis of the majority of legal systems will bring to light inconsistencies and contradictions and similarly, contradictions by the judiciary, to a certain extent, are unavoidable.

The codified aspects of Customary International Law do not contradict each other or nullify another documented piece. However the un-codified aspect of Customary International Law allows for many contradictions. An example of this is the *Nicaragua*\(^{111}\) case where the ICJ focused on the aspect of *opinio juris* compared to the *North Sea Continental Shelf Case*\(^{112}\), where state practice played an important role.

### 6.2.6 It cannot demand something beyond the power of ‘subject’

This criteria falls nicely into the well-known Latin phrase *Nemo dat non quad habet*, meaning nobody can give what they do not have. This phrase is well versed among many legal principles, as it is the foundation to the functionality of law.

It is integral that law does not ask more than is possible from the people, states or organisations bound to it. In his story, Fuller refers to a law, instated by King Rex, that citizens have ten seconds to

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\(^{111}\) *Nicaragua* (1984)

\(^{112}\) *North Sea Continental Shelf* (1969)
appear when summoned, cannot sneeze in the Kings presence and other impossible tasks.\textsuperscript{113} Fuller uses a phrase to describe this:

\begin{quote}
'To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos.'\textsuperscript{114}
\end{quote}

This is an important phrase. The purpose of law is to control and direct behaviour, if it asks for behaviour that cannot be actioned, the law loses its purpose. It also loses its power, as it becomes something unachievable so states will no longer attempt to comply with it, or the rest of its rules.

Due to the nature of Customary International Law there is no set provision of what is asked for by states. Arguably, this means that there is no guarantee that it will not ask of a state more than it can do.

6.2.7 Stability
Stability refers to the consistency of the law. Fuller stated that ‘a law that changes every day is worse than no law at all’.\textsuperscript{115} The law must be stable and consistent to enable states to act in accordance with it.

Once again, in relation to Customary International Law, this falls onto the flexible, unpredictable nature of it. It is too far to say that Customary International law changes everyday however the organic nature of it easily allows for changes.

However, changes and development in the law does not cause the issues that Fuller is describing. Fuller’s problem was with constant changes in the law to the extent that citizens cannot regulate their own conduct. Despite there being a lot of changes in Customary International Law, it is not to the extent that the ‘norms’ are constantly superseded.

Therefore Customary International Law does not fall down on the stability issue of Fuller’s principles.

6.2.8 No divergence
Finally, there must be no departure from the written law by the judiciary.

In every one of Rex’s judgments he refers to the code and states that he is applying it, however on closer scrutiny he has diverted from the ‘code’ or legislation. Again, citing the \textit{Nicaragua} judgment, it is clear that Customary International Law is guilty of this. As has been discussed, the ICJ referred to the elements of Customary International Law however they did not apply them. This has also

\begin{flushright}
\textsuperscript{113} Fuller (1964) p.36
\textsuperscript{114} Fuller (1964) p.37
\textsuperscript{115} Fuller (1964) p.37
\end{flushright}
occurred in other cases discussed where the ICJ has neglected one of the elements of Customary International Law.

Judicial interpretation has a role to play within this. Judicial Interpretation cannot go so far as to cause a divergence between the written law and case law; it must codify the law without supplementing it. As discussed, the elements that must be interpreted are that of state practice and opinio juris, however, as indicated the ICJ often departs from these set criteria. This being said, there is not much scope for divergence from the court, as the rules surrounding Customary International Law are exceptionally open.

Judicial Interpretation cannot be avoided. The judiciary needs to apply legislation to the case in hand and there will always be a slight divergence between different judges’ judgments. What needs to be avoided is the interpretation of the legislation against the intentions of the legislature. Fuller understood this and would consider Judicial Interpretation as necessary provided that it is consistent with the intentions of parliament and does not deviate from the purpose of law.

Going back to Customary International Law, it is integral that the judiciary follows the criteria of opinio juris and state practice. This is difficult due to the uncertain nature of them; however both elements must be present.

Therefore it is clear that Customary International Law falls into the trap of no divergence, which is considered, by Fuller, to prevent its ability to become law. The lack of regulating body has allowed the ICJ to deviate from article 38(1)(b) ICJ and the uncertainty of the criteria of these elements allows for inconsistent judgments.

6.3 Summary

When considering each individual aspect of Fuller’s principles, it is clear that there is a continuing factor causing Customary International Law to fall short of these principles. This factor is that the law is not codified or publicised.

If there are no ‘guidelines’ or provisions it is arguable that something cannot be clear. This can be best explained using a metaphor that we all have experience in, building IKEA, or any, flat-pack furniture.

There a numerous ways to assemble the flat-pack bookcase or coffee table to enable it to complete its purpose however there is one correct way of completing it, which can be found in the manual which is provided. If the user reads the manual and yet builds the furniture in a manner contrary to the instructions he can be is, for the purposes of this metaphor, voluntarily breaking the ‘rules’
despite the same result being achieved. However if the user is not prevented with this manual, outlining the way his furniture should be built, he can achieve the same result without being aware that he is doing so contrary to the ‘accepted’ provisions or the rules.

An example of this in practice is the North Sea Continental Shelf case\textsuperscript{116}, which referred to the drawing of International Sea barriers and the method used to complete this.

The same result could have been achieved regardless of the method however the method chosen is extremely important to enable states to amend their actions in the future.

It is apparent that Customary International Law does not appear to fulfil Fuller’s criteria for the ‘ideal’ law. However this is just that, the focus on creating law that is ‘perfect’. It could be said that no legal systems actually fulfil this criteria due to the complexity of states and the vast amount of legislation required to keep them in operation. In other words it is an impossible task to create Fullers ‘Utopia’.

\textsuperscript{116} North Sea Continental Shelf (1969)
7.0 Are Fuller’s Eight Principles conductive of Law?

It would be extremely narrow minded to assume that Fuller’s eight principles fully represent what the law should be. When writing his eight principles, Fuller stated that:

‘A total failure in anyone of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.’

This assumes that something cannot be law if it breaches any of the eight criteria. However, Fuller circles around and contradicts himself later on.

Fuller stated that, in practice, every element need not be present within the law. This is a tricky point. Arguably every element must be present to have a good system of law or not, it is one extreme or the other. However Fuller has set himself a get out clause which relates to his beliefs surrounding morality and the law.

Fuller believed that morality is a founding point of the law. The law should seek to do good and prevent evil. However good does not have any set rules, there is no formula for good. Therefore in order to do what is good or morally right, a ‘gut instinct’ or case by case basis approach may be required.

With this in mind, Fuller recognises that one or more of these elements may be missing if it allows for a moral or ‘good’ result. An example of this is the English case of *R v R*, which will briefly be outlined:

*R v R* involves numerous of Fuller’s elements, namely, that the law must not be used on ad hoc basis, it must be publicised and finally that there must be no divergence between adjudicators, administrators and legislators. It was a criminal trial for the rape of the defendant’s wife. The law did not recognise the rape of spouses at the time and the judiciary used their discretion and powers of judicial interpretation, to convict the defendant. For the first time they recognised that raping a spouse was illegal. This is controversial as the defendant was convicted on a law that was not enforced at the time or his ‘act’ and during his trial.

Fuller would argue that in a case such as this, the moral goodness allows for certain elements of his eight rules to be missing. Despite Fuller’ moral standpoint is arguably a strong one as it heeds to the good of society, it could be argued that a consistent law is more desirable.

It is arguable that Fuller’s principles breach themselves, as they ask for something beyond the powers of the states. As discussed under heading 6.3, there is the question as to whether these

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117 Fuller (1964) p.39
118 R v R (1992)
principles are actually possible or whether they ask for something that cannot be completed. Human nature dictates that mistakes are made, things may contradict each other and there may be divergence from the written law and the judiciary’s judgment.

This being said, Fuller’s principles provide a guideline and a measuring stick for the perfect system of law. This system may not be possible in practice but using Fuller’s principles the legal system can attempt to avoid shortcomings. Fuller’s principles provide the clearest idea of what the law should be.

7.1 Criticisms of Fuller
Fuller has been unable to escape criticism; however this is not indicative of a poor theory. Generally, the criticism that Fuller has received has focused on his failings to include further criteria, rather than failings in actual correctness of the criteria he provides.\(^{119}\)

When writing the Morality of Law, Fuller’s main concern was, quite obviously, the connection between the law and morals. He wrote with the view that the law is based on morality and considered, in great depth, what this meant. This detracted from the questions surrounding the criteria of law outside of this. This being said, Fuller’s criteria are transferable. Fuller was concerned with fairness, reciprocity and maintaining trust and peace between the state and its citizens. These factors are still of concern when dealing with inter-state relationships and therefore apply the same.

As previously mentioned, Fuller wrote in a manner between legal positivism and natural law. He never quite claimed one but flitted between them. Therefore the criticisms that will be considered will be that from the natural law perspective and legal positivist perspective.

7.1.1 Natural Law perspective
Natural Law thinkers traditionally follow the approach that law is developed from a hierarchical system with God, or a higher being/moral power at the top. They believe that law is determined by nature and is universal.\(^{120}\) Therefore the same principles will apply to international law as to domestic law.

7.1.1.1 Aquinas
Aquinas, was a follower of Natural Law and provides a view which is culturally and religiously more relevant within modern western society than his predecessors, such as Aristotle. Aquinas maintains the natural law connection to a higher power, or God, however, unlike Aristotle; he writes in a more modern era with increased collaborative interaction between states. Aquinas wrote a long time

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\(^{119}\) Murphy (2004) p.240

\(^{120}\) Strauss (1968) p.137-146
before Fuller and therefore has no direct comments on Fuller’s principles. However it is clear from his writing that Fuller’s principles fit his own principles regarding law.

Aquinas believes that all natural creatures have instilled which he calls ‘eternal reason’. This ‘reasoning’ compels creatures to seek what is ‘good’ and this is the foundation of law. He believes that this basic principle is present in domestic and international law. He would consider that Customary International Law requires these features.

Aquinas described the law as being an ‘analogous term’ and therefore it has many meanings. He believed that the primary meaning of law is the ‘directive of our acts issued by someone in authority’ that strives to reach ‘common good’, which creates a basis for a legal duty as a form of control. Basically, the law is a guideline directing the acts of its subjects. Therefore Aquinas would agree with Fuller’s criteria that the law must be publicised and clear in order to allow its ‘subjects’, in our case states, to comply with them.

Despite believing in a ‘higher law’, unlike the majority of Natural Law thinkers, Aquinas considers human law to be the ‘proper law’ in terms of linguistics however it is measured and based on ‘eternal law’, which comes from God.

Despite being in agreement with the basis of Fuller’s principles, on the face of it, Aquinas would have quarrel with Fuller’s disallowance for judicial interpretation, which is one of the critical points surrounding Customary International Law. Aquinas encourages the development of the law through judicial interpretation provided that it provides the moral or good result. Aquinas believed that the law should be moral or ‘good’ which Judicial Interpretation could allow by applying the law to provide the ‘moral’ result on a case-by-case basis. Fuller, to a certain extent, would agree with this. Fuller also believed that the judiciary should seek the ‘moral’ approach. However, Fuller saw the limit to judicial interpretation; it should reflect the law. Aquinas would agree with this limitation, judicial interpretation should apply the law not amend or create new law.

Aquinas’s would consider the ‘self made’ aspect of Customary International Law as the correct approach to the formation of law. As stated, Aquinas believed that law is instilled within everyone. It is a directive from a higher being which allows people to strive for the common good in society. The emphasis on state practice and opinio juris allows for the ‘eternal reason’ of the states to create law; instead of relying upon legislative procedures where this could get lost.

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121 Aquinas (1996) Questions 90-97 XIII
122 Aquinas (1996) p. vi
123 Aquinas (1996) I-II Question 90 Article 4
124 Aquinas (1996) p. 611
Therefore Aquinas would agree with Fuller’s principles. Aquinas’ takes more of a flexible approach to the law and, considering the benefits of Customary International Law, may not have condemned it.

**7.1.2 Positivist approach**

The positivist approach considers the sources of law and not its merits in determining whether it is valid\[125\]. It considers that it is irrelevant whether the law is functioning; the important aspect to consider is whether it fits the checklist for law. Therefore in terms of Customary International Law, it does not matter whether it works as a form of law if it does not fit the criteria for law.

**7.1.2.1 Hart**

Like Aquinas, Hart believed the law has many meanings and aspects\[126\] however he rejects Fuller’s command theory. He states the law does not function on commands, as it is impossible to inform citizens of their every responsibility.\[127\] Like Aquinas, Hart also sees the law as a form of guidance. Therefore he would consider that the law does not have to comply with all of Fuller’s principles as it guides rather than directs behaviour.

Further, Hart would consider that Fuller’s principles do not apply to International Law. This is due to the fact that international law is primitive\[128\], as it does not have all the elements of a fully developed legal system. This is evidenced as there is no legislative body and the judiciary have little powers as a sovereign state can choose not to obey the legislation.

Similarly to Aquinas, Hart’s would criticise the potential limitation on judicial interpretation, in the form of Fuller’s principle of no divergence. However, unlike Aquinas he saw a limit to the good that judicial interpretation can provide.

He believed that it should be limited to the meaning of existing law and not create new law. Hart recognised that the law can be unclear, which he called the ‘Penumbra’. He explained this terminology through the example of a sign that states ‘no vehicles’ allowed in the park\[129\].

Hart suggested that the term vehicle provides a ‘penumbra’ in the law. This is because it is an uncertain term. The meaning of ‘vehicles’ could change in the future. He recognises that the law is not perfect as men make mistakes and therefore judges should interpret the law.

Hart argues that the law must be interpreted by courts who ‘bring to light’ the purpose sought within the legislation, which may have a moral overlap. It is arguably impossible to separate the ‘is’

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\[125\] Gardner (2001) p.199  
\[126\] Hart (1994) p. 1  
\[127\] Hart (1994) p. 21  
\[128\] Hart (1994)  
\[129\] Hart (1994)
and the ‘ought’\textsuperscript{130} within statutory interpretation which often relies on the opinions of the courts as to the intention of parliament. Basically, the law is the law and it cannot be changed by judicial interpretation. This fits with Fuller’s principle that there should be no divergence between the legislature and judiciary.

There have been criticisms of Hart from other legal positivists who argue that he appears to be contradicting himself when he agrees that the law is the law regardless of its merit, however judicial interpretation is valuable. You cannot say the law is what it is and yet allow interpretation which could allow the law to become what it ‘ought’ to be.

To explain this further, the law is what it is when incorporated, therefore using the vehicle analogy, it concerns vehicles originally discussed. The judiciary will be turning the law into what it ought to be if it adds another form of transport to the list.

It is arguably impossible to separate the ‘is’ and the ‘ought’ within statutory interpretation which often relies on the opinions of the courts as to the intention of the lawmakers.

Despite the problems with Hart, his thought pattern clearly is in favour of judicial interpretation as it solves the problem of ‘Penumbra’ in the law. He appears to see Judicial Interpretation as not changing the law but merely applying it. Therefore, in the case of Customary International Law, the courts will be interpreting Customary International Law and not creating it through the use of state practice and opinio juris.

Hart’s theories suggest that Fuller’s principles are correct. He would agree that the law should be complete, clear, stable and publicised. Further, the law must not ask more than possible of its subject or contradict other laws; however Hart sees judicial interpretation as a way of safeguarding this, however, he would consider that the judiciary should use this power with care\textsuperscript{131}.

Hart would also consider that international law, as a primitive form of law would not be able to comply with all of Fuller’s principles and therefore judicial interpretation is necessary to act as a substitute.

Hart has not been without criticism with Jeremy Waldron describing Hart’s theory as ‘unhelpful’ and ‘indifferent’\textsuperscript{132}.

\textbf{7.2 Fullers Response}

Fuller would not consider International Law as ‘primitive’. It is agreeable that it is young and subject to development but it should not be excused from the basic principles of law. Fuller’s principles refer

\textsuperscript{130} Hart (1958)
\textsuperscript{131} Hart (1994) p272-273
\textsuperscript{132} Kramer (2008) p.67-69
to law in general. Something is not considered to be law if it does not satisfy these principles and the same applies to International Law.

Fuller recognises the importance of judicial interpretation provided that it does not defer from the actual law; it cannot create new law or amend current law. However it can interpret the meaning of the law and apply it to the situation in hand. Fuller uses the example of vague legislation to explain this, which is quite fitting to the topic of Customary International Law.

Fuller stated that there is no prohibition against vague legislation however the judiciary are unlikely to consider it as valid, if it does not reasonably clearly state what it prohibits.\(^{133}\) Fuller was not against judicial interpretation; rather he does not consider that the judiciary should go against the purpose, or the reason, for the legislation.

Therefore Fuller would consider that the interpretation of state practice and *opinio juris*, by the judiciary is desirable, provided it fits in with the purpose of those provisions. The purpose of the objective element of state practice is to show acceptance of the rule, at large by states, while the purpose of *opinio juris* is to determine whether states feel that they should be bound by the rule. Provided judicial interpretation is in-line with these factors, it does not differ from the legislation and therefore complies with Fullers rule. It is considered that in general, interpretation by the ICJ has been in-line with the purpose of the statute.

Fuller would consider that the aspect of ‘self made law’ i.e. the reliance on state practice and *opinio juris* is a bad trait. Like Aquinas, Fuller believed that the law should contain a moral element; however this element can be derived through set legislative procedures. Fuller would consider that in order to fulfil the common good, the subjects must be aware of the obligations. Fuller considered that the purpose of the law is to guide the acts of its subjects\(^{134}\), in this case states, and therefore the law must be clearly structured, publicised and clear. Further it should not be created on an ad hoc basis.

\(^{133}\) Fuller (1964) p.131  
\(^{134}\) Fuller (1964) p.42
8.0 Is Customary International Law a form of Law?
Customary International Law does not fit into Fuller’s eight legal principles however, despite criticism from some legal writers; it has been recognised as law by the courts and many states.
As previously discussed Fuller allows for deviance from its rules if it is in the interests of maintaining morality in the law, which could be the reasoning used to explain the development of Customary International Law, despite it contradicting Fuller’s principles.

Heading back to the discussions surrounding judicial interpretation, it is arguable that this allows Customary International Law to fit in with the rest of Fuller’s principles. For example judicial interpretation can be used to ensure that there is no contradiction between law or the law does not require the state to act beyond its powers.

It is considered that the element preventing Customary International Law from becoming law its unwritten nature. If Customary International Law was clearly written in statute or treaty there would be no issues with the first of Fuller’s principles, that the rules must be complete. If there were clear guidelines surrounding Customary International Law there would be no issues with the ICJ applying the article 38(1)(b) on an ad hoc basis.

It is noted that there can be arguments surrounding the fact that the rules surrounding Customary International Law are complete; there are two rules that must be complied with. However, as has been discussed throughout this paper, the rules are not always complied with, with the ICJ often ignoring one aspect all together135 and the requirements needed to satisfy these rules are unclear.

If Customary International Law was written or encoded in treaties, it would prevent contradictions occurring between customary rules, as the judiciary would have a clear reference point. It would also enable the rules to be clear.

There are many debates among academics as to the meaning of *opinio juris* and what constitutes state practice. A clear outline of what these terms mean and how to satisfy them will enable a consistent approach to Customary International Law. Further, states will realise their obligations and will not be bound to something that they are unaware of.

Finally, and most importantly, a codified system will enable Customary International Law to fall within the second, and one of the most important, of Fuller’s principles, that it must be publicised.

It is accepted that an un-codified system, by itself, is not the focus of these uncertainties. The British constitution is largely un-codified; however this is a historical development, which on a smaller scale,

135 Nicaragua (1984)
allows for easier interpretation. The British judiciary and legislature are trained on finding these anomalies and understand their legal system. The international legal system is not as straightforward, and arguably this prevents states fully understanding their obligations.

One could argue that the scope for judicial interpretation has allowed Customary International Law to develop and has provided codification of such law within ICJ judgments. These create the backbone of Customary International Law and provide a reference to it. This is arguably no different from the British Constitution, which is found in various documents and judgments and requires the judiciary, and legislature, to piece it together.

Therefore it is integral to determine whether the development of customary international law, through the use of Judicial Interpretation, allows for Customary International Law to wear the title ‘law’.

The final point to consider is H.L.A Hart’s argument that international legal systems are young and cannot be subject to the same constraints placed upon a developed system. The international legal system is still working to find it ‘rhythm’ and ‘purpose’ and should be allowed to grow and develop freely.

It is appreciated that the international legal system is to blame, in part, for the failings of Customary International Law. As H.L.A Hart stated, international law is primitive with no clear legislature, judiciary or powers. Arguably, this allows for contradictions in the law and ad hoc results over the imperfections of Customary International Law itself.

It is agreed that the current state of the international arena has prevented Customary International Law from flourishing, something which it could have done if it was implemented within a state. The harsh reality is that the uncertainty between state relations, and introduction of various state groups, such as the European Union, has prevented Customary International Law from growing and developing.

There is no disputing that international law and international relations have increased in the past 70 years, to a point where it is difficult to predict future needs and flexibility is required; however, does this classify it as primitive? Further, should a new legal system be excused from the basic principles of law?

There are hundreds of different answers to these questions however it is considered that Fuller’s principles should be found in every legal system regardless of age or position. A primitive system

should be developed and based on the basic principles of law. It is put forward that a system cannot develop and grow into a desirable legal system if it does not have the correct foundations.

It is therefore considered that Hart's primitive law argument can be considered to be a reason rather than a justification of the failings within Customary International Law. Further, it does not change the position as to whether it should be considered to be law; rather it indicates that Customary International Law is far too under developed to bear the term ‘law’.

**8.1 Is it Desirable?**

It is noted that the criticisms of Customary International Law are a familiar theme throughout this paper; however it does have desirable traits. These will be discussed to determine whether there is a reason for Customary International Law to be ‘law’ or whether it is better for it to be merely considered as a norm.

The lack of strict rules surrounding Customary International Law allows it to be flexible, further Customary International Law binds all states without the need for them to ratify it. This allows for the quick resolution of new rules and binds states that would not otherwise ratify the law. This allows it to work as a time saver, which is desirable in certain instances, for example norms of *jus cogens*, which will be discussed shortly.

There are over 200 states that play in the international ring, which makes the passing of new law an extremely difficult task. Each of the 200 sovereign states will spend years negotiating over treaties to ensure that their state interests are fairly represented. It is desirable to have a form of law that can be formed quickly if there is practice and general consensus. As stated, this is particularly desirable in cases where the custom relates to human rights, such as extraordinary rendition. John Tasioulas stated that Customary International Law can provide an important means for advancing global justice as it binds all states¹³⁷.

In times of increased trade and growing globalisation it is necessary for the law governing the states to be flexible to the every changing needs of the expanding international community. Customary International Law provides a quick flexible method for the international legal system to keep updated and respond to ever changing market needs, which are not provided for in any other method.

Customary International Law also has a failsafe engrained into it. It will not allow a state that has persistently objected to the practice in question to be bound by it. Therefore a state that would not,

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¹³⁷ Tasioulas (2007) p.308
hypothetically, have ratified the treaty will be able to escape the clasp of the Customary International Law in question, if they have repeatedly or persistently objected to it.

Further Customary International Law can help towards global justice. This can be demonstrated by the norm of *jus cogens*. This norm refers to ‘compelling law’ which is a form of customary law where no derogation is permitted\(^\text{138}\). It provides that certain rules are so engrained into international law that they cannot be removed, for example, the provision against torture and slavery. There is no clear indication as to what constitutes a norm of *jus cogens*, however it is clear that as it is a form of Customary International Law, all states are bound to its provisions and have a duty to comply with it. Human Rights Law and international law regarding the treatment of citizens and other states, can take years to fully develop. Once developed it can be difficult to ensure all states sign up to its provisions.

This being said, there have been debates as to whether *jus cogens* can be considered to be a form of Customary International Law. This is because Customary International Law requires the criteria of state practice and state acceptance (*opinio juris*) to be present. The rule of *jus cogens* applies to all states whether they consider it to be law or not\(^\text{139}\).

It is accepted that Customary International Law has desirable aspects. It allows for quick and flexible rule making in an expanding and multi-cultural environment. However this does not provide justification for its branding as law rather it seems more suited as a temporary measure. Therefore Customary International Law has desirable traits however these traits are more suited as a temporary measure for dispute resolution or problem solving and should later be codified and ratified by states.

\(^{138}\) S.S.Wimbledon (1923)
\(^{139}\) Siderman de Blake v Republic of Argentina (1992)
9.0 Conclusion

This paper has sought to determine whether or not Customary International Law is consistent with Fuller’s eight legal principles. It has aimed to discover whether, subject to Fuller’s rules, it can be considered to be law. To determine this, this essay has explored the creation and development of Customary International Law, its usage in practice, the reasons why it is followed and its compliance with Fullers principles. Further, to gain perspective of the suitability of Fuller’s principles, Fuller’s criticisms have been explored; alongside other Natural Law and Legal Positivist perspectives.

This paper considers the difficulties in Customary International Law as stemming from its unwritten nature and the uncertainty as to the elements that create it. Article 38(1)(b) ICJ attempts to outline the elements needed to create Customary International Law however it fails to explore the weight placed on each element and the requirements for them. It is unclear what constitutes state practice or opinio juris and the ICJ is inconsistent in its usage and determination of them.

This is not the full picture. The problems with Customary International Law are deeper than the issues in creating it. They also stem to the external factors around it; the fact that it binds all states without their ratification, even though the aspect of opinio juris potentially places an element of state acceptance within the creation of customary law, however the evidential aspect of this is very weak. It is therefore possible for customary law to be created without state consent. Further customary law is un-codified. These issues clearly contradict Fuller’s principles as it prevents clear and publicised law, meaning that states may be unaware of their obligations. Further it allows for divergence between the legislation, namely article 38(1)(b) ICJ, and the decisions of the judiciary. It also provides scope for laws and rules that go beyond the power of the state and contradicts other legislation.

This instability raises the questions as to why it is considered to be law. It is clear that Customary International Law does not comply with Fuller’s conditions allowing it to become law. It is undesirable for a state to be bound to a law that it may not have ratified. The persistent objector clause is of little help; states are required to continuously reject the act in question further it places a requirement on states to monitor the actions of other states to determine whether Customary International Law is being formed.

Perreau- Saussine & Murphy argues that the presence of customary law indicates that the legal system is underdeveloped and the custom forms the role of filling the gaps. Hart agrees with this
and would argue that we should not put the same constraints of a developed legal system on a primitive one.

Hart would argue that as customary law is indicative of a primitive legal system\(^{140}\), it should be allowed to continue until the lacunas in the law are filled; allowing for the International Legal System to develop. International relations have skyrocketed in the past 70 years, since the end of the World War II. It could be argued that we need to give it space to grow and develop before enforcing ‘developed’ rules.

This notion has is rejected by this paper. In order for a legal system to develop it has to be correct from the outset, otherwise the flaws will become deeply engrained into the developed legal system. A complex system, such as the International Legal System, needs strict rules and clear laws to prevent contradictions forming and to enable state participation. As discussed, states, in general, follow international law for self preservation purposes. A state will generally put the interests of its subjects first and will seek to develop law which is consistent in these interests. It is therefore integral that clear developments are made to prevent more developed states taking advantage of under developed states in the legal arena.

The problem with the unwritten nature of Customary International Law is a common theme throughout this paper; it could be considered that codification of these rules will solve the problems with Customary International Law. However, this will still leave the problem in the creation and content of Customary International Law.

The issue of creation is a hard problem to tackle. If the elements of Customary International Law are removed, it would remove the benefits of Customary International law: that it is flexible and it can work towards global justice. This benefit of Customary International Law contributes towards the regulation of states. It provides for a quick and flexible system of rules, which, in the ever-changing political arena can become outdated quickly. The making of treaties is time consuming and it therefore cannot respond to changing needs, for example, changes in methods of trade or international warfare. As Niels Peterson stated, Customary International Law’s flexible nature serves as a foundation for a coherent legal system\(^{141}\).

However, this benefit is not sufficient to justify Customary International Law’s status as law; Customary International Law is far too flawed. It is therefore put forward that Customary

\(^{140}\) Perreau-Saussine, Murphy (2007) p. 1
\(^{141}\) Petersen (2008)
International Law is not a form of law but should be considered to be a guideline in the creation of law or a form of secondary law. It should not have the same status as treaty law, which at the moment does not supervene Customary International Law. Instead, it should be used as a guideline in creating law, used to assist in the interpretation of law and used as a secondary form of law to help ‘plug’ any gaps in the law. Treaty law, which has been ratified should supersede law which is created through custom.

It is considered that the focus on state practice and *opinio juris* provides for a good foundation to the law. It is desirable that the law is created through practice, which Customary International Law allows. However, as in any democratic system, the law needs to be created by a legislature. The law needs to be ratified and discussed by the parties who are subjected to it.

To summarise, Customary International Law does not comply with Fuller’s eight principles of law and is riddled with uncertainty. However, the benefits of Customary International Law, especially its flexible nature, make it far too desirable to completely write off.

Therefore, as stated, it is considered that Customary International Law should remove its legal hat and place on the hat of a basic custom. This custom should provide states with a guideline on how to act. These guidelines should not supersede treaty law. International Custom can be used in court as a method of determining state practice and should be used by the legislature in development of new law. This will use its ability to temporarily fill cavities in the law allowing for the formation of a clear legal system.

Therefore Customary International Law should be considered as a guideline in forming new law and as a temporary measure in uncertain circumstances to promote global justice. It should be considered as divorced from Fuller’s principles and therefore lose its name as ‘law’.

Perreau-Saussine and Murphy have argued that a form of custom will always exist in the legal system. They believe that it can be traced back to the beginning of legal systems and it will always reappear. This is because it fills any gaps within the law and allows for the organic growth of the law, to fit into the standards of the subjects that comply with it.

To cite arguably one of the most referenced authors, William Shakespeare:

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142 Nicaragua (1984) p.177
143 Perreau-Saussine and Murphy (2007)p.151
144 Perreau-Saussine and Murphy (2007) p.8
‘We must not make a scarecrow of the law, setting it up to fear the birds of prey, and let it keep one shape, till custom make it their perch and not their terror.’

145 Shakespeare (2010) Scene 2, page 2, para 1
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