The Individual and Customary International Law

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Abstract

A state monopoly on customary international law formation was once required and acceptable, given the status states enjoyed as the sole subjects of international law. Since the drafting of the most commonly cited doctrinal sources of customary international law, legal personhood has been extended to individuals. During this same time period, individuals have come to participate in treaty-making in some key areas of international law, including human rights. The customary international law of human rights, no less than treaty law, has direct effects on individuals. It sees them as the subjects protected by those provisions that have attained the status of customary law. Unlike treaty law, though, there is no space in the traditional customary international law doctrine for individuals to participate in the law-making process. As a result, there is currently a disjuncture in customary international law; individuals are its subjects but are not seen as legitimate participants in its formation.

Uncomfortable with this state of affairs, this Article seeks to investigate whether the participation of individuals in customary international law formation is desirable. First, it takes note of a prior observation of legal scholars that individuals do, through various mechanisms, already play an active role in customary international law formation despite the doctrinal insistence that only States play such a role. Second, this Article develops theoretical justifications for the inclusion of individuals in customary international law formation. Finally, calling on established legal institutions as well as on social science tools for assessing individuals' practices, beliefs and expectations, the Article proposes methods by which individuals might participate in the customary international law formation process.

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“...obedience to a law which we prescribe to ourselves is true liberty.”

“The essence of a customary rule lies in the fact that it arises from the conduct of those whom it binds.”

“The will of the people shall be the basis of the authority of government.”

**INTRODUCTION**

The traditional narrative of international law is familiar: states are sovereign; states enjoy a monopoly-hold on legal personality under international law; states make international law. This traditional narrative, at one time accepted as true, is now wrong on every count.

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1. JEAN-JAQUES ROUSSEAU, THE SOCIAL CONTRACT (1762). This work is available in electronic format at [http://www.constitution.org/jjr/socon_01.htm#008](http://www.constitution.org/jjr/socon_01.htm#008) (last visited February 10, 2007).

2. Virally, *The Sources of International Law*, in **MANUAL OF PUBLIC INTERNATIONAL LAW** §3.10 (Sørensen ed. 1968).

The traditional doctrine on customary international law (CIL) is also well known: it is made up of state practice and *opinio juris*. This account is also wrong, both factually and normatively. Until recently, the recognition that actors other than states participate in international law has been confined to the observation of legal realists. The role of non-state actors in the formation of CIL has not been further considered or explored despite vital questions that arise from the realists’ observation. These questions fall essentially into two categories. First, what effects would a doctrinal re-ordering that recognized a role for individuals in CIL formation have on international law generally, and on human rights and CIL in particular? Second, if it is conceded that general international law, human rights and CIL call for and can accommodate breaking the monopoly-power states hold on CIL formation doctrine, how would individuals participate? This Article will seek to address these questions.

Many discussions of CIL start, either conceptually or chronologically, with the Statute of the International Court of Justice (ICJ). Of course, custom was part of customary international law long before the Statute was adopted. Taking just one step back in time, for example, one can note that the Statute of the Permanent Court of International Justice (the predecessor to the ICJ) included identical text in respect to CIL. Taking further steps back, one finds familiar, if somewhat dated, definitions of custom in early international law treatises.

In these earlier periods, in legal scholarship in other areas, theorizing about the relationship of custom to law was well underway. This deeper theorization on custom makes clear that one of the legitimizing premises of custom is that it is thought to originate from the actions and beliefs of those who it later comes to bind – the subjects of the law. The belief that custom originates from its subjects seems to have been translated directly into international legal doctrine.

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4 For a narrative discussion of the process by which Article 38 of the Statute of the PCIJ was adopted into the Statute of the ICJ, see *The Statute of the International Court of Justice: A Commentary*, 689-690 (Andreas Zimmerman et al., eds., 2006).


From the time custom was first identified as a source of international law, until fairly recent when there has been a re-conceptualization and expansion of the subjects of international law, states have been the only entities recognized as international law’s only subjects. Thus, it was only logical to define CIL as law that was made from the acts and beliefs of states alone. Currently, however, individuals have been widely recognized as subjects of international law. One question that arises logically from this recognition is what effect this has on the power of individuals to make law, and specifically their power to participate in the formation of CIL.

Among the many authors who have discussed the problems inherent in the doctrine on the formation of CIL, many seem to have considered or briefly touched upon the prospect of individuals participating in CIL formation. None, however, have delved deeply into the possibility. This Article aims to just that.

The present Article will contribute to at least three strains of international law literature. First and perhaps most obviously, it will contribute to the current understanding of CIL generally and CIL formation more specifically. As the Article will demonstrate, few theorists have made explicit the possibility that individuals could or should participate in CIL formation. Still, CIL literature often skirts the edges of this possibility, even if it does not address it directly.

Second, the Article will address the existing literature on the individual as a subject of international law. The establishment of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), have caused commentators to take notice of a palpable expansion in the types of subjects of international law. During this moment, scholars noted that individuals might be taking on a role as subjects of international law, as there were increasingly instances in which individuals had enforceable rights and obligations under international law. In the intervening years, this idea has gained acceptance and legitimacy, especially as an increasing number of human rights treaties have included provisions granting individuals rights to personally seek redress and as various tribunals have provided avenues for individuals to make legal claims based on violations of their human rights as established in international law.

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7 For a discussion on this expansion, see Section III.A.1 herein.
8 Id.
10 Examples included the use of United States Federal Courts as a forum to address violations of the “law of nations” by way of modern Alien Tort Statute litigation. The Alien Tort Statute can be found at 28 U.S.C § 1350.
addition, the development of theories of individual responsibility for violations of international law, whether in the human rights or humanitarian law arenas, has provided further evidence of individuals becoming subjects of international law. A relatively novel idea, however, is the potentially corresponding notion that individuals should be and arguably already are makers of international law, even if this role is less than formally recognized. This Article will discuss important writings on the individual as the subject of international law in order to establish the groundwork for a relatively modest assertion of liberal democratic theory - that people ought to participate in making the law that governs and protects them.  

Finally, the Article will contribute to the literature on the participation of private actors in the international law-making process. Existing work has primarily described the increasing prominence of private actors, often in the form of NGOs or “civil society,” in the work of international institutions and in the norm and treaty-formation process. This growing body of literature has not yet turned squarely to the role individuals might have in forming CIL, despite CIL’s relevance in governing and protecting individuals.  

Part I of this Article will begin by establishing preliminary terminology relevant to the discussion on the formation of CIL. It will then briefly discuss historical and contemporary CIL doctrine, as well as critiques thereof. Readers well-versed in CIL literature will find this portion of the Article familiar.

Part II will illustrate that others writing about CIL, especially as it relates to human rights, have not fully addressed the difficulties created by the exclusion of individuals from CIL formation. The Article will describe three strands of foundational literature. The first strand is occupied by writings that have specifically identified the possibility of individuals participating in CIL formation but which have looked on the possibility with skepticism. The second provides examples of a much wider body of work which alludes to the possibility of including individuals in CIL formation without directly addressing this prospect. The third strand is made up of work which looks upon individuals participating in CIL formation from either a realistic perspective or from an optimistic perspective and leads the current author to believe that indi-

11 ROUSSEAU, supra note 1.

individuals do participate in CIL formation and, further, that a doctrinal role for such participation should be established.

The theoretical basis for including the individual in CIL formation will be found in Parts III and IV. Part III establishes grounding for this concept in international legal doctrine generally, and specifically in the areas of human rights and CIL. Part IV looks beyond legal doctrine and into literature on globalization and the attendant emergence of cosmopolitanism and transnationalism. It seeks to establish that large-scale, observable social phenomena have changed the fundamental landscape on which the law-making doctrine of international law is based.

Finally, in Part V, this Article will discuss the practical aspects of formally recognizing individuals in the formation of CIL. This discussion will be divided into two parts. The first asks whether the inclusion of individuals requires the Statute of the ICJ to be re-drafted and whether the Restatement of Foreign Relations Law of the United States would require new wording in its next incarnation or whether the current texts would allow (or reflect) such a possibility. The second asks, very practically, how the beliefs and expectations of individuals might be discovered such that future adjudicators and scholars aiming to determine the content of CIL might include individuals in their analytical and deliberative processes.

I. BUILDING BLOCKS: TERMINOLOGY AND DOCTRINE

A. Preliminary Terminology: Usage, Custom, Customary Law, International Custom

An inquiry into the formative process of customary international law asks how we make determinations of what behavior has become so commonplace or commonly accepted that a trespass against that commonality is believed to be admonishable by law. Along the road to becoming law, behavior may pass through various other characterizations describing its ubiquity or lack thereof in society as well as the attitudes of a social group towards that behavior. The behavior may become a common practice or usage; it may become customary; and it may take on a sense of being obligatory such that a breach of that obligation would violate the expectations of the affected community. At this point, it may be said to have become customary law. This is especially so if a tribunal has had the opportunity to disclose the sense that the behavior has come to be expected as a matter or law.\textsuperscript{13}

\textsuperscript{13} SADLER, supra, note 6, at 8.
Practice and Usage. There are distinctions between the terms usage, practice, custom, international custom, customary law and customary international law, and acknowledgment of these distinctions will be of use in the remainder of this Article. Long before customary international law (as that term is currently understood and will be discussed below) was conceived, the idea of custom and its relation to law or customary law had been described and utilized with varying degrees of success. Custom is among those terms that is blurred around the edges and about which there can perhaps be no perfect clarity. Thus it is likely that customary law and customary international law, ideas which integrate the root notion of custom in at least some respects, will similarly be blurry and are perhaps best understood as such. Nonetheless, a brief discussion of what is meant by these terms will be useful.

Practice and usage are commonly understood as referring to common practices among a people arising from the repeated acts thereof. They are distinct from the full universe of the activities of a people in that a practices and usages are repeated, common and notorious. They are also distinct from law in that, depending on the particular practice or usage, there may not be legal sanctions for engaging in or failing to engage behave in that manner. A practice or usage may not have acquired the status of custom or of customary law. A simplified example might be a particular secret handshake used by members of an exclusive, though large, social group. Members of the group might easily identify one another through their practice of using one particular handshake. If the handshake serves no purpose other than to include or exclude members of the social group, it would be termed a usage or a practice. Of course, exclusion from the group is a form of social reprisal, perhaps even one carrying high costs, but failure to know or use the handshake is not actionable by law. When used herein, the terms practice and usage will be synonymous.

14 For a very useful exposition of the family of meanings attached to the word “custom” see BURTON LEISER, CUSTOM, LAW, AND MORALITY: CONFLICT AND CONTINUITY IN SOCIAL BEHAVIOR 8 (1969). Leiser explains that a definitional approach which does not expect or seek perfect clarity has often been very fruitful in making clear what has been confused by attempts to utilize overly precise terminology. Successful examples of this definitional approach, or an “ordinary-language” approach can be found in H.L.A. HART, THE CONCEPT OF LAW, R.M. HARE, THE LANGUAGE OF MORALS and KURT BAER, THE MORAL POINT OF VIEW, among others. Id. at 8-9.

15 Usage originates in Roman law and, like each of the terms defined herein, often is interchanged with the others. See, KARL WOLFE CUSTOM IN PRESENT INTERNATIONAL LAW xix (2nd ed., 1993).


17 BLACK’S LAW DICTIONARY, supra note 16 at 1541.

It should of course be noted that there are many common uses of the term custom. Some refer to the practices of single individuals.\(^\text{19}\) For example, a person may have a custom of always tying their right shoe before their left. Given that this Article will concern itself with the role of the individual in forming customary international law, it is worth stating explicitly that this Article does not concern itself with the unique “customs” of single individuals. Rather it concerns itself with the customs that arise among and between people in society.

Custom. The Oxford English Reference Dictionary defines custom as: 1. “The usual way of behaviour”, “A particular established way of behaviour”\(^\text{20}\). Custom is thus sometimes used to be essentially synonymous with usage and thus means that set of practices of a people which are repeated, common and notorious and refers to “all the social rules which are observed by the bulk of the members of society….”\(^\text{21}\) This definition, however, would accommodate the handshake example used above, as it makes no distinction between usage and custom which, within law, is of significance. By this meaning usage and custom are synonyms.

Others have used custom to denote that subset of usage and practice which has attained the status of law such that an authoritative body, should it have an opportunity to make explicit the status of the behavior, will recognize it as customary law and enforce it. This is the distinction between usage and custom generally utilized in American legal doctrine\(^\text{22}\) and recognizes that widespread usage and acceptance can be an important source of law. Except where deviations are made explicit, this Article will employ the term custom in this latter sense.\(^\text{23}\) Custom, then, is that body of practice that has become expected by a people to such a degree that it has become law.

Custom thus refers to those norms that are both usage and law. They are widespread and accepted and, in many instances, of a longstanding nature. Such norms become law as a result of uniform practice or accep-

\(^{19}\) As in “It is Adam’s custom to shine his shoes every Friday.”
\(^{21}\) SADLER, supra note 6 at 2.
\(^{22}\) This distinction can be found described, for example, in Luisville & N.R. Co. v. Reverman, 243 Ky. 702, 49 S.W.2d 558, 560 and U.S. for Use of E&R Const. Co., Inc. v. Guy H. James Const. Co., D.C. Tenn., 390 F.Supp. 1198, 1209.
\(^{23}\) Other terminological distinctions are possible, of course, and this Article does not attempt to exhaust the various possibilities. Francisco Suarez and others since him, for example, have distinguished between “custom as fact” (meaning the kind of act which people engage in with regularity without any legal compulsion to do so) and “custom as law” (meaning those acts in which people engage with regularity and which they are obliged or required to do under penalty of law). See FRANCISCO SUAREZ, TREATISE ON LAWS AND GOD THE LAW GIVER 442 (DE LEGIBUS, AC DEO LEGISLATORE,) (1612).
tance and, at least theoretically, become law even before an authoritative or juridical body has an opportunity to assess their status as law. For example, one can imagine a society in which rules of the road were not codified in statutes. In such a society, it is plausible that some uniform rule about what drivers do at a four-way intersection would arise. Uniform practice might well arise dictating that the first to arrive at the intersection would also the first to be allowed to drive through the intersection. If one day a driver violated this usage, a person harmed by this violation might sue the violator. If a reviewing authority—a court—would or ought to find the common practice enforceable such that the violator would be held liable to the injured party, one might say that even before the court reviewed the case, this driving usage had attained the status of law. It had become customary law. Used in this way, custom refers to the factual circumstance—the existence of a particular practice that is accepted among people as law, while customary law refers to the normative claim—e.g. that a just court would recognize this usage as law or that a particular usage has been recognized as law. Custom and customary law are distinct from one another, but only procedurally. In relation to custom no reviewing authority has had an opportunity to recognize the legal status of a usage and in the case of customary law, a reviewing authority has had this opportunity and has recognized the usage as law. This close connection between the terms custom and customary law allows them to be used in most instances as synonyms herein.

The terms international custom and customary international law (CIL) will be used herein to refer to that set of practices to which international legal obligations or rights attach. These are distinct from usage in the same manner as was described in establishing the distinction between practice or usage and custom in the prior discussion. Obligations and rights in respect to particular practices may “become international” for a number of reasons. For example, international obligations and rights may attach because the practice itself has an international character. Second, international rights and obligations might attach because the entities engaged in that practice are states. States are the traditional subjects and objects of international law. State practice can thus give rise to international custom. Third, rights and obligations might attach under international law because the practices relate to international or global problems such as nuclear war, global

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24 For a thorough discussion of the process by which usage becomes law, see SADLER, supra note 6 at 2.

25 Karol Wolke has employed a similar demarcation of these terms in the international context. See WOLKE, supra note 15 at xx.
environmental concerns, the protection of human rights, etc. Finally, international rights and obligations might attach because sufficient uniformity about a practice has arisen internationally among the entities who will enjoy the rights or be burdened by obligations once the practice becomes CIL.

B. Customary International Law

1. A Brief History

Discussions on custom as a means by which international law is formed often begin with Francisco Suarez whose 1612 *Tractus De legibus ac deo legislatore*\(^{26}\) provides the first record of custom being recognized as a source of international law.\(^{27}\)

Custom as a source of international law appears to have been recognized in an international treaty for the first time relatively recently. In 1874, Article 9 of the Conference of Brussels on the Laws and Customs of War stated: “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the *laws and customs* of war.”\(^{28}\)

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\(^{26}\) This work is summarized by M. Bos, *The Recognized Manifestations of International Law: A New Theory of Sources*, 20 GYIL 26 (1977).


\(^{28}\) Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874. D. Schindler and J. Toman, *The Laws of Armed Conflicts* 22-34 (1988). (available at [http://www.icrc.org/ihl.nsf/WebART/135-70009?OpenDocument](http://www.icrc.org/ihl.nsf/WebART/135-70009?OpenDocument), last visited November 15, 2006). (emphasis added). This conference was convened by Russia to discuss an international agreement on the content of the rules of war. The delegates to the Conference were unable to agree on it as a binding treaty, and it was never ratified. Plausibly then, its more enduring contribution to international legal doctrine is as the first such Convention that included a distinction between the laws of war and the customs of war.\(^{26}\) Other humanitarian law treaties of the time adopted this distinction, without explicitly setting out what was meant by laws of war vs. customs of war.
In 1899, Convention (II) with Respect to the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land, stated in its preamble that “until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” This preamble is particularly noteworthy. Not only does it not limit itself to laws of war and customs of war but it also lists the sources of the “principles of international law” to which it refers. That list includes the public conscience.

2. The Modern Doctrine

The distinction between international laws of war and customs of war as found in these early humanitarian law documents has become entrenched in modern formulations of international law as the distinction between treaty and custom. All leading authorities recognize the importance of both treaty law and custom as sources of international law.

Article 38 of the Statute of the International Court of Justice sets out the sources of international law as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;

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30 See e.g., BROWNLIE, supra note 17 at 3-29. On the foundations and sources of international law, Dekker, I. F; An introduction to international law, Janis, Mark W; Principles of international law, Murphy, Sean D; Antonio Caseese, International Law, Oxford University Press (2001), 117-136.
subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{31}

Of particular interest for a discussion of CIL then, is Article 38(1)(b) of the Statute. It is the traditional starting point for discussions of CIL\textsuperscript{32} despite the “widely reported defective drafting of Article 38(1)(b).”\textsuperscript{33} This Article will not concern itself with whether the Statute was worded appropriately.\textsuperscript{34} Rather, it will focus particularly on the question of who has a role in shaping the international custom to which it refers.

Section 102 of the Restatement (Third) of Foreign Relations Law of the United States also sets out the sources of international law. It does so as follows:

\textsuperscript{31} Statute of the International Court of Justice, Article 38 (emphasis added); BROWNLE, supra note 17 at 6. This Article should not, however, be seen as the eternal and exhaustive list of the sources of international law. See JENNINGS R. AND WATTS, A., eds. OPPENHEIM’S INTERNATIONAL LAW 45 (9th ed., 1992).

\textsuperscript{32} See, WOLFKE, supra note 15 at 2; See also, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, Reporter’s Notes 1 (1987). The Statute of the International Court of Justice forms an “integral part of the [United Nations] Charter” by way of annexation. ICJ, The International Court of Justice, 5th ed. (2004) 9. As such, it is not a formal source of law any more than the Charter itself. Rather, it is a material source of law, albeit a highly important one.


\textsuperscript{34} The United Nations itself has recognized that the Statute was not well worded: “while Article 38 was not well drafted, it would be difficult to make a better draft in the time at the disposal of the Committee.” UNCIO, v. XIV, p. 176, cited in Wolfke, Custom in Present International Law, 2nd ed. (1993) p. 5. In an effort to clarify how evidence of custom was to be derived, Judge Manley Ottmer Hudson, as Special Rapporteur to the International Law Commission stated in 1950 that the elements which must be present before a principle or rule of customary international law can be found to have become established were:

- concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- continuation or repetition of the practice over a considerable period of time;
- conception that the practice is required by, or consistent with, prevailing international law; and
- general acquiescence in the practice by other States.

1. A rule of international law is one that has been accepted as such by the international community of states
   a. in the form of customary law;
   b. by international agreement; or
   c. by derivation from general principles common to the major legal systems of the world.\textsuperscript{35}

The Restatement defines CIL slightly differently from Article 38(1)(b) of the Statute of the ICJ as the law that “results from a general and consistent practice of states followed by them from a sense of legal obligation”\textsuperscript{36} and provides, in Comment (b) thereto, a brief elaboration on the acts and omissions that contribute to the making of customary international law as well and on the temporal aspect of CIL and the delineations between general and specific CIL.\textsuperscript{37}

Under either Article 38(1)(b) or Restatement §102, CIL is composed of two elements.\textsuperscript{38} The first is termed the objective element, or the practice element, and looks to the actual behavior of states – their actual practice. The second is termed the subjective element, or the requirement that the particular norm is observed out of a sense of legal obligation. This second subjective element is known as the \textit{opinio juris} requirement.\textsuperscript{39}

3. Critiques of CIL Formation Doctrine

Both the objective and the subjective elements of CIL have undergone extensive scrutiny and each has been teased apart and analyzed from various perspectives.\textsuperscript{40} For example, in addressing the subjective element of CIL, Anthony D’Amato includes descriptions of CIL’s inher-

\textsuperscript{35} RESTA TEMENT (T HIRD ) FOREIGN RELA TIONS LAW OF THE UNITED STA TES §102(1) (1987).
\textsuperscript{36} Id. at §102(2).
\textsuperscript{37} Id. at §102(2), Comment 2 (1987).
\textsuperscript{38} Continental Shelf Case (Lybia v. Malta) 1985 I.C.J. 13, 29 (June 3) (“The material of customary international law is to be looked for primarily in the actual practice and \textit{opinio juris} of States.”)
\textsuperscript{39} See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark/ Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3, at 44 (February 20) (“The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”); Asylum Case (Columbia v. Peru) 1950 I.C.J. 265 at 276-7; Lotus Case (France v. Turkey) 1927 P.C.I.J (ser.A) No. 9, at 18, 28; See also, RESTA TEMENT (THIRD) §102, Comment c (1987); BROWNLIE, supra note 17 at 7-10.
\textsuperscript{40} Among the most comprehensive and coherent presentations of the various problems inherent in CIL can be found in ANTHONY D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). On this question, see also, RESTA TEMENT (THIRD) §102 (1987), Reporter’s Note 2.
ent “circularity problem.” In his book, *The Concept of Custom in International Law*, he asks “[h]ow can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?”

The practice requirement of CIL has also been highly scrutinized, as authors have asked how much time is necessary to create custom as well as how much consistency and widespread acceptance is required. In fact, one can find proposals in the CIL literature that argue either that the objective element or that the subjective element should be eliminated all together.

Many critiques of CIL attempt to address the doctrine as a whole, often asserting whole new theories of CIL, setting out alternatives to CIL or attempting to hobble or strongly curtail its validity or uses.

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41 D’Amato, id., at 66.
42 D’Amato, id., at 58 stating “The literature contains no standards or criteria for determining how much time is necessary to create a usage that can qualify as customary international law.”
45 For a well articulated argument that the objective element can be eliminated, see Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 149-158 (2005).
46 For arguments that the subjective element is deeply flawed see e.g. Peter Hagensmacher, *La doctrine des deux elements du droit coutumier dans la practique de la cour internationale*, 90, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5 (1986) (arguing that there is no subjective element in CIL. Rather the *opinio juris* element is nothing more than an interpretation of state practice at the international level) cited in Michael Byers, *Power, Custom and the Power of Rules*, 140 (1999). See also Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECEUIL DES COURS, 155, at 250, 289 (“[I]t is not necessary to demonstrate the presence of the subjective element in all, or perhaps even most, instances.” “[W]here there is a well established practice, the Court and perhaps other international tribunals, not to mention the States themselves, tend to conclude that there is a customary rule without looking for proof of *opinio juris*.,” cited in Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 145 (2005).
48 Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529 (1993) (arguing that a significantly developed international legal system creates the opportunity for a universal international law binding on all States. Charney observes that “Customary international law, which has traditionally been a product of state practice and *opinio juris*, is particularly vulnerable” to questions regarding the validity of international law.) id., at 550.
Occasionally commentators make explicit whether they are addressing themselves to problems in the means by which CIL is formed \(^{50}\) or the means by which states become obligated to observe CIL \(^{51}\) or the means by which it is implemented. \(^{52}\) This Article will focus specifically on the means by which CIL is formed.

In an effort to clarify how evidence of custom was to be derived, Judge Manley Ottmer Hudson, as Special Rapporteur to the International Law Commission stated in 1950 that the “elements which must be present before a principle or rule of customary international law can be found to have become established” were:

a) Concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;

b) Continuation or repetition of the practice over a considerable period of time;

c) Conception that the practice is required by, or consistent with prevailing international law; and

d) General acquiescence in the practice by other States. \(^{53}\)

Accordingly, the most commonly contemplated strands of inquiry in respect to CIL formation ask: what counts as state practice, \(^{54}\) how many states need to participate in the practice in order for it to be considered express authority from either state or federal legislative bodies.) See also Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113 (1999); Jack L. Goldsmith & Eric A. Posner, Understanding the Resemblance Between Modern and Traditional Customary International Law, 40 VA. J. INT’L L. 639 (2000) (using “the tools of game theory to sketch a positive theoretical account” of CIL and arguing that “CIL emerges from nations’ pursuit of self-interested policies on the international stage.” Jack Goldsmith and Eric Posner, Special Feature: Further Thoughts on Customary International Law, 23 MICH. J. INT’L L. 191 (2001).

\(^{50}\) Modern Critiques of CIL formation will be discussed herein in Section I.B.

\(^{51}\) See Guzman, Norman and Trachtman, Goldsmith and Posner supra, note. 47 and 49.

\(^{52}\) An excellent roadmap of this debate over CIL can be found in Earnest Young, Sorting Out the Debate Over Customary International Law, 42 VA. J. INT’L L. 365 (2002).


\(^{54}\) See, ANTHONY D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Michael Akehurst, Custom as a Source of International Law, 47 BRIT.Y.B.INT’L L. 1, 1-3 (1974-75); ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 124 (1987) (encapsulating the debate between Akehurst and D’Amato regarding what behavior counts as state practice).
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CIL, and over what period of time such state practice must continue in order for it to be considered custom. In addition to these questions, writers such as Michael Byers and Charles de Visscher have questioned the principle of sovereign equality as it relates to CIL in asking what role is played by power in CIL formation. Byers defines “power” broadly to include various types of non-legal power, such as military might, power derived from wealth (which affords states the possibility of applying economic pressures as well as diplomatic pressures on other states) and power derived from moral authority. He describes CIL formation as a process through which states use their power to develop, change or maintain rules. Naturally, the strength of a given state’s power will determine whether or to what extent that state is able to influence the formation and mutation of CIL.

Detlev Vagts has described an extension of this view in what he calls hegemonic international law. Others, adopting the theory of hegemonic international law have described the proceedings of international institutions in order to illuminate the benefits and detriments of a hegemonic approach to international treaty and customary law making, breaking and/or subverting.

What is remarkable in this literature is that virtually all of it has accepted the core premises of the 1950 Special Rapporteur. There is a nearly complete absence of the idea that individuals ought to have a participatory role in CIL formation. Only a small handful of commentators have suggested overtly that individuals be included in the CIL formation process. These will be discussed at length in the Section that follows.

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57 In a commonly quoted passage de Visscher likened CIL formation to the formation of a dirt road across virgin land: “Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.” CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 147, (Percy Corbett trans., 1957), cited in Michael Byers, Power, Obligation and Customary International Law, 11 DUKE J. COMP. INT’L L. 84 (2001).
58 BYERS, supra note 46 at 5-6.
II. FOUNDATIONAL LITERATURE:
SKEPTICISM, ALLUSION AND POSSIBILITY

The literature on CIL is almost devoid of clear recommendations, proposals or even suggestions that CIL would be doctrinally strengthened by a formal recognition that individuals should be included in CIL formation. There is, however, a body of literature in which individuals figure as shadows and whispers in relation to CIL. It might be broken into two categories. The first category is small and will fall under the rubric of “Skepticism.” The Skeptics mention the possibility of including individuals explicitly but dismiss it outright. The second, larger category falls under the rubric “Allusion.” The Allusionists suggest some role for the individual without ever making this suggestion explicit.

There is a third category of foundational legal scholarship which has greatly informed this article. This literature will be found herein in a section called “Possibility.” This is the work of a small number of scholars who have seen the possibility of including individuals in CIL formation and, to some degree, have addressed it directly and optimistically. This literature is groundbreaking in its imagination and creativity. A discussion of this literature will illustrate, however, that despite the treatment this possibility has received, to date there is no robust theory of the individual in relation to CIL formation.

As to each category, it is of course possible, in fact likely, that the author will not have captured every reference available. This is most likely in relation to the Allusionists, where the aim is mainly to give examples of the prevalence of this idea lying in the underexplored shadows of other work. If I have failed to include key sources, I look forward to learning about those sources I have missed. The aim here is not so much to create a bibliography of foundational literature as to highlight existing work that provides theoretical footing for the ideas discussed in the main body of the present Article.

A. Skepticism

As stated previously, the foundational literature that explicitly but dismissively mentions the possibility of including individuals participating in CIL creation is small. David Fidler in his *Challenging the Classical Concept of Custom*, pointing to the liberal notion that the cross-border activities of private parties serves a “quasi-public purpose” resulting in increased interdependence between nations, states that:
Perhaps it follows from liberal international theory that the CIL process should take into account the practice of private persons and enterprises as well as the practice of States. Such a notion is even more radical than the idea that the State practice of democracies should count more than that of dictatorships or other types of non-liberal States.  

Similarly, Michael Byers has squarely, though curtly, addressed the possibility of including individuals in the CIL formation process. He accepts that according to the German historical school of Savigny and Ranke, *opinio juris* “is the common will, or legal consciousness of a Volk, or people.” He dismisses the potential relevance of this definition to CIL however, stating:

It is difficult...to see how shared consciousness could exist in respect of the substantive content of each and every rule of customary international law, especially those rules of a highly technical character. In addition, from a ‘traditional’ international law perspective such shared consciousness would necessarily exist among States, as opposed to people or peoples.

B. Allusion

In comparison to those authors who have squarely reckoned with the possibility of individuals participating in CIL formation, either with skepticism or with optimism, the world of scholars alluding to individuals playing such a role is immense. In this second category, it is as if individuals either already play a role so recognized and accepted as to be unworthy of mention or are so disenfranchised within international law that explicitly mentioning the possibility is imprudent or pausing upon it for reflection is not even considered. Either way, this literature is frustrating because it cannot be uncontroversially cited as forming a foundation for the inclusion of individuals in CIL formation. Nonethe-

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62 David Fidler, *Challenging the Classical Concept of Custom*, 39 GYIL 198 (1996). Professor Fidler is referring to a controversy among CIL theorists which notes that powerful states often do tread more heavily and more often on the path toward CIL creation and arguments that perhaps liberal, democratic or free states ought carry more weight in CIL creation.

63 Byers, supra note 46 at 139.

64 Byers, supra note 46 at 139-140.
less, some examples bear mention, not because they are in explicit agreement with the thesis of this Article but because they provide pebbles if not stepping stones on the path to the development of a robust theory for including individuals in CIL.

It is, of course, impossible to know what reasons the various commentators who have contributed to this literature would give for making such allusions without more careful articulation and clarification. It is similarly impossible to know what role allusions to this possibility played along the path to their theories on various aspects of international law or international relations. The insinuation of a role for the individual in CIL, even when indirect, is evidence of others having imagined this possibility useful. Such references, especially many of them cobbled together, begin to take shape as a rough path toward the proposal made herein. Second, in many instances careful readers of this work will recognize some of the difficulties posed by the absence of individuals. This gap challenges a coherent articulation of CIL that bears real relevance and holds real legitimacy in a world in which the subjects of international law now include individuals.⁶⁵

The German historical school of Savigny and Ranke⁶⁶ holds that the *opinio juris* component of CIL is the legal consciousness of a people.⁶⁷ This approach will be discussed further in the section below titled “Possibility.” For now, it bears mention because Anthony Carty has attempted to re-introduce this approach, though rather than addressing the role that this form of *opinio juris* would play in CIL creation, he has focused more squarely on nationalism.⁶⁸ Utilizing the language of *opinio juris* through a re-negotiation of it’s most commonly accepted definition

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⁶⁵ For a discussion of individuals as the subjects of international law, see Section III.A herein.


is certainly one means by which to involve the individual in CIL formation. Unfortunately, this approach has not been thoroughly elaborated.

In the literature on CIL formation, it is not uncommon to see authors stop just short of including non-state actors in the CIL process. Rather than restricting participation to states alone, as the traditional elaboration of CIL does, one senses a push against this barrier. For example, in an interesting overview of the importance and creation of CIL in various international law fields, Anja Ziebert-Fohr proposes a role for the international community at large, without indicating how or why she is making such a claim or specifying exactly to whom she is referring by the “international community at large.”69

Daniel Bodansky takes this type of allusion one step further when – against the accepted doctrine – he states that “[a]ccording to the standard account of customary international law, claims about customary law are empirical claims about the ways that states (and other international actors) regularly behave.”70 There are two reasons this statement is interesting. First Bodansky’s claim that the standard account of CIL formation includes states “and other international actors” is notable because the standard account does no such thing.71 For example, the Restatement (Third) of the Foreign Relations of the United States refers only to states as CIL law-creators. However, my object is not to correct Professor Bodansky, as he is well versed in matters of CIL and many other international law topics. Rather it is to expose two rather common phenomena. The first is that it is not unusual to see claims that non-state actors have CIL law-formation powers. This instance is particularly useful because Professor Bodansky makes clear that he is referring to, “for example, international organizations, transnational corporations and other non-governmental groups.”72 The second notable phenomenon, and here Professor Bodansky’s claim is a particularly clear example, is that it is not unusual to find allusions to a role for non-state or supra-state actors portrayed as “standard.” This, of course raises twin questions. First, why are claims for including non-state actors being made? Second, why are such claims being conveyed as standard?

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71 One can scour the traditional texts on CIL and find no such reference. See, e.g. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) and comments thereto or Article 38(1)(b) and comments thereto.

In a well-known article, the late Jonathan Charney very clearly elaborated some of the shortfalls of CIL doctrine in an era like the present one that is at once highly influenced by the evolution of some areas of international law and which demands that international legal doctrine be able to grow in its substantive coverage as well as in its universal enforceability. In his proposal for a universal international law, he alludes to the utility, or perhaps the necessity, of broad and active participation by “all states and other interested groups” in the law-creation process if that process is to operate legitimately.

This Article positions itself in agreement with Charney’s assertion that including such actors would result in greater legitimacy – whether to CIL or to an alternative such as the one proposed by Charney. Still, because Charney only mentions very briefly the possibility of including actors other than states in the law-creation process, one is left with a series of questions about his intentions, motivations and, indeed, his theory for such inclusion. Again, this is by no means a criticism of Charney’s work. Rather it is another example in which the ideas articulated by the present Article have been invoked without a thorough elaboration.

Even more direct, yet still in the category of allusion, are references to the participation of non-state actors that come in a form similar to that offered by Professor Mendelson. In his quite useful exposition on the formation of CIL, Professor Mendelson ventures his own working definition of CIL. It is as follows:

A rule of customary international law is one which emerges from, and is sustained by, the constant and uniform practice of States and other subjects of international law in their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.

In a relatively full elaboration of what he means by his own inclusion of “other subjects of international law”, Mendelson actually states that “[a] contribution to the formation of customary international law, in the broader sense, is also made by other types of entity, such as non-
governmental international organizations...multinational and national corporations; and even the individual.”

Unfortunately, in his explanation of how non-state entities participate in the formulation of international law, Professor Mendelson does not return to the individual in particular. Rather, he treats all non-state actors as similarly situated. He acknowledges that all such actors may, in the current state of international law, have an indirect role in CIL formation but insists that States “have a monopoly over the law-making process.”

It is noteworthy that Mendelson seems somewhat apologetic for this position. After his insistence that States currently monopolize the CIL making process, he writes, “This may not sound very “progressive”, and some may consider it undesirable for States to have such a tight monopoly over the law-making process; but in my opinion that is the present reality.” Indeed, this Article does not dispute that this is the current state of the formal articulation of the law. Rather, it aims 1) to re-articulate the realists’ observation that the formal doctrine on CIL formation may not reflect the actual formation process and 2) to articulate why such a tight State monopoly on CIL formation is undesirable.

C. Possibility

As stated previously, the universe of literature which has explicitly considered the possibility of individual participation in CIL formation is remarkably small. Under the rubric of “possibility”, this literature will be discussed below.

1. Realism: Participation in International Legal Process

Myres McDougal, writing together with Harold Lasswell and Michael Reisman, contemplating the various roles individuals could play in decisional processes related to international law identified in 1967 the essential problem of individuals being “locked out” of effective decisions in international process. Mainly because the phrasing and language they used forty years ago feels quite avant-garde even today and because of the high degree of relevance of their work to this project, it bears quoting at length.

Most of us are performing...decision roles without being fully aware of the scope and consequences of our acts. Because of this, our participation is often considerably less effective

76 Id. at 203.
77 Id.
than it might be. Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawnlike political impotence, of being locked out of effective decisions, is an equally unwarranted orientation. The limits of the individual's role in international as in local processes is as much a function of his passive acquiescence and ignorance of the potentialities of his participation as of the structures of the complex human organizations of the contemporary world.

Interdependence has made world power processes and world law as relevant to each individual as the decisions made in the municipality in which he lives. Responsible citizenship, then, extends from the municipality to the limits of the enormous arena in which man interacts. Effective participation by the individual human being, in all his different roles and capacities, in the decision making of the contemporary world - a participation which will more adequately secure his deeply demanded values, including perhaps even survival itself - must of course depend in great measure, on an understanding of the relevant global processes, the identification of the factors which condition them, an ability to isolate feasible problems and the capacity to harness the knowledge and specialized imaginativeness of a host of disciplines.

A more systematic expansion of these impressionistic remarks about the individual human being's increasing role in, and responsibility for, world affairs would require the careful description of a comprehensive world social process, in terms of a set of interlocking, transnational functional and geographic interactions; of the global or earth-space process of effective power which is an integral part of the larger transnational community matrix; and of the processes of authoritative decision, including a world constitutive process, maintained by the holders of effective power for identifying and securing their common interests. For our
immediate purposes it will suffice merely to summarize that there is today among the peoples of the world a rising, common demand for the greater production and wider sharing of all the basic values associated with a free society or public order of human dignity; that there is an increasing perception by peoples of their inescapable interdependence in the shaping and sharing of all such demanded values; and that peoples everywhere, both effective leaders and the less well positioned are exhibiting increasing identifications with larger and larger groups, extending to the whole of mankind. Concomitant with this enhanced perception and understanding of overriding community membership, one may observe also in all parts of the world an increasing awareness and concern that mankind has not yet created the legal institutions, or processes of authoritative decision, adequate to clarify and secure common interests under conditions of contemporary interdependence. From peoples living in the shadow of possible ultimate catastrophe, yet tantalized by the promise of a potential abundance hitherto unknown in the production and sharing of all values, the demand for a more adequate international, transnational or world law becomes ever more insistent.78

McDougal, Lasswell and Reisman are elaborating on the seven functions of effective decision process earlier articulated by Lasswell.79

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79 H. LASSWELL, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (1956). These seven categories (intelligence, promotion or recommendation, prescription, invocation, application, termination, appraisal) are defined as follows:

1. Intelligence is the obtaining, processing, and dissemination of information (including planning).
2. Promotion (or recommendation) is the advocacy of general policy.
3. Prescription is the crystallization of general policy in constituting authoritative community expectations.
4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
5. Application is the final characterization of concrete circumstances according to prescriptions.
Notably, they were very aware that they were at the forefront of a significant change in “world social process” and called their own remarks “impressionistic” while sharing their sense about what a more clear elaboration would require. This project of elaboration is still underway.

2. Individuals Front and Center

In the chronological development of this idea, Lung-chu Chen is the next important figure, as his contribution sprung from work he engaged in jointly with McDougal and Lasswell.80 And develop it did, together with perceptible changes in international law. In 1980 when Professor

6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and of responsibility therefor [sic.].

This framework was central to a body of work by a number of international legal scholars, especially Lasswell, McDougal, Reisman and Lung-chu Chen. See e.g., McDougal, Lasswell & Reisman, The World Constitutive Process of Authoritative Decision, 19 J. LEGAL ED. 253, 415ff. (1967) and MYRES MCDouGAL, ET,AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, Ch.4, (1980).

Chen wrote together with McDougal and Lasswell, even in a moment of inspiration about the role of the individual in which they saw “almost unlimited democratic potential” as to the ability of individuals to participate in the intelligence, promotion, invocation, termination and appraisal functions of effective decision making, they hesitated as to the ability of the individual to participate in the prescription and application functions.  

As early as 1978, Professor Chen had observed that, increasingly, individuals were coming to demand a voice in decisions that affect and determine their own value systems, which included a number of enumerated human rights. In addition, he noted that individuals increasingly are demanding full participation in decision making processes and value setting.  

A decade later, Professor Chen noted that “[t]ransnational structures of authority and procedures for application have been established and maintained...to secure greater compliance with...human rights.” Remarkably, through these structures, “individuals and private groups are given increased, though still limited, access to arenas of transnational authority to bring complaints about human rights deprivations against even against their own governments.”  

In relation to the participation of individuals in CIL formation, Professor Chen has this to say: “[u]nder the concept of “custom” that creates law through widely congruent patterns of people’s behavior and other communications, individuals and their private associations have always participated in the prescribing function.” In making this statement, Chen relies on a conception of CIL formation that appears to deviate from the traditional one described in Section _ herein. In order to make this leap, Chen lays a framework that breaks from legal formalism in respect to CIL formation and attempts to argue for what he believes is a more realistic assessment of how custom is formed.  

While many may not be willing to stretch the traditional CIL doctrine to such extents Chen’s framework is quite useful for its thoughtful

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81 Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. INT’L L. 188, 192-193 (1968). Here they state: “While the public functions of prescription and application are necessarily restricted, in terms of direct participation, to a very small though hopefully representative group, participation in all other functions presents almost unlimited democratic potential.”


83 Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective* 78 (1989). Professor Chen goes on to state: “Although nation-states continue to play the most prominent role in the prescribing (and terminating) and applying functions, individuals and private groups play important roles in regard to other decision functions...”

84 Id.

85 Id at 80.
realist’s approach to the actual participants in CIL. In keeping with the New Haven School, of which he was a part, he articulates the realist’s important observation that, of course, individuals are the ultimate participants in every social process, whether as individuals per se or as part of private groups or states. By way of essentially seeing through the nomenclature of CIL, which is highly reliant on states, he attempts to convince his readers that individuals are very active participants in international decision making processes generally and, by the by, in CIL formation particularly.

Professor Chen’s 1989 book on international law devotes one chapter entirely to a discussion of the changed and changing role of the individual in international law and the various means by which the changed and expanded role of the individual has distorted, perhaps beyond comprehension, the subject-object dichotomy in international law. Essentially, he observes, as others did before him, that the individual has become a subject of international law. For Chen, as for others then, the traditional model of international law, which holds that states are the lone subjects of international law, if it ever was accurate, is now simply outmoded. Both Chen and this Article agree, of course, that states play the most prominent role in some international law processes. Even if (or when) the individual is formally recognized as a legitimate participant in the creation of CIL, the state will continue to hold this position of prominence.

Professor Chen’s written work on the proposition that individuals ought to and do participate in international decision making processes spans decades. It overlaps with the work of Jordan Paust.

86 Id. at 80-81. The New Haven School was created and developed by McDougal, Lasswell and others, including Chen. Its inspiration is rooted in American Legal Realism and used its modalities to re-conceptualize and re-characterize international law and relations. For Professor Chen’s own definition of the New Haven School, see: 87 AM. SOC’Y INT’L L. PROC. 408 (1993)

87 LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 80 (1989).

88 Id., at Chapter 5. This Article discusses the expanded universe of subjects of international law, such that it includes individuals in Section III.A. It should be noted that this Article accepts this position and builds upon it.

89 This has been just one of Professor Lung-chu Chen’s scholarly projects. Even the list of his works relevant to this project is lengthy and includes: Perspectives from the New Haven School, 87 AM. SOC’Y INT’L L. PROC. 407 (1993); Constitutional Law and International Law in the United States of America, 42 AM. J. COMP. L. SUPP. 453 (1994); In Affectionate Memory of Professor Myres McDougal: Champion for an International Law of Human Dignity, 108 YALE L.J. 953 (1998-1999); Human Rights and the Free Flow of Information, 4 N.Y.L. SCH. J. INT’L & COMP. L. 37 (1982-1983); Institutions Specialized to the Protection of Human Rights in the United States, 1 N.Y.L. SCH. HUM. RTS. ANN. 3 (1983); Self-Determination and World Public Order, 66 NOTRE DAME L. REV. 1287 (1990-1991); Protection of Persons (Natural and Juridical), 14 YALE J. INT’L
3. CIL Has Long Recognized Non-State Actors


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\text{the expectations of all human beings ("mankind," "the world," "the people") are not only relevant to CIL but they also provide the ultimate criterial referent. Indeed, no other ultimate referent would be realistic, since all human beings recognizably participate in such a process of acceptance and the shaping of attitudes whether or not such participation is actually recognized by each individual or is as effective as it might otherwise be (e.g., even if apathetic "inaction" is the form of participation for some, a form that simply allows others a more significant role). It is this ultimate referent, moreover, that provides customary law with a built-in basis for its own general efficacy, resting as it does on actual patterns of generally shared legal expectation, and with a claim to being the most democratic form of international law).}\footnote{Jordan Paust, \textit{Customary International Law: Its Nature, Sources and Status as Law of the United States}, 12 Mich. J. Int’l L. 62 (1990-1991); \textit{Id.}, at 59, citing Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796).}
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In substantiating the view that individuals already do participate in CIL formation, Professor Paust asserts that leading authorities have also recognized the importance of individuals to determinations of CIL. He notes, for example, that a number of important historical Supreme Court decisions regarded the international law of nations as established by “the general consent of mankind”\footnote{\textit{Id.}, at 59 citing W. Blackstone, Commentaries on the Laws of England, 66 (1765).} and that Blackstone stated that the “law of nations is a system of rules...established by universal consent among the civilized inhabitants of the world.”\footnote{\textit{Id. at 59 citing W. Blackstone, Commentaries on the Laws of England, 66 (1765).}}

This Article disputes that individual participation is historically and/or traditionally accepted by CIL doctrine. More accurate is later
characterization of the active role that non-state actors play in the CIL of human rights as a legal realist’s view of what actually happens in CIL formation. Under this view there are “no single set of participants...Like all law, [CIL] is full of human choice and rich in individual and group participation, irrespective of the formal state-centric doctrine on CIL formation.”

Professor Paust’s contributions, then, come in the form of holding to the view that individuals, in reality, already participate in forming CIL and even states that they are already acknowledged in CIL doctrine.

4. Challenging the Doctrine to Include NGOs

Professor Isabelle Gunning has proposed that the CIL formation process be expanded to include states, intergovernmental organizations and non-state actors, especially NGOs. Approaching the subject of CIL and human rights from feminist and Afrocentric perspectives, she argues that human rights law challenges the doctrine of customary international law and its exclusive state-centric orientation.

One of her central critiques of traditional CIL doctrine is that it is characterized by a masculine and Eurocentric view of the world. She argues that a feminist view would be relational, rather than self-interested; “a feminist perspective represents the ability to ‘act in concert.’”

In her view, this interconnectivity demands a relational approach to foreign affairs in which every nation is “increasingly required to take into account the interests...of nations across the globe.” Globalization and cosmopolitan citizenship form the theoretical basis of connectivity herein, whereas for Professor Gunning, it is a feminist and Afrocentric lens that leads to interconnectivity. Under either view, the logical extension of a non-state or supra-state interconnectivity is to open the CIL formation process to non-state actors.

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95 Id.
96 Id., at 212.
99 Id., at 220. Globalization scholars have similarly exposed an increasing global interconnectivity. This will be discussed in greater depth herein.
100 Id., at 220.
Having arrived at the position that an exclusively state-centric view of CIL is no longer viable, Professor Gunning sets out a proposal to propose a more expansive universe of participants in CIL formation. Perhaps because of the more communitarian approach she takes through a feminist and Afrocentric perspective, she does not directly address the inclusion of individuals. Rather, she proposes that CIL law-making potential be extended to international organizations and non-governmental organizations (NGOs).  

Although Professor Gunning does not arrive at the inclusion of individuals in CIL formation, her contribution to the current Article is essential, since it articulates concrete proposals for including non-state actors. For example, she argues for a NGO certification process similar to the consultative status granted to NGOs prior to their recognition before ECOSOC bodies. Professor Gunning points to ECOSOC Resolution 1296(XLIV), which at the time of Professor Gunning’s article provided the requirements NGOs were required to meet in order to receive consultative status. She argues that NGOs meeting these or similar guidelines should be seen as participants, “on par with states,” in determinations of the content of CIL.

5. Doctrine Change, Yes; NGOs, No

Influenced by field work in Kosovo, Professor Julie Mertus also has expressed the view that a more inclusive international law process is desirable. Her position differs from that of Professor Gunning, however, due to the skepticism she has expressed about NGOs. While she seeks to advance a non-state based, participatory role in CIL, she is cautious about NGOs serving as a proxy for civil society.

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102 Id., at 222-234.
103 Id., at 230.
108 Id., at 561 (2000)
with a model for expanding CIL which would rely on NGOs in the manner Professor Gunning proposes is that there is already existing evidence that the ECOSOC rules for NGO consultative status favor some types NGOs over others. Professor Mertus remarks that “ECOSOC itself has noted that its practices are far from perfect and that non-mainstream and Third World NGOs in particular may face a disadvantage at gaining access and rights of participation in such intergovernmental arenas.”\textsuperscript{109} In addition, similar to the position adopted in this Article, Professor Mertus is concerned that, even if a wholly fair and inclusive process for NGO consultation could be devised, looking to NGOs to assess the beliefs and expectations of individuals is imperfect,\textsuperscript{110} since they may distort, disguise or hide from view the difference and dissent that would be of paramount importance in assessments of the content of CIL.\textsuperscript{111}

6. Private Actors in Other Areas of International Law

The body of literature thus far reviewed under the rubric of Possibility relates directly and obviously to the project at hand. Each of the schools and authors herein described have provided some insights into the participation of individuals in the process of CIL formation. As stated previously, this appears to be the entirety of the foundational literature. What is evident is that the concept of including individuals in CIL formation is largely under theorized and underdeveloped.

Before proceeding to the theory and justification for the inclusion of individuals, one additional piece of scholarship bears mention for its relevance through analogy to this Article. Professor Janet Koven Levit, in a quite recent article, has exposed what she calls “bottom-up lawmaking” in trade-finance communities. She examines the rule-to-law making that transpires as the rule-setting processes engaged in by groups of private actors (individuals, banks, multinational corporations) and public actors in the trade finance sector congeal into hard law with legal consequences.\textsuperscript{112} For example, the rules set out in the Uniform Customs and Practice for Documentary Credits (UCP) are created by private bankers who organize through the International Chamber of Commerce. Despite the fact that the customary rules and practices articulated by this group are created by private individuals rather than policy makers or states, the

\textsuperscript{109} Id., at 562 (2000).

\textsuperscript{110} Id., at 561 (2000).

\textsuperscript{111} For further discussion on the role of NGOs see Section V.B herein.

UCP, while not statutory law, courts in the United States and elsewhere frequently use it to decide letter-of-credit disputes.\(^{113}\)

Professor Levit observes that while the process by which the rules set out by these private groups coalesce and slowly harden into law bears a strong likeness to the process of CIL formation. Nonetheless, she observes the traditional CIL doctrine and its attendant state-centric approach and concludes that the bottom-up law making she describes cannot therefore be CIL formation. For Professor Koven Levit, because the actors engaged in the formation process are private actors - in some instances individuals – the process in which they are engaged cannot, by definition, be CIL formation.\(^{114}\)

Rather than push against the state-centric approach to CIL, she opts instead to argue for the emergence of a new category of law or law making. In this way, Professor Levit appears to have adopted the sovereignty paradigm to which Professor D’Amato has referred.\(^{115}\) Some may observe that the phenomena Professor Koven Levit describes may be distinguished from the processes with which this Article concerns itself. It might be said that her work observes and comments upon private international law or transactional law while this Article addresses paradigmatically public international law. However, Professor Koven Levit herself argues quite persuasively that these classifications are not easily maintained, especially in light of her work.\(^{116}\) It might also be said that the rules set by the actors Professor Koven Levit observes affect only the actors who create them, or at least only that type of actor (e.g. bankers generally), while the CIL, and especially the CIL of human rights, affects all people everywhere. Again, Professor Koven Levit herself would reject this distinction, as she aptly points out that the rules-come-law she describes have effects on people far beyond those who engage in making them.\(^{117}\)

There are, however, true key differences between Professor Koven Levit’s bottom-up law making and the inclusion of individuals in the formation of the CIL of human rights. First, in at least some of the contexts she describes, the rules set by individuals and private actors have been recognized by adjudicating bodies as law.\(^{118}\) This is quite different from the current state of CIL, of course. There is no identifiable

\(^{113}\) Id., at 128 (2005).
\(^{114}\) Id., at 125 (2005).
\(^{116}\) Levit, supra, note 113, at 189-194.
\(^{117}\) Levit, supra, note 113, at. 131 (2005).
\(^{118}\) Levit, supra, note 113, at 128 (2005).
precedent in which a court consulted the expectations or beliefs of individuals as to the content of the CIL of human rights. The second key difference is that the rule-makers featured in Professor Koven Levit’s article are a very small set of people in comparison to the universe affected by their rules. 119 This results in a democratic deficit to which Professor Koven Levit devotes considerable thought. In contrast, the inclusion of individuals in the CIL formation process would increase democratic participation in law making.

Most striking about Professor Koven Levit’s article, however, is that the insights and motivations in observing a bottom-up approach to international law are very similar to those at work in this Article. It is fascinating that such work is being conceived in areas of international law that are traditionally seen as so dissimilar. 120

The body of work discussed in this section is rich and imaginative. Each, in some form or another, thinks beyond the exclusively state-oriented formulation of CIL. Perhaps the German historical school’s position that opinio juris is the opinion of the people gave inspiration to the New Haven Schools realist observation that individuals currently do participate in CIL formation. It is certainly true that the New Haven School’s approach to international law and the observations its contributors made regarding the participation of individuals in CIL and international law generally have provided valuable insights for Professors Chen, Paust, Gunning and Koven Levit, each of whom in turn provide their own very useful contributions to the current Article. Professors Chen and Paust further the realists’ insight that individuals already do contribute to CIL formation. Professor Gunning, pushing for a role for NGOs and intergovernmental organizations, sought theoretical grounding for her proposal in feminism and Afrocentrism. Finally, Professor Koven Levit’s work observes private parties, including individuals, participating in “bottom-up law making” that is very much like custom formation, though in areas of trade finance.

Missing throughout this foundational literature is a theoretical underpinning for the proposition that the individuals should be recognized in the CIL formation doctrine and a thorough consideration of how this might be accomplished, both doctrinally and in practice. The remainder of this Article will venture to fill these gaps.

III. Doctrinal Bases for the Inclusion of Individuals in CIL

The following Section will provide theoretical justification for including the individual in the CIL formation process. It will do this in two parts. The first is a doctrinal justification and the second is a social and philosophical justification. The doctrinal justification will point to a pair of under recognized disjunctures present in current international law doctrine. First, it will demonstrate that the various roles individuals currently play in international law create a situation in which it is odd at best that individuals are not recognized as participants in CIL formation. Second, it will argue that, especially in the area of human rights, the failure to recognize individuals contributes to some of the most widely recognized failings of CIL doctrine. Including individuals would likely add no greater complexity to the doctrine, but it may well help to alleviate some of its most cited failings.

Having established a doctrinal exigency for including the individual, Section IV then seeks to delve into the current social condition of individuals in order to ask whether there are deeper philosophical justifications for the inclusion of individuals. This Section will discuss three intertwined phenomena: globalization, cosmopolitanism and transnationalism. In so doing it will observe that the philosophical underpinnings of CIL doctrine, so bounded in Westphalian notions of state sovereignty, have been corroded to such extents that, at least in the area of human rights, excluding the individual from CIL formation renders CIL doctrine somewhat incoherent. This incoherency is likely to increase over time, as globalization, cosmopolitanism, and transnationalism continue to take hold in the human imagination and further tangibly manifest themselves.

Before proceeding further a caveat is in order. The remainder of this Article will address itself to that portion of CIL that has been called the CIL of human rights. This cabining is necessary, not because it is likely that the inclusion of individuals will not hold some import in other areas of international law (indeed, it is likely that it will), but rather for the purpose of simplifying a rather complex examination of the necessity and utility of including individuals in the CIL formation process. Thus the CIL of human rights will be discussed herein as an illustrative example. An examination of other applications of the ideas herein discussed must be left to another author or another time.

A. International Law Doctrine

1. Individuals as Subjects of International Law
States were once thought to be the only subjects of international law. In other words, states were thought to be the exclusive holders of rights and obligations under international law. If ever this assumption was a realistic description of international law, it no longer is. Rather, individuals have come to be recognized as the subjects of and participants in international law and as such are believed to possess rights and duties under international law.

For some time, authors argued vigorously that individuals were the object of international law. The view that individuals were mere objects of international law was the presiding understanding of the position of the individual. In essence, this view held that:

- first, that the individual is not a subject or person of this law; that he has no rights and duties whatsoever under it or that he cannot invoke it for his protection nor violate its rules. Secondly, this doctrine predicates that, as object, the individual is a thing from the point of view of this law or that he is benefited or restrained by this law only insofar and to the extent that it makes

121 “In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law.” RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Part II, Introductory Notes (1987) (hereinafter Restatement (Third)). See also, G. SCHWARZENBERGER, INTERNATIONAL LAW 140-41 (3d ed. 1968) which states:

[The] injured individual is merely the peg on which the State hangs its claim. It is the State which has been injured in the person of its subject. By asserting the claim of a subject, the home state demands respect for international law which has been violated by the injury inflicted on its national.

122 Some commentators have argued that states have never been the exclusive subjects of international law. Lung-chu Chen, for example, refers to this paradigm as the “Vattelian fiction” (referencing Emmeric de Vattel’s famous dictum that an injury to an individual is an injury to that person’s state) and points to a number of examples to substantiate his position. For example, he states; “The proscriptions on piracy, war crimes, breaches of neutrality, violence against ambassadors, and the slave trade, were clearly directed to the individual.” LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 77 (1989)

123 For arguments that the individual has become a subject of international law, see Edwin Tucker, Has the Individual Become the Subject of International Law?, 34 U. CIN. L. REV. 341 (1965); Conference of European Jurists on “The Individual and the State”, 3 INT’L L. 603 (1968-1969).


125 Id., (George Manner, at 428)
it the right or the duty of states to protect his interests or to regulate his conduct within their respective jurisdictions through their domestic laws. It predicates, further, that the individual as such, or as object, has no international right or claim against states to be made by them an object of their international rights and duties or to be treated by them according to international law once they have in fact made him an object thereof. Rather, it holds, the individual must look to states also in these respects....This theory maintains, thus, that men have no standing whatsoever as men in this law.\textsuperscript{126}

At the time that the object theory of the individual was established, it was such because “the very nature of international law necessitated this view.”\textsuperscript{127} By the early 1950’s the grounds for the object theory of the individual were significantly eroded and rested only on the circular argument that an individual is an object under international law because international law treats the individual as an object.\textsuperscript{128} At this same time, a subject theory of the individual was increasingly being advanced, mostly with specific reference to the fundamental shifts in the design of international law following World War II.\textsuperscript{129} This is in part because of the recognition, at least from the time of the Nuremberg Tribunals, that individuals are also bound by international law. Readers are now urged to recall a basic understanding of customary law doctrine: \textit{The essence of customary law is that it is born from the conduct and beliefs of those whom it binds.}

By the time the Restatement (Third) was drafted, it was widely acknowledged that the status of individuals had moved beyond that of mere object and was no longer akin to the status of rivers, cattle or real

\textsuperscript{126} Id., (George Manner, at 428). This theory was widely accepted at the time of Manner’s article. In footnote 2 of his Article, he provides ample citations for both express and tacit acceptance of this position.

\textsuperscript{127} Id., (George Manner, at 429).

\textsuperscript{128} Id., (George Manner, at 429).

\textsuperscript{129} This theory was advanced even before WWII, on the observation that in at least three areas – pirates, slaves and fishermen – international law incontrovertibly treated individuals as subjects of international law. See, Philip Marshall Brown, \textit{The Individual and International Law}, 18 Am. J. Int’l L. 533-34 (1924). This editorial is a very early and strong critique of the state-centric power orientation in international law advanced by Bodin, Vattel and Grotious. \textit{id.}, at 534. The majority of the literature regarding the status of the individual in international law – whether defending the object theory or observing a palpable shift to a subject theory appeared after World War II. See, e.g. AAGE NØRGAARDE, \textit{THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW}, (1962) in 12 Int’l & Comp. L. Q. 1056 (1963).
Individuals are now the subjects of international law, holding rights and obligations thereunder.

2. Individuals as Participants in International Law

While the debate about the proper status of individuals in international law has apparently settled, it is worth noting that underlying debates about the status of the individual are still relevant to the subject matter of this Article. For example, Rosalyn Higgins once suggested that the subject/object dichotomy is confusing in the context of international law. Rejecting the positivist school’s approach to international law as a set of rules and building on the work of McDougal, Chen and Lasswell which views law as process, she argued that there are not objects and subjects in decision making processes. Rather, there are a variety of participants. “Individuals are participants, along with governments, international institutions and private groups.” Higgins observes that it is necessarily the case that individuals will only participate in processes that are relevant to individuals. As such: “they are part and parcel of international law, representing the claims that are naturally made by individual participants in contradistinction to those presented by state participants.”

Having ascended out of the status of object the role of individuals has taken on significance and continues to be relevant. Much of this discussion has occurred using the conceptual thinking and terminology of the rights and duties of individuals. Some, however, have adopted the process-oriented approach of the New Haven School. In a robust analysis of the role of the individual in international law, this process-oriented approach is essential, as it allows for thinking beyond the rights and obligations of the individual in the context of conflicts and allows for thinking about the various other functions in which individuals might participate.

McDougal, Lasswell and Reisman discuss seven functions in international law process. These seven categories (intelligence, promotion
or recommendation, prescription, invocation, application, termination, appraisal) have been defined as follows:

1. Intelligence is the obtaining, processing, and dissemination of information (including planning).
2. Promotion (or recommendation) is the advocacy of general policy.
3. Prescription is the crystallization of general policy in constituting authoritative community expectations.
4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
5. Application is the final characterization of concrete circumstances according to prescriptions.
6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and of responsibility therefor [sic.].

The roles individuals play in the intelligence, promotion, invocation, and appraisal functions are non-controversial and are of less importance to the central argument of this Article. The application function is largely within the ambit of adjudicators. Of particular interest for this Article, then, are the prescription and termination functions, which may be thought of as very similar, as they both relate to the making and un-making of law.

3. Individuals and Prescription

a. Individuals and prescription by invocation

To the extent that the prescription function is influenced and affected by the invocation function, it is important to recognize that individuals may now enforce human rights law at the international and national level. Individuals may enforce human rights through domestic law,


through constitutional provisions integrating human rights into a given country’s constitution\textsuperscript{136} or statutory mechanisms such as the Alien Tort Claims Act in the United States and universal jurisdiction statutes. Regional human rights systems provide for individuals to submit petitions and claims based on human rights violations. For example, in 2001, the European Court registered 13,858 applicants – so many, in fact that the court’s ability to adequately handle legitimate claims was drawn into question.\textsuperscript{137} The Inter-American Commission and Court also allow for petitions from individuals.\textsuperscript{138} Individuals may also now make claims based on human rights violations before non-regional international bodies. The United Nations accepts individual communications before four treaty bodies: the Human Rights Committee (HRC),\textsuperscript{139} the Committee on the Elimination of Racial Discrimination (CERD),\textsuperscript{140} the Committee on the Elimination of Discrimination Against Women (CEDAW),\textsuperscript{141} the Convention Against Torture (CAT),\textsuperscript{142} and may soon also accept individual communications under the Convention on Migrant Workers.\textsuperscript{143} The International Criminal Court is now yet another venue through which individuals may participate in the invocation function in the area of human rights.\textsuperscript{144}

b. Individuals and prescription in the area of treaty law

\textsuperscript{136} Colombia’s constitution, for example, provides individuals with the ability to make claims based on any constitutional rights, including those international human rights that have been incorporated thereby.

\textsuperscript{137} European Court of Human Rights, Historical Background, available at: http://www.echr.coe.int/ECHR/EN/Header/TheCourt/TheCourt/HistoryoftheCourt/ (last visited February 15, 2007).


\textsuperscript{139} This may be accomplished through use of the First Optional Protocol to the International Covenant on Civil and Political Rights.


It has been argued and demonstrated elsewhere that non-state actors, including individuals, play a role in the making of treaties, and in particular human rights treaties. The United Nations Charter, in Article 71, provides a formalized role for civil society through consultation with NGOs. The relationship between NGOs and the United Nations is now regulated by a 1996 ECOSOC resolution. This relationship contemplates a role for NGOs to participate in a variety of means, each of which may influence the substance and form of resulting resolutions and treaties.

...active participation of NGOs in the development of new treaties and standards has always been and continues to be an important activity of NGOs.

NGOs are frequently instrumental in the development and drafting of human rights norms. Examples of NGO involvement in human rights standard-setting are plentiful and well documented. Often NGOs act as catalysts in the development of new human rights standards and participate actively throughout the preparation of human rights treaties...In some bodies, participation of NGOs in standard-setting is a recognized practice.

Furthermore, it is not the contention of this Article that NGOs actually make treaties, nor that NGOs are a perfect mechanism for the involvement of individuals in international governance. The relevant point is that individuals, through NGOs, have a formalized role in the treaty making process.


\[\text{147} \text{ Resolution E/1996/31 provides for written and oral consultation with ECOSOC and its subsidiary bodies within the competence of the NGOs and also for consultative roles with the Secretary-General of the United Nations.}\]

\[\text{148} \text{ Caroline E. Schwitter Marsiaj, The Role of International NGOs in the Global Governance of Human Rights: Challenging the Democratic Deficit, 21 Schweizer Studien zum Internationalen Recht, 24 (2004).}\]
A recent instance of standard setting in the U.N. system in which individuals participated in standard setting has been described by Professor David Weissbrodt and is of interest here. Professor Weissbrodt served as the principal drafter of the United Nations’ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In a recent article, he describes the process by which the norms were formed. Individuals, separate from NGOs, were among the participants in the consultation process that led to the creation of the Norms. The Norms are not yet, and may not ever become treaty, but the process by which they were created is significant and is not at all unusual. Thus, especially in the area of human rights treaty making, individuals have had a formal, active and direct role in standard setting and treaty making. Some may argue this has been the case from the outset.

c. Individuals and non-treaty prescription in other areas of international law

It has also been argued and demonstrated that non-state actors, including individuals, in other areas of international law participate in rule making in respect to their particular areas of interest. As discussed previously, Professor Koven Levit has discussed three instances in the area of trade finance in which private actors make rules. In addition to making the rules, these actors are also engaged in enforcing the rules they participated in making. While she argues that this rule making is not the same as making CIL, the rule making in which these actors are engaged does have the force of real law. Thus, in a distinct area of international law, the parties most affected by that law have a recognized and formalized role in creating the rules and law which matter to them.

Absent from accepted doctrine and even from the literature on CIL, is a recognized role for the individual in the CIL formation process. Given the various locations where individuals do engage in the prescrip-

151 The list of contributors is available at: http://www.ohchr.org/english/issues/globalization/business/contributions.htm  
tion function, this gap seems to be an uneven treatment of the law and of individuals. This Article will assert below that attention to this gap may help to alleviate some aspects of discord in the CIL doctrine.

B. Human Rights Doctrine

1. Human Rights Doctrine is Oriented Toward the Individual

Perhaps more than in other areas of international law, including individuals in the making of CIL of human rights is reasonable. The conceptual and legal shift within international law from a situation in which individuals were objects with no legal personality to a situation in which individuals are seen as subjects and active participants occurred in large part as a result of the creation of the human rights system and doctrine following World War II. As has been previously discussed herein, it is incontrovertible that individuals possess actionable rights under modern human rights law. Individuals also participate in the making of standards, rules and law in the area of human rights treaties. This is the only logical approach to individuals within a doctrine that is designed, in large part, to protect individuals from human rights violations which their own states may commit.

This orientation of human rights doctrine – an orientation that is necessarily cautious, if not skeptical, about the potential of states to commit all manner of human rights violations – inherently recognizes that states will not always behave in accordance with the provisions found in the Universal Declaration of Human Rights, the ICCPR, the ICESCR or subsequent human rights treaties, norms and declarations. This skepticism can be found in every admonishment to states to observe, protect, ensure or otherwise provide their populations with the human rights enumerated in these various documents. It is partially for this reason that non-state actors have from the outset been granted consultative status within the United Nations on human rights matters. In such an atmosphere of skepticism toward states, it is odd at best that states would be left with the sole and exclusive domain over the creation of the CIL of human rights. This is especially so given that the skepticism toward states is perpetually proven to be warranted, as numerous state-perpetuated violations occur annually.

The current situation is one in which states – including regular violators of human rights doctrine and the actors which the human rights treaties have had in mind as potential violators – are monopoly holders of the formal authority to create CIL, even in the area of human rights. This condition is founded on a commitment to the volunteerist, or con-
The consensualist conception of international law. It is apparent that this conception of international law does not fit well with human rights doctrine. In fact, an often cited attraction of CIL, especially in regard to *jus cogens* norms, is its ability to bind states that have not voluntarily taken on particular human rights obligations through treaties. This is among the reasons that custom is viewed as the “Achilles’ heel of the consensualist outlook.”

The participation of individuals in the formation of CIL would also potentially challenge the volunteerist principle. However, perhaps this would be the case only in a confined universe of cases. In cases in which the expectations and beliefs of individuals are discernable and are found to have coalesced into custom, this information would be factored together with the traditional objective and subjective state elements in determining the content of CIL. Consider the following hypothetical examples.

In the first hypothetical situation, the human rights norm being considered (for example, a prohibition on genocide) is one about which individuals and their states appear to be in agreement and a sufficient number of states will have behaved with the necessary uniformity for the requisite time period such that the prohibition on genocide can be declared CIL. An inquiry into the expectations and beliefs of the population will show that there is sufficiently uniform expectation or belief that they should be protected from genocide. In these cases, the volunteerist principle is not challenged – the state consents to be bound by law which prohibits genocide and individuals do not challenge that position.

In a second hypothetical situation, however, a reviewing body looking at the words and actions of only states would come to the conclusion that a given norm has not risen to the level of CIL. If the reviewing body were to peer through the level of the state and the behavior thereof, it would find that individuals have very much come to believe in their own possession of the particular norm under consideration.

Actual examples in which this might be the case are not difficult to imagine or come by. The current state of Myanmar serves as an excellent example of a state that denies to its population the protection of human rights. Without more investigation, Myanmar is likely to serve as an exception that must be accounted for in any consideration of whether

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154 The volunteerist, or consensualist conception of international law holds that in order to be bound by international law, states (traditionally the exclusive subjects of international law) must consent to be bound by that law.

any given norm has become CIL. A large enough number of Myanmars, taken together, can serve to ensure that any given norm cannot be shown to have attained the requisite level of uniform acceptance to become custom. Under current CIL formation doctrine, this would be the result even if there is existing evidence that the people of Myanmar (or of the Myanmars of the world) have come to believe that they possess human rights and hold expectations that their human rights should be observed.

This is not merely a hypothetical situation posed for the purpose of illustration. The sitting government of Myanmar is signatory to no human rights treaties save CEDAW and the Convention on the Rights of the Child. Myanmar is also infamous for its ongoing violations of human rights. If a reviewing body were to look no further than the instance of Myanmar, it would have no choice but to see Myanmar’s words and actions as an example of a state were a given norm of human rights has not yet taken hold. For a large set of international law scholars, this would serve as evidence that the given norm may not be CIL. However, there is significant and mounting evidence that the people of Myanmar believe they possess human rights and expect those rights to be protected. Under current CIL formation doctrine, this information can not be considered, despite its obvious relevance.

The case of Myanmar is an extreme example, but it is not alone as a state that does not observe human rights in words or in actions. there are also other instances where human rights doctrine itself seems to dictate that individuals be consulted in determinations of the content of CIL. The action versus words problem, so often noted in the CIL literature, serves as a valuable conceptual jumping off point.

This problem refers to the questions that arise when a state outwardly condemns a given practice or repeatedly signs on to human rights treaties, declaration, etc. prohibiting that practice while also engaging in actions that contradict their statements. For example, a state may con-

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158 There is currently a Burmese democratic constitution drafting process in progress underway. The current draft of the constitution recognize the rights of Burmese people under human rights instruments (draft constitution on file with the author). In addition the well known Alien Tort Statute case between unnamed Burmese peasants and Unocal provides evidence that individuals within this country believe themselves to possess human rights which their state denies to them. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
159 For a recent discussion of this literature, see Andrew Guzman, Saving Customary International Law, 27 Mich. J. Int'l L. 115 (2005).
demn torture repeatedly while actively engaging in torture. The contradiction created by the conflicting actions and words may serve to denigrate or degrade the status of a norm against torture as prohibited by CIL. This is especially the case under the traditional view of CIL, which holds that only the physical acts of states count. It is of course plausible that the declarative acts of states and the opinions and expectations of individuals might well stand in agreement in condemning torture. Nonetheless, if individuals are not taken into account and physical acts are given greater weight than declarative acts, the continuing physical acts of torture by states may serve to denigrate a customary prohibition against torture. Again, this seems an odd result. Especially in an international order predicated on a commitment to democratic participation and one which aims to protect individuals from human rights violations.

2. Human Rights Doctrine Requires Information From Individuals as it Evolves

Human rights, whether created by treaty or CIL, are designed to affect and protect individuals. In order for human rights doctrine to remain vibrant and coherent, it is necessary to include individuals in considerations of the content of human rights law, regardless of whether that law is made by way of treaty or custom.

Institutionalizing the inclusion of public opinion, after all, is among the rationales behind granting NGOs consultative status within the United Nations and also within the Council of Europe. The Council of Europe is very explicit about this rationale and states that “initiatives, ideas and suggestions emanating from the voluntary sector can be considered as the true expression of Europe.” Commentators may do well to similarly include discussions of public opinion and expectation in their assertions that a given norm has coalesced into CIL. Reviewing bodies attempting to determine the content of CIL also may see the

\[\text{\textsuperscript{160}}\text{Id.}\]

\[\text{\textsuperscript{161}}\text{This view has been expressed by Anthony D’Amato in Anthony D’Amato, The Concept of Custom in International Law, 88 (1971). But see, KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, 84 (2nd ed. 1993) (stating that all resolutions constitute acts of conduct and can lead to the formation of customary law).}\]


\[\text{\textsuperscript{164}}\text{Id., preamble.}\]
necessity of expanding their own competence to include peering through the veil of state sovereignty to ask about the beliefs and expectations of individuals in respect to human rights rather than focusing solely on the behavior of states.

C. CIL Doctrine

A natural question that arises at this point, even if the reader has been convinced that characteristics of international law generally and human rights doctrine both form strong bases for including individuals in CIL formation, is whether the doctrine of CIL itself forms a basis for this shift.

Common criticisms of CIL include assertions that it suffers a legitimacy crisis. Ben Chigara has presented a very thorough accounting of the reasons for this crisis. In his view, the state practice + opinio juris = CIL formula fails to describe the current international legal system. Chigara reminds us that Article 38(1)(b) was originally drafted in 1920 and integrated into the Statute of the ICJ without change in 1945. At the time the text was drafted, the state was the only recognized subject of international law. The volunteerist principle of international law was also largely unchallenged. Both of these essential premises of international law, however, have largely eroded since the text of Article 38(1)(b) was drafted. The position of the state as the only recognized subject of international law and the volunteerist principle embodied in that era have largely eroded. In arriving at this conclusion, Chigara points to many of the same factors already discussed in this Article, including the rise of the international human rights regime, the proliferation of NGOs and IGOs as international legal actors and the creation of the International Criminal Court as evidence that state sovereignty and state consent do not play the unique role the once did.

Given this fundamental change in conditions, Chigara argues that the twin-pronged approach of Article 38(1)(b) to CIL formation no longer fully represents the framework used in the decisions of the ICJ. He believes that the confusion surrounding CIL may be adduced as evidence that there are blind spots in the formulation, and in the interpretation of the formulation, of CIL. “These blind spots threaten the determinacy, coherence and legitimacy of customary international law.” As applied

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165 See generally, Ben Chigara, supra, note 27.
166 Id. at 67.
167 Id. at 73.
168 Id. at 73-88.
169 Id. at 136.
170 Id. at 136.
to the ICJ and CIL, Chigara seeks to examine, whether the free play of the text 171 of Article 38(1)(b) has contributed to the perceived legitimacy deficiencies in CIL.

The reader is urged now to recall the realists’ observation discussed earlier herein that individuals, in very real ways, currently participate in the formation of CIL. 172 Although individuals currently do participate in CIL formation, the current text and/or interpretation of Article 38(1)(b) do not allow the ICJ or any other reviewing body using the formulation provided by Article 38(1)(b) to outwardly recognize, acknowledge and discuss this participation as relevant in their decision making process. This can result in a situation in which the ICJ has to engage in the free play of texts, thereby obscuring the true grounds for their decisions. 173

It is not the assertion of this Article that the failure to formally include individuals in CIL formation is the only reason for the legitimacy deficit resulting from the decline of state sovereignty and volunteerism. Such an assertion would be overly grand, to be sure. However, as this discussion has shown, international law now recognizes individuals as subjects. Individuals are protected by and are bound by human rights. At the same time, at least the two basic premises of CIL discussed above have been significantly eroded since the Statute of the ICJ was drafted. The result is that the inability to formally recognize information from individuals when determining the content of CIL contributes to this legitimacy deficit. This is exacerbated by the fact that individuals are de facto participating in this process.

IV. Modern Social/Philosophical Bases for Including the Individual: Globalization, Cosmopolitanism, Transnationalism and Participatory Democracy

A. Globalization

The term “globalization” 174 is a term used in many disciplines and discourses to describe a broad range of cultural changes which together

171 “the free play of texts” refers to the Derridian idea that “often our language reveals that we mean more than we say, and also often say more than we mean.” Ben Chigara, supra, note 27 at 136.

172 See Section III.A herein.

174 The term globalization is not one for which an agreed definition exists. There is great debate about its meaning and content. See, e.g. Phillipe Legrain, Open World: The Truth About Globalization (2003); Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization (1996); R. Robertson, Globalization: Social
create world-wide interdependence, interaction and integration and have allowed unprecedented connection between people in varying capacities. 175

Communication, technological development, rapid international transportation, international law, especially in areas of trade and human rights, are all markers of and contributors to globalization. Globalization is felt as increased interdependence, a sense of living in a smaller world and a sense that what happens in one place has potential effects in a very distant part of the world. It is brought on not just by the technological improvements made in travel, communications and the media, but also is the result of the emergence of regional and global agreements and customs, especially when these agreements and customs create a consciousness of interconnectedness among people all over the world. 176

A widely quoted definition of globalization is put forward by David Held and others as:

... a process (or set of processes) which embodies a transformation in the spatial organisation of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – generating intercontinental or interre-
gional flows and networks of activity, interaction and the exercise of power.\(^{177}\)

It is this transformation of social relations that is most pertinent to this Article. It is precisely this “rapid growth of complex interconnections and interrelations between states and societies...along with the intersection of national and international forces and processes...”\(^{178}\) that present largely under-theorized problems for traditional democracy discourse.\(^{179}\)

Traditional democratic theory has focused on democracy within the nation state and much less on the challenges that arise as a result of globalization and the attendant decline of state sovereignty. In the last decade political theorists have begun to ask questions that have real significance for legal doctrine and process.\(^{180}\) The results have come in the form of fundamental re-thinking about the concept of citizenship and the lock on citizenship and democracy enjoyed until recently by the state. This re-thinking has resulted in a re-emergence\(^{181}\) of a theory of cosmopolitan citizenship, cosmopolitan democracy and “cosmopolitan democratic law”\(^{182}\) that draws into question the legitimacy of current frameworks for democratic law generally, especially given developments in international law that rely on notions of democracy and human rights.\(^{183}\)

Some legal scholars, including scholars of international law, long ago came to the conclusion that changes in international law and the changes brought on by globalization create a new condition – a new terrain for individuals:

In traditional international law the individual played an inconspicuous part because the international interests of the individual and his

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\(^{179}\) Id at ix.

\(^{180}\) A sampling of these questions has been articulated by David Held. *Id* at x.

\(^{181}\) Cosmopolitanism and cosmopolitan citizenship are not new ideas, as students of political philosophy will know. Immanuel Kant was a great proponent of the idea of universal community and cosmopolitanism. See, e.g. Immanuel Kant, *Kant: Political Writings* 107-108 (Hans Reid ed., H.B. Nisbet, trans, 2d ed.1991).


\(^{183}\) Id at 99-121. See also James Crawford, *Democracy in International Law*, Inaugural Lecture, Cambridge University Press (1994) (providing an insightful analysis of the effects of the development of international law on traditional notions of state sovereignty).
contacts across the frontier were rudimentary.
This is no longer the case.184

B. Cosmopolitanism and Cosmopolitan Citizenship

In a previous writing, the author has presented initial thoughts on the emergence of a global community, not merely as a philosophical matter, but as a real phenomenon.185 Briefly, that article presents the work of social scientists and legal scholars that point to the emergence of a cosmopolitan community.

The identification of the emergence of a global community has led, in turn, to observations of an emerging global - or cosmopolitan - citizenship.186 Linda Bosniak, for example, has concluded that emerging global identities exist and that viewing the activities pertaining to global identities as acts of citizenship is a choice toward further developing transnational identities.187

It is not the author’s view that individuals have become denationalized. Nation states will not disappear in the foreseeable future. Ann-Marie Slaughter, for example, has argued convincingly that the nation state is strong and remains central and important, even after the ascent of transnationalism and globalization.188 Rather, what is important to note is that individuals have added global or cosmopolitan identities to their already multi-leveled, or plural, political identities. The emergence of a cosmopolitan citizenship creates a new circumstance requiring a rethinking of the appropriate locations of citizen participation in government and governance.189 This context is relevant to the proposal that individuals should be included in the CIL formation process.

C. Transnationalism, the Subaltern, and Globalization from Below

Another highly relevant and connected social and political phenomenon is that which has been described and documented under a variety of names by scholars of the subaltern, such as Boaventura de

187 Id at 509.
188 See, Ann-Marie Slaughter, Global Government Networks, Global Information Agencies, and Disaggregated Democracy, HARVARD LAW SCHOOL, PUBLIC LAW WORKING PAPER No. 18. (arguing that the emergence of transnational governmental networks makes evident the continuing importance and centrality of the state).
189 See, Christiana Ochoa, Cosmopolitan Vision supra note 191 at 136.
Sousa Santos, César Rodríguez-Garavito, and Balakrishnan Rajagopal. This approach grasps the richness of globalization and seeks to see and study the activities of the “vast set of networks, initiatives, organizations and movements that fight against the economic, social, and political outcomes of hegemonic globalizations.” This set of groupings and activities is another face of globalization – it is the globalization that occurs outside of and sometimes in reaction to the neo-liberal and elite-oriented globalization.

Counter-hegemonic globalization and its attendant legal, illegal and extra-legal activities (which take the form of cross border group formation, activism, rallies, protests, petitions, etc.) presents new and real opportunities to include the beliefs and expectations of individuals from all sectors of the world in respect to human rights.

D. Participatory Democracy

The vast discourse on globalization includes questions and theories about the effects of globalization on traditional notions of democracy. Among the questions asked are whether traditional democracy, occurring within nation states and through representatives is a) still a realistic narrative of the means by which decision making is made in a globalized world and b) whether it should be. A much more full exploration of the connections between modern theories of participatory democracy and the participation of individuals in CIL formation is necessary.

For the purposes of this Article it is sufficient to say that the connections are immediately intuitively obvious. The origin of the theory of participatory democracy is often credited to Jean-Jacques Rousseau who presented an argument that authority over a people can only be legitimate if it leaves those who obey it as free as they were prior to their

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190 BOAVENTURA DE SOUSA SANTOS AND CÉSAR RODRÍGUEZ-GARAVITO, EDs. LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (2005).
191 BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).
192 Boaventura de Sousa Santos supra note196 at 29.
193 A much more comprehensive set of the questions raised can be found in DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER, ix, (1995).
194 Participatory democracy, or direct democracy, as a model for law-making is not new.
195 Interested readers may find an expanded articulation of these connections in a forthcoming article by the author.

See, Christiana Ochoa, Direct Democracy in International Law, IND. J. GLOBAL LEGAL STUD. (forthcoming).
submitting to that authority. Participatory democracy grants individuals the ability to participate in making the laws they must obey.196

An orientation toward a robust model of positive liberty is at the core of individuals participating in CIL formation. This, however, is not a radical orientation by any means. Rather, debates over the merits of positive versus negative liberty are among the most enduring in modern political life. It should also be noted that this orientation simply mirrors that adopted by the United Nations and the Council of Europe, both of which have institutionalized avenues for direct participation from non-state actors.197

V. Operationalizing the Inclusion of Individuals

The proposal that individuals ought to be included in the process of CIL formation is both theoretically grounded and technically feasible. Having addressed the theoretical foundations for this inclusion, the Article will now turn to an all-too-brief discussion of how individuals would be included in the CIL formation process.

Suggesting that individual participation in CIL formation make the leap from being merely the observation of realist scholars to being the formal approach followed by scholars and adjudicators when making determinations regarding the content of CIL requires consideration of how this might be undertaken. This discussion falls into three categories. The first entails the doctrine itself. It asks whether changes to Article 38 of the Statute of the ICJ and Section 102 of the Restatement (Second) of Foreign Relations Law of the United States must be re-worded or whether the change proposed herein is one which can be embraced by the current language of these provisions. In other words, must this be a textual change or is potentially an interpretive change?

The second question asks what should be measured. This Article uses the terms “belief” and “expectation” to indicate what it is about

196 JEAN-JAQUES ROUSSEAU, THE SOCIAL CONTRACT (1762). This work is available in electronic format at http://www.constitution.org/jjr/soccon_01.htm#008 (last visited February 10, 2007). Though Rousseau is often credited with the theory of participatory democracy, the Athenian model was one of direct democracy. Montesquieu and Machiavelli are also cited as having elements of this theory in their writings. SEYMOUR MARTIN LIPSET, ED., POLITICAL PHILOSOPHY: THEORIES, THINKERS, CONCEPTS 358 (2001).

individuals that one would seek to ascertain when seeking to determine the content of CIL. It uses these terms tentatively, however. There are various meanings for the term “expectation,” for example, and these must be explored. Also, there are other elements in respect to individuals that may be apt evidence of custom formation.

The third discussion is an intensely practical one. It asks, if individuals are to be included in the CIL formation process, how would this be done in practice? How would public belief or public expectation be assessed such that it could be utilized in relevant inquiries into the content of CIL? This Section will address these two aspects of including individuals in turn.

A. Including Individuals: Textual Change or Statutory Interpretation?

It might be helpful at this point for readers to be reminded of the existing language of the traditional doctrine regarding secondary sources, opinion-evidence, and means of proving whether a rule has become international law. Article 38(1) of the ICJ and Section 103 of the Restatement are instructive. They are as follows:

Article 38 of the Statute of the International Court of Justice sets out the sources of international law as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\(^{198}\)

Section 103 of the Restatement on the Evidence of International Law states that:

1. In determining whether a rule has become international law, substantial weight is accorded to:

\(^{198}\) Statute of the International Court of Justice, Article 38; BROWNLIE, supra note 17 at 6. This Article should not, however, be seen as the eternal and exhaustive list of the sources of international law. See, JENNINGS R. AND WA TTS, A., supra note 31 at 45.
a. judgments and opinions of international judicial and arbitral tribunals
b. judgments and opinions of national tribunals
c. the writings of scholars
d. pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.199

In both instances, the sources of opinion-evidence are very state-based. But in each case, it is notable that states are not the only source of evidence. In each case some individuals play a role in providing evidence as to the content of CIL (though admittedly only a very restricted and elite group). My point here is certainly not that all individuals fall into the definition of “most highly qualified publicists” or even qualify as “scholars.” Rather, it is to note that courts already look to writings of individuals as filters on actual custom. Whether that custom about which scholars provide information is shaped by the behavior of states or by the norms that have taken the shape of law for actual people is not specified. Under either the Restatement approach or the Article 38 approach the scholars or jurists may have license to address, or at least are not in any way precluded from addressing, the expectations of people among other considerations, especially in compelling cases.

In a realistic sense, this may be the best that can be expected. Even under current doctrine, the writings, affidavits and testimony of highly qualified international law experts are essential in assisting adjudicatory bodies in determining whether state behavior has created law. This would certainly continue to be true in the event that public belief and expectation come to be included in such determinations.

To some this may feel unsatisfactory. Perhaps it seems that law-determining bodies must themselves engage in the collection of evidence about individuals’ expectations. Perhaps only this would be seen to satisfy the more direct participation to which this paper makes reference.

Even this more radical position on direct participation may not require textual revisions to Article 38(1)(b) itself. Article 38 does not specifically state whose “general practice” makes up CIL. And this wording did not result from a lack of attention to the inclusion or exclusion of exclusively state-centric language. Rather, early drafts of the text of Article 38(1)(b) indicate that an exclusively state-centric formulation was explicitly considered but not ultimately adopted.

The various drafts of Article 38(1)(b) very specifically moved away from an exclusively state-centric approach. The text of these drafts, in chronological order, is as follows:

Proposal by Baron Descamps
“...international custom, being practice between nations accepted by them as law.” 200

Amended Text Submitted by Mr. Root
No change 201

Proposals Presented by the President (Baron Descamps) and Lord Phillimore, as Amended by Mr. Ricci-Busatti
“...international custom as evidence of common practice among said States, accepted by them as law.” 202

Root-Phillimore Plan
“International custom, as evidence of a common practice in use between nations and accepted by them as law.” 203

Text Proposed by Drafting Committee, of a Draft Scheme for the Establishment of a Permanent Court of International Justice
“...international custom, as evidence of a general practice, which is accepted as law.” 204

Text Adopted in First Reading
“International custom, being the recognition of a general practice, accepted as law.” 205

Draft-Scheme
“...international custom, as evidence of a general practice, which is accepted as law.” 206

201 Id., at 344.
202 Id., at 351.
203 Id., at 548.
204 Id., at 567. This version is of particular relevance since it is here that all reference to states and nations disappears from the formulation of CIL. It is both fascinating and frustrating that the Proces-Verbaux of the Proceedings of the Committee includes no discussion of the reasons for this change nor the arguments surrounding it, if any were made.
205 Id., at 666.
Final Text Adopted by the Committee
No change\textsuperscript{209}

Present Text of Subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice
No Change\textsuperscript{208}

The rules of statutory interpretation would arguably cut in favor of an interpretation that the “general practice” to which Article 38(1)(b) refers can, may, or does include states as well as other actors. However, anyone ambitious enough to take up that position should be aware that it would require strong modifications to much well established commentary on Article 38(1)(b) which has held a exclusively state-centric view as a central assumption.\textsuperscript{209}

The Restatement is another matter. While Section 103 thereof allows for the participation of an intellectual elite in interpreting CIL, Section 102 is very clearly state-centric and holds that CIL is the result of “a general and consistent practice of states.”\textsuperscript{210}

This is not to suggest, of course, that the Restatement might not be worded quite differently in its next incarnation. The Introductory Note to Part II of the Restatement alludes to significant changes in international law that were only starting to take hold in the legal imagination at the time it was finalized in 1987. It recognizes that while it had historically been assumed that individuals “were not persons under (or subjects of) international law...[i]n principle...individuals...can have any status, capacity, rights or duties given to them by international law or agreement, and increasingly individuals...have been accorded such aspects of personality in varying measures.”\textsuperscript{211} This note is particularly provocative in light of the manner in which individuals were regarded under the 1967 Restatement Second. In the twenty years between 1967 and 1987, individuals moved from being treated largely as objects to being recognized as subjects of international law.\textsuperscript{212} It is not a far stretch to imagine that in

\textsuperscript{206} Id., at 678.
\textsuperscript{207} Id., at 730.
\textsuperscript{208} Statute of the International Court of Justice, Article 38(1)(b).
\textsuperscript{209} It is worth noting that the state-centric assumption has not often been explored and exposed. The basic premise of this assumption is the volunteerist view of international law which holds that the international legal system is consensual vis-a-vis states.
\textsuperscript{210} \textit{RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (2)} (1987), (emphasis added).
\textsuperscript{211} Id., Part II, Introductory Notes (1987), (emphasis added)
\textsuperscript{212} It may be of interest to compare the language of these two Restatements.
f. Rights of individuals under international law. International law imposes upon states duties with respect to individuals. This, it is a violation of international law for a state to treat an alien in a manner which does not satisfy the international standard of justice under the rule stated in § 165. However, in the absence of a specific agreement, an individual does not usually have standing to complain of such a violation before an international tribunal. Generally, it is the state of which he is a national that has the standing to bring the complaint. Moreover, the state of nationality may usually decide whether to exercise the right. For example, under the rule stated in § 73, a diplomatic representative is immune from the exercise of the jurisdiction of the state to which he is accredited. The state the he represents may, however, waive this immunity.

International law does not prohibit states from granting to individuals rights which they may enforce directly. See the Convention of December 20, 1907 for the Establishment of a Central American Court of Justice, which provides that individuals may bring complaints in that court, whether or not the state of their nationality supports their claims. Doc. No. 12, G/9, 14 U.N. Conf. Int’l Org. Docs. 477 (1945), [1907] Foreign Rel. U.S. 697 (1910). And as indicated in § 2 below, a state may provide a remedy under its domestic law to give effect to a rule of international law. Also, as indicated in § 3 (b), an individual or corporation may enter into an agreement with a foreign state by the terms of which disputes arising out of the agreement are to be decided according to principles of international law.

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §1 (1967); and

In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law. In principle, however, individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying
drafting the next Restatement, the ALI will recognize that the status of individuals may have shifted in significant ways since the 1987 Restatement Third. In fact, the phenomena of globalization, cosmopolitanism and transnationalism described only briefly herein (but much more thoroughly in other venues and by other authors) has largely only since 1987 come to be described, analyzed and understood.

Whether individuals are included by way of the interpretations and analysis of the most highly qualified publicists and scholars or by way of a textual revision, a second discussion is of paramount importance. What follows is a discussion of the sources of opinion-evidence that might be employed in determining what individuals have come to believe are their rights as a matter of CIL.

B. Elements of Custom Among Individuals

This Article employs the terms “belief” and “expectation” in referring to that which would have to be measured if individuals are to be included in determinations of CIL’s content. As mentioned previously, these terms are used tentatively, for the following reasons.

When this Article uses the term expectation, it adopts a definition of expectation that captures what individuals have come to expect regarding measures. For example, international law and numerous international agreements now recognize human rights of individuals and sometimes give individuals remedies before international bodies. See § 703. Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide. Corporations frequently are vehicles through which rights under international economic law are asserted.

Although individuals and corporations have some independent status as persons in international law, the principal relationships between individuals and international law still run through the state, and their place in international life depends largely on their status as nationals of states. Thus, the law of state responsibility for injury to aliens hinges upon the nationality of the person injured. See § 713. A state may regulate conduct by its nationals outside its territory. See § 402(2). The nationality of individuals and corporations is dealt within §§ 211-213.

ing the ways in which the state or other entities ought to behave. The
term expectation can, of course, have other meanings. For example, it
might be said that, even if individuals have come to expect their protec-
tion from slavery, they may be citizens of a state that regularly overlooks
instances of slavery or slave conditions. There could well be a distinc-
tion between what individuals have come to expect normatively (i.e.
they have come to expect that they should be protected from slavery)
and what they expect will happen in their real experience; in other
words, their prediction of state behavior. (i.e. they will not be protected
from slavery – their state will not investigate or prosecute cases of
alleged slavery). This distinction is essential to understand if the term
“expectation” is to be used for the purpose of including individuals in
CIL formation, as the normative expectation would be useful while the
realistic expectation would simply reflect the behavior of the state and
would, therefore, provide no additional information and would thus not
be useful.

“Belief” is used herein to mean something similar to the opinio juris
element in the traditional CIL formulation. It is used to signify what
individuals believe about how states and other entities (including their
own selves) ought to behave as a matter of law. It is possible that the
term opinio juris would be the better term to use. The primary reasons
for not doing so herein is to avoid confusion with the term “opinio juris”
as that term is used in the traditional state-based formulation of CIL and
to avoid becoming immediately enmeshed in the debates and disagree-
ments over the term opinio juris that have occurred in the context of
state-based CIL.

It is also essential to note that it is likely necessary to include indi-
vidual’s practice as an element in CIL determinations. After all, custom
arises from conduct and actual behavior as opposed to arising from
beliefs or expectations alone, and is thus significant. Also, there may be
a certain grace in an individual-based “practice + opinio juris” formul-
ation which would mirror the state-based objective and subjective
elements. What exactly would be included in practice in respect to
individuals and the required uniformity, universality and duration of a
practice would surely all be the subject of controversy, as they have been
in the state-based formulation.

It is not the objective of this Article to settle these questions; these
debates will be important and will surely be prolonged. For this reason
this Article has deliberately thus far avoided referring to individuals’
“practices.”

The result is a hesitant use of the terms “belief” and “expectation”
that will likely prove to be only provisional. The dissatisfaction or
discomfort readers may feel at the use of these terms may well be shared
by the author, who looks forward to reactions and proposals for more fitting elements or measures of custom among individuals.

C. Determining Public Opinion

In determining CIL, courts have relied on “international agreements; domestic constitutions or legislation; executive orders, declarations or recognitions; draft conventions or codes; reports, resolutions or decisions of international organizations; and even the affidavits or testimony of textwriters.”[^213] It is not required that every item on this list be included in such determinations, nor that any one source or set of sources be given preference over the others. The difficulty of assessing state practice and the *opinio juris* of states necessitates flexibility in this respect.

In making determinations about the content of CIL, courts and commentators attempting to assess public expectation would similarly do well to look at a number of sources. As in the states-only context, it is unlikely that every item discussed herein would be useful or necessary in every determination and it is also unlikely that any source or set of sources should consistently be given preference over the others. Rather, a rich array of potential sources of evidence would be necessary in order to allow for the “process of continuous interaction, of continuous demand and response” among those engaged in the law-formation process.[^214] This Section will discuss the use of General Assembly Resolutions, NGOs, litigation and public opinion polls of evidence about the beliefs and expectations of individuals in respect to human rights.

1. General Assembly Resolutions

Professor Paust has put forth a proposal of how public opinion might be assessed for the determination of custom.[^215] In his view, General

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[^214]: Credit for the concept of the call and response nature of CIL is granted to Myres McDougal. He described this call and response as a process which allowed for the reciprocal tolerances that lead to the expectations that power will be exercised in some uniform pattern. See, Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 Am. J. Int’l L. 357-58 (1955).

Assembley resolutions are the most apt sources for the collection of evidence about public opinion. He is not the first to take the view that the actions of the General Assembly are useful in any attempt to arrive at world public opinion. 216 Professor Chen has referred to such resolutions as potentially “a new institutional mode by which the peoples of the world can clearly communicate expectations of authority and control.”217 While somewhat doubtful of such a utopian characterization of General Assembly resolutions, this Article agrees that such resolutions can be useful points of information. This position seems in keeping with the intent of the Restatement, which calls the evidentiary value of the resolutions of international organizations “variable.”218 Still, when resolutions of universal organizations are “adopted by consensus or virtual unanimity”219 they ought to be given “substantial weight.”220

Unlike Paust or Chen, however, this Article takes the view that no one source of evidence as to world opinion ought to be granted a premier status. For even as Paust notes:

[i]t might also be unrealistic to depend entirely on a General Assembly resolution to reflect relevant patterns of legal expectation. General Assembly resolutions reflect a one-state-one-vote system that can provide evidence of the legal expectations of humankind only if it is assumed that each state adequately represents its people and that somehow the actual vote reflects what


218 Restatement (Third) Foreign Relations Law of the United States, comment c to §103 (1987). The Statute of the ICJ does not mention include such resolutions in its list of sources for evidence. This is largely believed to be due to fact that the Statute was drafted before resolutions of international bodies took on their current importance. See, Reporters’ Notes 2. to Restatement (Third) Foreign Relations Law of the United States, comment c to §103 (1987).


220 Id. This is the standard employed by the Restatement for use of the work of universal organizations as evidence of law.
would have been a weighted voting pattern based on population numbers...\textsuperscript{221}

Each resolution of the General Assembly, taken alone, is not sufficient in determining what individuals have come to believe are their rights such that they should be recognized as CIL. It would be an odd result if it were otherwise, and any resolution of the General Assembly became CIL. Rather, a consistent and sustained pattern of General Assembly resolutions, showing some degree of consensus (if not uniform agreement), should be required.\textsuperscript{222} Professor Paust agrees with this proposition.

When one can identify a series of such resolutions through time, one can also rightly assume that such preferences or expectations are relatively stable within a given period and if they are matched with generally conforming behavior, one has evidence of a relatively stable customary norm.\textsuperscript{223}

The ICJ itself, in its 1996 Opinion on the Legality of Threat or Use of Nuclear Weapons has similarly stated:

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

\textsuperscript{222} Professor Paust has stated a very similar criteria. He writes:

\begin{quote}
\text{a unanimous resolution of the General Assembly may yet be the best evidence of such a pattern of expectation, but such an evidence is not inherently perfect. It can also be recognized that resolutions declaring international law or applying such law after serious and notorious events presumably might better reflect well-considered and strong or intensely-held preferences of the international community.}
\end{quote}

also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.224

As stated previously, however, this Article is of the view that even when consistent over time, General Assembly resolutions taken alone may not be sufficient to establish that public opinion has coalesced into custom on a particular norm. While this view may be seen as overly conservative by some, it is consistent with the position and rationalization expressed in the Reporters notes to Section 103 of the Restatement which points to specific examples in which General Assembly resolutions that were widely adopted cannot be thought to have been formative of CIL and also to examples in which less than unanimous resolutions may, despite of the lack of unanimity, still be indicative of CIL if they were bolstered by other evidence.225

2. Non-Governmental Organizations and Civil Society as Proxies for Individuals

The proliferation of NGOs in all areas of human rights leads naturally to the suggestion that consulting the work or advice of NGOs would be a valuable and reasonable method by which to include individuals in the CIL formation process. Professor Isabelle Gunning has made a similar proposal when she argued that the important role NGOs play in international affairs necessitates that they be included in the custom creation process, especially “[a]s these groups mobilize widespread support.”226 When Professor Gunning made her recommendation, she suggested that determining which NGOs should be included in the custom creation process could be done using procedures similar to those followed in the United Nations for granting NGOs consultative status.227

224 ICJ Reports (1996), 226, 254-255, paragraph 70.
225 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Reporters Note 2. to §103 (1987). The examples provided in the first case include the General Assembly resolution which declared use of nuclear weapons a violation of international law (G.A. Res 1653, U.N. GAOR, Supp. No 17 at 4) which was immediately challenged by the United States – an important power in such matters. See also, Oscar Schacter, The Crisis of Legitimation in the United Nations, 50 TIDSKRIFT FOR INTERNATIONAL RET 3 (1981) cited in RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Reporters Note 2. to §103 (1987).
Other authors, even those who might favor expanding the participants in the CIL formation process, have objected to this approach. For example, Professor Julie Mertus has made clear her skepticism about the ability of NGOs to represent people democratically, well or accurately.\textsuperscript{228} Hillary Charlsworth has also noted her skepticism of including NGOs in the CIL formation process, though on grounds that seem to apply equally well to state and non-state actors. Her objection is that including non-state actors would have the effect of “generating weak norms on a wide-variety of topics.”\textsuperscript{229} Indeed, there is a non-intuitive observation to be made in the space between the objections of Professors Mertus and Charlsworth.

Professor Gunning’s well-meant proposal to certify a relatively small (though perhaps unpredictable) number of NGOs to serve a consultative role for the purpose of CIL formation is unworkable. Limiting the universe of NGOs qualified to participate in providing information about individuals expectations and beliefs will almost immediately raise questions about the delineations between those NGOs certified as competent to provide information and those not certified as competent. Some questions may require the expertise of large, international NGOs while others may require the insights of smaller domestic organizations. Some may require the advise of NGOs with expertise in a particular subject, while others may require a whole different knowledge base and approach. The exclusionary process of certification will and should give rise to the skepticism raised by Professor Mertus. Maintaining an open process, which allows for the participation of a wide base of civil society is a better approach. This more open approach should prove satisfying to the concerns raised by Professor Charlsworth as well.

It should at no point be forgotten that the process in which individuals are to be included is one designed to assist in determinations of what constitutes CIL. In order to achieve the status of CIL, it must be shown that there is sufficient uniformity of views about a given norm, such that it can be said to have become custom. If there is not sufficient uniformity, a norm cannot possibly have customary law.\textsuperscript{230} In order to employ NGOs as a proxy for individuals, such that they can convey the expectations and beliefs of individuals, it is necessary to include many and


\textsuperscript{230} Such a norm may express the aspirations of many without having become custom, after all.
many different kinds of NGOs, broadly defined. To do otherwise would run afoul of legitimate and real concerns expressed by Spivak and others regarding the trend toward western hegemonic representation of people’s beliefs. A broad inclusion of civil society is the more advisable approach, when opening and formalizing a path for bottom-up law making. Even with a broad view of these potential proxies for individuals, it is necessary to keep in mind that in many (if not most) cases, this approach, taken alone, will not likely provide information sufficient to determining the content of CIL.

3. Empirical Data

a. Human Rights Litigation

This Article has already discussed the relatively recent ability of individuals to initiate litigation or other proceedings on the grounds that their human rights have been violated. Litigation of this nature can act as a source of information about the rights that individuals have come to believe are theirs and the rights which they expect to have protected, promoted or enforced. The complaints and petitions received by international tribunals and national courts are valuable pools of information regarding the content of people’s expectations and beliefs. Such claims may be based in treaty or in custom and this variation, of course, may make clear analysis of the utility of such claims difficult at times. Nonetheless empirical data about these claims will be valuable. Information regarding the content of these complaints, the norms being called into play, the number of complaints based on any particular norm, and the broad or narrow geographic origins of the claims can serve as very useful information from individuals regarding whether a given norm has attained the level of custom.

231 Gayarti Chakravorty Spivak, Can the Subaltern Speak? in CARY NELSON AND LAWRENCE GROSSBERG, MARXISM AND THE INTERPRETATION OF CULTURE (1988). Spivak’s essay warns that the subaltern are a heterogeneous group. Thus, any assumption of a solidarity of the subaltern will run into inevitable problems. First, it will create a new and deepened assumption that the subaltern are a singular collective group. Second, among the subaltern, it will create a dependence on western scholars to speak for them, rather than assuring routes to speak for themselves.

232 Recent relative to the creation of the Statute of the ICJ and the era in which the object theory of the individual and the volunteerist principle in international law were paradigmatically accepted.

233 See Section III.A herein.

234 The present author has presented this idea previously, arguing that litigation under the Alien Tort Claims Act serves as an unusually "pure" source of such information, given that ATCA litigation must be based on a claim that the law of nations, or CIL, has been violated. See, Christiana Ochoa, Towards a Cosmopolitan Vision of Interna-

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Some readers may feel concern about using litigation in this manner because they believe it could create a countermajoritarian difficulty within international law, in which adjudicators might cause an affront to democratic principles by invalidating the domestic law of given states. A full exploration of this issue is outside of the scope of the current Article. However, on initial impression, it is difficult to see how using complaints and petitions as sources of information, if properly conducted, would by itself, give rise to a countermajoritarian difficulty.

This Article does not propose that a small number of petitioners or plaintiffs would, through their litigation, grant to a future adjudicator the power to declare a norm to have become CIL. Rather, precisely because the project before the adjudicator would be to determine if the norm has in fact become custom, only a relatively large number of claims, with broad geographic origins, expressing very similar views about the norms claimed by the petitioners or plaintiffs would serve as evidence that a particular norm has become CIL. In the absence of these characteristics, litigation or petitions alone would be of only little value, and scholars or adjudicators making an analysis of the status of a norm in the public opinion would do well to look to other sources as well.

b. Public Polling

Disciplines outside of law have longer and deeper experience with the question of how to derive public opinion. Law is perhaps one of the least well-suited disciplines for deciphering public opinion, and in this way customary law is unique. Both the civil and common law approaches have divorced themselves from custom and are thus strongly rooted in deriving or devising rules and procedures and are not overtly swayed by popular opinion. The work of other scholars, in other disciplines, on determining popular opinion is and will be essential in attempts to determine whether public expectation and belief are such that a norm has become CIL.

Since the Statute of the ICJ was drafted, the emergence and growth of the public opinion poll has been one of the greatest developments of research into public opinion. The global spread of the internet has created a previously unthinkable ability to attain data on a broad number of topics. For a very brief introduction to the internet as a tool for public polling and a non-comprehensive list of internet based polls, see, American Library Association, Internet Resources: Guide to Public Opinion Poll Web Sites: Polling Data From Around the World, 67 College & Research Library News, No. 9 (October, 2006). Available at http://www.ala.org/ala/acrl/pubs/crlnews/backissues2006/october06/opinionpoll.htm.

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history or the importance of this development. Rather, this Article will discuss two very relevant examples of projects that illustrate the viability and potential utility of large scale polling for the purpose of assessing beliefs, expectations and practices.

A project called Eurobarometer has been in place since 1973. It is a made up of a number of public opinion surveys performed regularly for use by the European Commission. The goal of Eurobarometer is to aid the European Commission in assessing “the evolution of public opinion in the Member States, thus helping the preparation of texts, decision-making and the evaluation of its work.” The surveys and studies “address major topics concerning European citizenship: enlargement, social situation, health, culture, information technology, environment, the Euro, defence, etc.” Among its studies, Eurobarometer performs qualitative studies which “investigate in-depth the motivations, the feelings, the reactions of selected social groups towards a given subject or concept.”

Similarly, an international group of political scientists has founded a collaborative survey research project that measures public opinion on democracy in eighteen African countries. Through native language personal interviews with a broad cross-section of the population of a number of African countries, this group of political scientists has arrived at groundbreaking data and has made accessible information about public sentiment that has previously been unknown.

There are similar barometer projects in Latin America, Asia and East Asia. All of these “barometer” projects have collaborated and

See also, Yale University Library Public Opinion Subject Guide, available at http://www.library.yale.edu/socsci/opinion/ (last visited, February 21, 2007).


“Id., European Commission Website

“Id., European Commission Website

“Id., European Commission Website

This project, called Afrobarometer attempts to track public sentiment and changes therein over time. Information about this project and its methods can be found at http://www.afrobarometer.org (last visited, February 21, 2007).

See, BRATTON, ET AL., PUBLIC OPINION, DEMOCRACY AND MARKET REFORM IN AFRICA, (2005). (Using the data collected through the Afrobarometer project, the authors describe what large numbers of ordinary Africans believe and expect about democracy and market reform).


http://www.asianbarometer.org/ (last visited, February 27, 2007).

agreed to methodologies that will allow the various barometers to be compared with one another. This project is called Globalbarometer.\textsuperscript{245}

Though it does not appear that any of the barometer projects have taken on the role of attempting to directly assess public opinion in respect to CIL or, any even any given norm,\textsuperscript{246} the salience of these projects to the proposal contained herein is remarkable and bears further investigation.

Of course, there are surely limitations with the use of public polls. The perils of the public poll and the manipulability of this tool are important to keep readily in mind. The methodologies used, the populations studied or surveyed, the ability of poll results to provide insights about the texture and content of varying types of responses (rather than homogenizing varying groups), and the survey questions themselves would have to be highly scrutinized any time that public polls were used to make a claim to about individuals’ beliefs and expectations.

4. Other Potential Approaches

In this Section this Article has provided four means by which evidence regarding the beliefs and expectations can be collected such that it could be employed in determinations of the content of CIL. Surely others exist, and the author looks forward with great interest to learning about them.

CONCLUSION

A concern readers may raise is that individuals’ beliefs and expectations are not currently measured or known. While this concern may be legitimate, readers should not make the mistake of believing that such beliefs and expectations are unknowable. Until now, little empirical research has been conducted about the beliefs of individuals regarding their human rights. While there is something inherently troubling about this fact, it is understandable to some extent. After all, until now, only states have controlled the field of CIL formation. Thus, only their behavior and beliefs have been of concern.


\textsuperscript{246}The barometers are currently oriented toward determining public opinion with respect to issues of democracy and the market. The barometers thus indirectly provide information with respect to human rights that are particularly relevant to civic participation such as freedom of speech and assembly. This could already be of use, for example, in attempts to determine the customary or non-customary content of some civil and political rights.
In 1949, shortly after the adoption of the Statute of the ICJ, the United Nations General Assembly’s International Law Commission commissioned a memorandum meant to assess the materials one might consult in attempting to determine the content of CIL.\(^{247}\) Submitted just sixty years ago, it is a rudimentary report, listing the available documents produced by various states that could serve as sources of evidence of the actions and *opinio juris* of states. The short list of potential sources of evidence for assessing the beliefs and expectations of individuals provided and discussed herein is even more rudimentary than this report, but it can serve as a starting point to larger discussions on how individuals can be included in CIL formation.

Another potential misunderstanding that readers may have is that the participation of individuals in CIL formation would either dismiss or discount the centrality of states. It aims to do neither, as it does not in any way mean to suggest that states would not continue to play a vital role in CIL formation. Rather, it accepts that international law now pertains to many types of subjects, including states. Thus, to the extent the content of CIL bears on their interests and experience, and to the extent that it might obligate or protect them, states as well as individuals would play a role in the formation of CIL.

Some may argue that the danger of this proposal is that it will add to the indeterminate nature of CIL. Perhaps it will be useful to readers at this point to be reminded of the imperfect nature of CIL determinations, even under traditional state-only doctrine. In seeking to make determinations of the content of CIL, there are no systematic rules of procedure that must be meticulously followed. In making such determinations, courts or commentators may rely on a number of broad and diverse sources, without discussing the reasons for including some and not others or the relative weight given to each. As Byers has very concisely stated, even though the processes of CIL creation may be complex and even ambiguous, this does not mean that the emerging rules are similarly indeterminate. In fact, “the rules which result from its operation are nonetheless very real, and have tangible results. Their normative value is not diminished by the possible indeterminacy of the arguments which may be made to establish their existence and content.”\(^{248}\)

This is important to remember because readers may feel uncomfortable with the proliferation of sources required by including individuals in CIL formation and the variety of methods presented herein for deter-


\(^{248}\) *BYERS*, supra note 46 at 211.
mining public opinion. They would do well to remember that the very nature of CIL determinations is indeterminate. This proposal would not muddy an otherwise clear and well-established methodology. This is not to say that it might not make CIL determinations slightly more complex. It may, and this is a serious and legitimate concern. It is at least arguable, however, that the risk and increased costs that might result are outweighed by the increased legitimacy brought to determinations of the content of the CIL and, thereby, to CIL itself.