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### Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post *Sosa v. Alvarez-Machain*

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**TOWARDS A COSMOPOLITAN VISION OF  
INTERNATIONAL LAW: IDENTIFYING AND DEFINING  
CIL POST *SOSA V. ALVAREZ-MACHAIN***

*Christiana Ochoa\**

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I. INTRODUCTION

There are now more than sixty thousand multinational corporations operating in the world.<sup>1</sup> This rapidly increasing number and the impressive global reach of corporations create connections among individuals such that the actions of any given corporation can be simultaneously felt all over the world. Its consumers in the west, its

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1. MEDARD GABEL & HENRY BRUNER, *GLOBAL INC.: AN ATLAS OF THE MULTINATIONAL CORPORATION* 3 (2003).

laborers in the east, and people who depend on a clean environment across the globe can be affected by the decisions a given corporation makes.

The interconnectedness of these various constituencies, created in part by corporations, has led us to understand that a subset of the problems created by business has an international character. International solutions that ensure more responsive and responsible corporate actors are therefore necessary. The global nature of transnational corporations, and the partially cosmopolitan identities formed in response to living in a globalized world, has thinkers the world over developing proposals for new or re-worked institutions, mechanisms, and frameworks for engaging the new conditions brought on by this individual and corporate trend toward a globalization of the corporation and cosmopolitanization of the self. This Article will add to this literature, as it proposes that our changed condition should cause us to rethink the formation and function of customary international law (CIL).

The proposal contained herein would also operate outside the context of corporate responsibility and would affect other discourse in which human rights are given the character of CIL.<sup>2</sup> Still, it is a graceful coincidence that this Article will be published together with David Weissbrodt's and Cynthia Williams's most recent contributions to scholarship promoting corporate social responsibility in the international context, given that multinational corporations are among the most visible of modern-day human rights violators.

The connection between the subject of this symposium—corporate social responsibility—and the proposal made herein regarding CIL most poignantly arises in the context of the hotly debated Alien Claims Tort Act (ATCA or the Act).<sup>3</sup> Recent years have seen important developments in the resolution of ATCA cases. In June 2004, the United States Supreme Court issued its decision in *Sosa v. Alvarez-Machain*.<sup>4</sup> In that opinion, the Court addressed whether the plaintiff, Humberto Alvarez-Machain, was entitled to recover damages under the ATCA.<sup>5</sup> Although *Sosa* did not involve any corporate entities as defendants, the Court's decision is highly relevant for corporations because of the now well-known use of the ATCA as a mechanism for seeking redress from corporations engaged in practices that violate basic

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2. For a discussion of the CIL of human rights, see *infra* Section IV.

3. 28 U.S.C. § 1350 (2005) (alternatively called the Alien Tort Statute by the U.S. Supreme Court and others).

4. 542 U.S. 692 (2004).

5. *Id.*

human rights.<sup>6</sup>

The amicus curiae briefs filed in connection with *Sosa*, as well as the writings of many scholars who have studied the impact of ATCA litigation are evidence of the strong disagreements that have arisen in the nearly twenty-five years of litigation under the Act. Similarly, the statements made in the immediate aftermath of *Sosa* by corporate entities and advocates of trade and corporate interests on one side<sup>7</sup> and human rights advocates on the other<sup>8</sup> predict continued disagreement regarding the proper scope of ATCA litigation. What there seems little dispute over at this point, however, is that the Court's decision in *Sosa* leaves corporations exposed to continued litigation under the ATCA as federal courts follow the Supreme Court's guidance in identifying and defining actionable claims under the ATCA.<sup>9</sup>

One of the fundamental debates over ATCA litigation concerns the power of federal courts to incorporate CIL in their decisionmaking.<sup>10</sup> Litigation under the ATCA and in other areas of the law has led the federal courts and the Supreme Court into a public debate over the proper role of foreign and international law, including CIL, in our own decisionmaking process.<sup>11</sup> In the dialogue over ATCA litigation, arguments to limit U.S. federal court employment of CIL have entailed narrowing preexisting understandings of the definition and role of CIL.<sup>12</sup> The result of this narrowing, however, is perilous for the future of human rights litigation, including the future of litigation against

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6. See *infra* notes 29–32 and accompanying text.

7. See, e.g., Press Release, National Foreign Trade Council, NFTC and USA\*Engage Cite U.S. Supreme Court Decision To More Narrowly Define Alien Tort Provision as Important Step In Curbing Erroneous Lawsuits (June 30, 2004), at <http://www.nftc.org/newsflash/newsflash.asp>.

8. Human Rights First, *Supreme Court Denies Claim of Alvarez-Machain, But Upholds Important Human Rights Law*, available at [http://www.humanrightsfirst.org/media/2004\\_alerts/0629.htm](http://www.humanrightsfirst.org/media/2004_alerts/0629.htm) (last visited Apr. 24, 2005).

9. *Sosa*, 542 U.S. at 748 (Scalia, J., dissenting) (discussing the Supreme Court's endorsement of the lower-court's definition of "actionable norms" under the ATCA).

10. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). See also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998), Gordon Christenson, *Problems of Proving International Human Rights Law in U.S. Courts: Customary International Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1995) and others.

11. In addition to the debate that occurs among the justices in dicta within opinions such as *Sosa* and *Roper v. Simmons*, 543 U.S. 551 (2005), individual members of the Court have engaged in this debate in public forums. Justice Scalia's address to the American Society of International Law in 2004 is an example. See ASIL Proceedings of the 98th Annual Meeting (2004). Another includes a debate between Justice Scalia and Justice Breyer held at American University on Jan. 13, 2005, a transcript of which is available at [www.american.edu/media](http://www.american.edu/media) (follow the link "speeches on campus").

12. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). See also Bradley & Goldsmith, *supra* note 10.

corporations violating basic human rights.

Part II of this Article will briefly describe the history of litigation under the ATCA and describe some of the claims that have been brought against state actors as well as private individuals and corporations.<sup>13</sup> Because many volumes have previously been devoted to this history, the description in this Article will be cursory and experts on this litigation may prefer to proceed to Parts III and forward. Part III will focus on the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*.

Part IV of this Article will turn to a discussion of CIL. It will first establish the difficulty scholars have had in determining the content of CIL and assert that this difficulty is due, in part, to a failure to recognize the role of individuals in the CIL formation process. It will discuss changes in international law that have placed individuals at the center of the international law of human rights and residual notions of sovereignty. These elements have resulted in a failure to recognize individuals as agents in the formation of the CIL of human rights despite recognition of this sort in the area of human rights treaty formation.

The remainder of this Article will rely on social theory regarding identity formation and transformation in the context of globalization. Discussing this literature, Part V will aim to establish that identities, like so much else in the current age, have at least partially dislodged from the local and national and have taken on an international, global, or cosmopolitan aspect, due in no small part to the multi-nationalization of corporations.

Building on the idea that individual identity is now partially cosmopolitan, Part VI will return to a discussion of CIL. This Part will advance two core arguments. First, it will draw attention to a particular deficit in adjudicatory machinery. The cosmopolitanism discussed in Part V has created new opportunities and interconnectedness among people. It has also led to problems that often require a keen awareness of the international quality of such problems and the international law available to address them. The international aspect of many modern problems creates demands on existing judicial institutions to consider avenues for the adjudication of international concerns. Properly conceptualized, CIL and the ATCA contribute to this project. The second argument advanced herein addresses the concerns expressed by Professors Trimble,<sup>14</sup> Goldsmith, Bradley, and Posner regarding judicial

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13. Part II is a brief reiteration of material published previously by the author. See Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act*, 12 IND. J. GLOBAL LEGAL STUD. 631 (2005).

14. Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 707-16 (1986).

application of CIL by federal courts as an anti-democratic practice. This Article argues that their concern relies on an unnecessarily narrow definition of the role of courts in the democratic process and suggests that their concern can be alleviated in two parts. First, many have previously addressed the role of federal courts in the democratic process. This Part will discuss the contributions others have made regarding the role of courts in democratic society through the promotion of dialogue over new or controversial issues. This Article will build on this work to argue that the manner in which CIL is formed creates a responsibility on the part of each branch of government, including the judiciary, to engage with CIL in order to ensure that each nation's citizens are fully represented in international lawmaking. Courts cannot and should not abdicate their role in interpreting CIL, as this would diminish their traditional roles in the political process. Second, Part VI will argue that curtailing avenues for U.S. participation in CIL formation and definition quashes participation on the part of U.S. citizens in the creation of CIL. Especially regarding the CIL of human rights, CIL depends on individual participation in order to ensure that it is adequately reactive to the exigencies created by globalization.

Given that CIL does in fact exist, limiting participation on the part of federal courts in the identification and definition of CIL has the effect of limiting U.S. citizens' participation in CIL's evolving composition. Part VII will discuss the ideal role of the judiciary in stimulating the formation of the CIL of human rights. To deny the courts such a role is to deny the global aspects of individuals' identities and is itself a limitation on democratic participation in international lawmaking.

## II. LITIGATION UNDER THE ATCA

In 1980, the United States Court of Appeals for the Second Circuit announced its decision in *Filártiga v. Peña-Irala*.<sup>15</sup> The plaintiff-appellants were Paraguayan nationals who sought to convince the Second Circuit that it had subject-matter jurisdiction over a case involving a tort committed in Paraguay by the defendant, who was also a Paraguayan national. According to the *Filártigas*, during the time Peña was the Inspector General of Police in Asunción, Paraguay, Peña kidnapped, tortured, and killed the *Filártigas*' son and brother, Joelito *Filártiga*. The plaintiffs alleged violations of "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights

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15. 630 F.2d 876 (2d. Cir. 1980).

and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.”<sup>16</sup> The plaintiffs relied on these documents as evidence of CIL prohibiting the treatment to which Joelito Filártiga was subjected. In so doing, they hoped to show that the requirements for liability under the ATCA had been satisfied.<sup>17</sup> The ATCA provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>18</sup> The Second Circuit decided in *Filártiga* that the ATCA “validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.”<sup>19</sup>

Passed by the first Congress in 1789, the ATCA was rarely invoked until the Second Circuit breathed life into it through its decision in *Filártiga*.<sup>20</sup> In the twenty-five years since, the Act has been at the center of a lively controversy over the use of the United States federal court system as a forum for settling the grievances of foreign nationals.<sup>21</sup>

During the past quarter century, multiple claims have been brought against actors public and private, foreign and domestic. The *Filártiga* case and *Kadic v. Karadzic*<sup>22</sup> are among the most well-known and perhaps the most emblematic of the cases in which foreign plaintiffs have sued foreign defendants. In both cases, the plaintiffs found their defendant in the United States and were able to serve process on the defendant. Their suits included allegations that the defendants, acting under color of law, engaged in tortious violations of international law. These cases involved violations of a subset of enumerated human rights so grave as to be indisputably prohibited by international law, including kidnapping, torture, homicide, and violations of the laws of war.<sup>23</sup> The courts in these cases applied international law against state actors or

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16. *Id.* at 879.

17. *Id.*

18. Alien Tort Claims Act, 28 U.S.C. § 1350 (2005).

19. *Filártiga*, 630 F.2d at 879. *See also* *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d. Cir. 1995).

20. Three cases involved the ATCA prior to *Filártiga*. *See* *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810, 1 Bee 74 (D.S.C. 1795) (No. 1,607). *See also* Brief for the United States as Respondent Supporting Petitioner at 17, *Sosa v. Alvarez-Machain*, No. 03–399 (9th Cir. Mar. 23, 2004).

21. The ATCA is central to this debate particularly as it pertains to accountability for human rights and humanitarian law violations. There are other statutes cited in this debate, including the aspects of the Foreign Corrupt Practices Act and federal antitrust statutes.

22. 70 F.3d 232.

23. *See id.*; *Filártiga*, 630 F.2d 876.

defendants acting under color of state law.<sup>24</sup> Nonetheless, the opinions published in these cases set the groundwork for future cases to be litigated against private actors.

The *Karadzic* case is probably best conceptualized as a transition between cases against public actors, or individuals acting under color of state law, and those involving private actors as defendants. Among the questions in *Karadzic* was whether Radovan Karadzic was a state actor.<sup>25</sup> He was the leader of the Bosnian-Serb faction when he perpetrated the violations at issue, but this meant he was the leader of an unrecognized government.<sup>26</sup> According to the district court, he was a private actor and, therefore, he could not be held liable for violations of human rights.<sup>27</sup> The appellate court reversed, finding two separate circumstances under which a private actor could bear international obligations. The first was when the individual commits one of a narrow set of wrongs that are of such gravity that state action is not considered a requisite for responsibility—for example, genocide. The second was when the violations were sufficiently tied to state action as to bring international standards to bear. Still, in *Karadzic*'s case, the court found that the significant support he received from the Yugoslav government gave his conduct the color of law.<sup>28</sup> During the era in which ATCA cases were limited to this type of litigation—when ATCA cases featured only state actors alleged to have committed violations of the most indisputably protected human rights—there was little opposition to the statute. At that time, the State Department of the United States issued advisory letters to the courts hearing these cases that encouraged them not only to hear the cases, but also to feel at liberty to find the defendants guilty for whatever violations they had committed.<sup>29</sup>

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24. The Second Circuit's decision in *Kadic* addresses this issue directly. Radovan Karadzic was the leader of the self-proclaimed Serb-Bosnian republic, "Srpska." *Kadic*, 70 F.3d at 236. The court discussed in dicta that the application of certain aspects of international law need not be limited to states or state actors but preferred to characterize Karadzic as a state actor rather than as a private individual because he was acting under color of law because of his collaboration with the former Yugoslavia or with substantial Yugoslavian aid. *But see* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775–76 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that the application of international law is limited in this way: "[s]pecifically, I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law.").

25. *Kadic*, 70 F.3d at 236.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Peña-Irala*, (2d Cir. 1980), *reprinted in* 19 INT'L LEG. MATS. 585 (1980). Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94–9035 (2d Cir. 1995) (affirming the ATCA and the *Filartiga* litigation), cited in Statement of Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith, Professor of International Law, Yale Law School, before the House Committee on International Relations on "A Survey and Analysis of

Still, the recognition in *Karadzic* that private actors *could* bear responsibility for human rights violations under the ATCA led to the development of claims against private actors, including corporate actors, for violations of international law—primarily the CIL of human rights. Well-known examples include a case brought against Royal Dutch/Shell Oil charging the defendants with complicity in human rights violations in Nigeria, including the killing of Ken Saro-Wiwa and others who were protesting a pipeline the company was laying;<sup>30</sup> the *Aguinda v. Texaco, Inc.* litigation, in which indigenous people in Ecuador brought an action against Texaco alleging multiple violations of rights recognized by international human rights treaties;<sup>31</sup> and a case initiated by Burmese peasants alleging that Unocal Corporation was complicit in the violation of various human rights, including forced relocation, torture, rape, and murder, which were committed by the Burmese military while providing security for the construction of a Unocal pipeline.<sup>32</sup>

The ATCA portion of *Sosa v. Alvarez-Machain*<sup>33</sup> featured a different kind of private actor as its defendant. Humberto Alvarez-Machain, the original plaintiff in *Sosa v. Alvarez-Machain*, was a Mexican national who was kidnapped in Mexico by other Mexican citizens acting on behalf of the United States Drug Enforcement Agency (DEA). He was thereafter transported to the United States where he was arrested, imprisoned, tried, and acquitted of any involvement in the murder of a DEA agent. After returning to his home country, he sued the Mexican citizens who kidnapped him, including Francisco Sosa, for contracting for his abduction.<sup>34</sup>

At the end of June 2004, the Supreme Court found that Alvarez-Machain was not entitled to recover damages from Sosa under the ATCA.<sup>35</sup> Still, the decision did not close the door on ATCA claims, as many had feared it might. Instead, the Court's opinion was a directive to the lower federal courts regarding the types of claims they should recognize under the ATCA.<sup>36</sup>

Another significant ATCA occurrence came in November 2004 when Judge Sprizzo of the United States District Court for the Southern

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Supporting Human Rights and Democracy 2002–03” July 9, 2003 at nn. 15, 16.

30. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

31. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d. Cir. 2002).

32. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

33. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004). *See also infra* Part III.

34. *Id.* at 697–99.

35. *Id.* at 692–93.

36. *See infra* notes 39–46 and accompanying text (discussing criteria lower courts are to apply).

District of New York used the tools laid out in Justice Scalia's concurrence in *Sosa* in order to dismiss a set of South Africa apartheid cases, including those against corporations that failed to divest from South Africa during the apartheid era.<sup>37</sup>

In December 2004, Unocal and the Burmese peasants mentioned earlier settled out of court, ending a long litigation battle over Unocal's alleged complicity in human rights violations committed by the Burmese government. Although the terms of the settlement are confidential, in principle it "will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to improve living conditions, healthcare and education, and protect the rights of people from the pipeline region."<sup>38</sup> Although there has been some debate over the meaning of this settlement, commentators have generally agreed that Unocal was trying to avoid a publicized court decision finding them liable under the ATCA.<sup>39</sup>

### III. CIL AND THE *SOSA* DECISION

This Part will focus on the Court's treatment of CIL and the directive the Court's opinion gave to the lower federal courts as to the treatment of future ATCA claims. Among the questions the Court tried to answer were how to translate the norms originally contemplated by this 200-year-old statute into a modern day formulation. Or, rather, how to apply the law of nations, limited at that time to prohibitions on violations of safe conduct, the protection of ambassadors, and the outlawing of piracy, to a world in which human rights are increasingly taking on the character of CIL.

Nearly twenty years ago, the *Restatement (Third) of Foreign Relations Law of the United States* (the Restatement) included prohibitions against genocide, slavery, extra-judicial killing, disappearances, and torture or inhuman treatment in its list of human rights that had become CIL.<sup>40</sup> But many scholars have argued for a broader substantive definition of CIL, such that, if we were to take them all seriously, CIL would include essentially all the rights enumerated in

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37. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

38. American Society of International Law, International Law in Brief, "Unocal to Reach Settlement in Alien Tort Claims Act Case" (Dec. 13, 2000), available at <http://www.asil.org/ilib/2005/01/ilib050128.htm#b1> (last visited July 15, 2005).

39. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

40. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS § 702 (1987).

the Universal Declaration of Human Rights.<sup>41</sup>

It was in the context of debates over which human rights were included in CIL that the *Sosa* Court attempted to define what was meant by the “law of nations” under the ATCA. The Court decided that “any claim based on the present-day law of nations [should] [1] rest on a norm of international character, [that is] [2] accepted by the civilized world and [3] defined with a specificity comparable to the features of the 18th-century paradigms” that led to the ATCA’s enactment.<sup>42</sup>

It appears that the first two factors the Court lays out are essentially a reformulation of the traditional view of CIL. The Court anticipated that its third criterion would create confusion for future litigants. At many junctures, the opinion urges lower court judges to exercise caution when considering claims under the ATCA. For example, the Court stated that “there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.”<sup>43</sup>

Still, the Court was not so restrictive in its interpretation of the ATCA and the state of play of *Erie*<sup>44</sup> that it shut the door on a court’s derivation

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41. See, e.g., Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 2001 COLO. J. INT’L ENVTL. L. & POL’Y 1, 23 (2001) (“However, I believe the concept of protecting environmentally displaced persons can be found in existing treaty law and customary international law.”); Leonard M. Hammer, *Reconsidering the Israeli Court’s Application of Customary International Law in the Human Rights Context*, 5 ILSA J. INT’L. & COMP. L. 23, 28 (1998) (“While it is difficult to disentangle instances in which the courts have referred exclusively to custom as opposed to constitutional principles, the courts have referred to the customary international law status of the right to housing, own property, equal protection of the law for aliens, and the right against discrimination.”) One could provide similar citations for most if not all rights enumerated in the Universal Declaration of Human Rights, the ICCPR, and the ICESCR.

Thus as early as 1965 the late Judge Waldock, perhaps a bit prematurely, concluded that the Universal Declaration had become, in to, a part of binding, customary international law. Three years later the non-governmental Assembly for Human Rights adopted the Montreal Statement, which included the assertion that the “Universal Declaration of Human Rights . . . has over the years become a part of customary international law.”

Richard Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L. & COMP. L. 1, 2 (1995–96).

42. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

43. *Id.* at 725. Other examples include: “A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.” *Id.* (describing five reasons for caution).

44. *Sosa*, 542 U.S. at 749–50 (describing *Erie* as “the watershed in which we denied the existence of any federal ‘general’ common law”). Because *Erie* did away with federal common law, some have argued that the judiciary can no longer recognize customary international law apart from Congressional authorization. See, e.g., Bradley & Goldsmith, *supra* note 10, at 852–55. However, others have responded that although *Erie* rejected general federal common law, it still left federal courts with jurisdiction to develop law in areas that specifically concern federal—rather than state—issues, including international law. See, e.g., Beth Stephens, *The Law of our Land: Customary International*

of substantive CIL norms. Instead, the Court adopted the view that “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”<sup>45</sup> Rather than enumerate which norms currently can meet the standards the Court established, it adopted a formulation that accommodates the mutable nature of CIL and recognizes that CIL is subject to change—especially in the realm of human rights. In its final formulation, the *Sosa* opinion employed the reasoning and language of Judge Edwards’s concurrence in *Tel-Oren*<sup>46</sup> and of the *Marcos*<sup>47</sup> litigation in requiring that claims under the ATCA rely on international law norms that are 1) definable or specific, 2) universal, and 3) obligatory.<sup>48</sup> In the final assessment, it appears the Court is requiring that claims under the ATCA rely on norms that really *are* CIL, rather than norms that some might argue *ought to be* CIL.

This leads us to look again at the Supreme Court’s second factor—that a claim based on the modern day law of nations must be accepted by the civilized world.<sup>49</sup> This factor takes us to the heart of the seemingly impenetrable problem of determining what *really is* accepted by the civilized world—what CIL really is.

#### IV. IDENTIFYING THE CIL OF HUMAN RIGHTS

##### A. Finding CIL

In examining the question of what CIL is, this Article looks to standard-bearers, such as Henkin and Slaughter, revisionists, such as Bradley, Goldsmith, and Posner, and those arguing for paradigm shifts, such as D’Amato and Charney.<sup>50</sup> Though this Article does not share D’Amato’s or Charney’s views entirely, it does posit that the current methods of thinking about CIL are lacking and that it is necessary to think about CIL in new ways. In the face of a litany of changing

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*Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 433–47 (1997).

45. *Sosa*, 542 U.S. at 729.

46. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that actions under the ATCA should be limited to “a handful of heinous actions—each of which violates definable, universal and obligatory norms”).

47. *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (adopting the position that CIL norms must be “specific, universal, and obligatory” in order to be actionable under the ATCA).

48. See Section C of the Court’s opinion. *Sosa*, 542 U.S. 731–38.

49. See *supra* note 42 and accompanying text.

50. Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47 (1995–96).

conditions brought on by globalization and cosmopolitanization, current methods of thinking about CIL formation are outmoded. Like these authors, I also think CIL is due for a paradigm shift.

This is the project this Article initiates, in an attempt to ultimately address at least two recurring problems in CIL that are often dragged onto the mat when one is wrestling with CIL. The first is the democratic participation problem; the second is the action-versus-words dilemma inherent in determinations of what ought to serve as evidence of CIL. Though this Article will only address the first of these issues, it will lay the groundwork for a later discussion of the action-versus-words problem. In order to address either of these problems, though, it is necessary to first explain my core proposal.

Many believe it is difficult to determine the content of CIL because there may be too many sources to which one must look in determining whether or not a particular norm has attained the status of custom.<sup>51</sup> The idea is that there are too many statements from too many countries and renowned jurists as to what human rights states observe out of a sense of obligation to allow for an accurate accounting of the current content of CIL.

Perhaps this is incorrect and, instead, one of the reasons it is so difficult to determine the content of CIL is that there are *too few* sources rather than too many currently being taken into account. It is plausible that the sources of data to which one looks in trying to determine which norms are CIL are overly limited or at least that they are not derived from all the necessary locations.

The current CIL formation process formally looks only to the actions and words of states. What is missing in the current system of CIL is a recognition that individuals ought to be active participants in the CIL formation process; that individuals ought to be consulted regarding the content of CIL. McDougal, Lasswell, and Chen have given cursory attention to this possibility. They state that the words and actions that make up evidence of CIL “may include the acts and utterances not only of officials (transnational and national) . . . but even of private individuals and representatives of nongovernmental organizations.”<sup>52</sup>

This could be accomplished through a proliferation of venues such as the International Court of Justice,<sup>53</sup> courts entertaining claims based on

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51. *See, e.g., id.*

52. MYERS S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 269 (1980).

53. *See* Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, *INT’L REV. OF THE RED CROSS* No. 850, 235, 238 (2003) (“Contemporary international humanitarian law is composed of: (A) a complex set of conventional rules, (B) customary

universal jurisdiction statutes, or provisional courts such as the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the Former Yugoslavia,<sup>54</sup> where individuals can and do advance claims undergirded by assertions of particular human rights norms as CIL. These venues, together with empirical documentation of which norms individuals invoke as CIL, would allow us to learn and better understand what individuals truly believe have come to be their rights under international law and, more specifically, under CIL. Since individuals are the *subjects* of the CIL of human rights, it must be that information regarding their perceptions of their rights under CIL would be helpful.

### B. The CIL of Human Rights

During the 1990s, international law scholars began to recognize that human rights norms that had taken on the character of customary international law had emerged as a particular category of CIL distinct from the wider body of CIL.<sup>55</sup> Several characteristics make the CIL of human rights different from traditional CIL, including a departure from the “approach that looks [exclusively] ‘into the past to identify customary patterns of State practice’ and then turns ‘this empirical result into a normative projection for the future.’”<sup>56</sup> The new CIL of human rights also requires cognizance of the sometimes rapidly evolving *opinio juris* component of CIL, such that a mutable view of CIL can be taken, which can accommodate new and additional human rights norms.

The relative changeability of the CIL of human rights is distinct from traditional conceptions of CIL, and thus it has received a wide degree of criticism and proposals for new ways of thinking and talking about it, as well as proposals that we create new categories of international law to

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norms and (C) *jus cogens*, which the case law of the International Court of Justice helps to clarify and interpret.”).

54. This is suggested in the *Tadic* case, where the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia held that CIL imposes criminal liability for serious violations of Common Article 3 of the Geneva Conventions. Judgment of 2nd Oct. 1995, para. 137, 35 I.L.M. 32 (1996).

55. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS § 702 (1987) (devoting a section on customary international law to the sub-category of the CIL of human rights). See also Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992). A 1994 symposium hosted by the *Georgia Journal of International & Comparative Law* devoted to the issue of the CIL of human rights. Richard Lillich's contribution to that symposium is a good example of the focused attention the sub-category of CIL of human rights received as it emerged in the discourse among international law scholars. See Lillich, *supra* note 41, at 10.

56. Lillich, *supra* note 41, at 12–13 (quoting Simma & Alston, *supra* note 55, at 89).

accommodate the necessary potential for the CIL of human rights to change rapidly. For example, Louis Henkin has proposed a new source of international law, termed “non-conventional law,”<sup>57</sup> which he sees as being less dependent on custom and more based on “contemporary human values” which make up a fundamental or quasi-constitutional law.<sup>58</sup>

Similarly, the late Jonathan Charney acknowledged the lamentably slow traditional development of CIL and argued that the rise of global problems has necessitated the development of an international law that does not require sweeping international consensus in order to gain authority. He argued that the traditional processes of developing CIL may have suited an era in which sovereignty was the foremost principle, but the increase in the number of diverse states, coupled with the decreasing ability of domestic legal systems to maintain isolation from the international sphere, require a change in the way international law and norms are developed.<sup>59</sup> He joined those who argued that the aftermath of World War II reflected a new willingness to bind states to international norms, regardless of an individual state’s acceptance of those norms.<sup>60</sup>

Rather than attempting to argue that CIL be changed to accommodate this shift in international lawmaking, Charney proposed what he called “universal” or “general” international law, which avoids the problem of attempting to develop a CIL of human rights within the traditional CIL formation process. Charney made clear that his proposal is not revolutionary. Rather, it reflects the current practice of multilateral forums that, through their everyday operations, accelerate the development of international law.<sup>61</sup>

Others have rejected proposals by authors such as Henkin and Charney for the creation of new categories of international law and have maintained that the two principal sources of international law are, and should remain, treaty and custom.<sup>62</sup> That being the case, any provision of international law that does not derive its status as such from treaty must necessarily derive its status from CIL. For those who maintain this traditional formulation of international law, it has become important to

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57. Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 37 (1995–96).

58. *Id.*

59. Jonathan Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 543–44 (1993).

60. *Id.* at 550.

61. *Id.*

62. See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

name the rapidly evolving human rights sub-category of international customary law.<sup>63</sup> This category has often been called the CIL of human rights<sup>64</sup> and this Article will adopt this terminology.<sup>65</sup>

### *C. The CIL of Human Rights and the Individual*

For much of its history, international law was concerned with relations among autonomous states. States were seen as both its creators and its subjects, under the traditional assumptions that international law is based on an interstate system in which each state is sovereign.<sup>66</sup> Historically, this was an accurate conception of international law, as its primary concerns “until well into this century were diplomatic relations, war, treaties and the law of the sea.”<sup>67</sup>

In the wake of World War II, a fundamental change occurred in the field of international law as a result of the emergence of international human rights law. This development shifted the focus of international law so that state values and concerns were no longer the exclusive issues addressed by international law.<sup>68</sup>

In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case.<sup>69</sup>

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant of Economic Social and Cultural Rights, as well as all subsequent human rights treaties, have clearly placed a distinct focus on the individual and on human, rather than state, interests. These treaties were developed to protect individuals from each other and, importantly, from the actions of states. As a result of this “acknowledgement of the worth

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63. *See id.* For some it has become important to identify this sub-category in an effort to simply understand the changing nature of CIL. For others, it has been in an effort to assert the importance of maintaining the traditional CIL formation process in order to argue for a narrow definition of the content of CIL such that new and developing human rights norms are not easily included.

64. Bradley & Goldsmith, *supra* note 62, at 319.

65. Though the current author is adopting the term “CIL of human rights,” she refrains from taking a position at this time as to the approaches of Henkin, Charney, and others who have argued for a new source or category of international law. While it may be that the articulation and development of such new categories is necessary, defining a position on this is outside the scope of this Article.

66. LOUIS C. HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 2–3 (4th ed. 2001).

67. Charney, *supra* note 59, at 529.

68. HENKIN ET AL., *supra* note 66, at 3.

69. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 (1950), reprinted in HENRY STEINER & PHILLIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 147 (2d ed. 2000).

of the human personality as the ultimate unit of all law,”<sup>70</sup> there has been an attendant “recognition of the individual as a subject of international rights.”<sup>71</sup> No longer are states the exclusive subjects, nor are individuals merely objects, of international law.

At the same time, individuals have taken an active and participatory role in the development of human rights treaties. Experts who are currently assigned the task of drafting new human rights treaties or norms have become sophisticated in their approach to ensuring that the documents will be relevant and effective in addressing pertinent themes. For example, in the context of this symposium, Professor Weissbrodt has explained the conscientious process by which he and his team consulted with essential individuals and relevant organizations as part of the process of drafting the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>72</sup>

The rationale for this consultation includes a belief that if human rights norms are meant to protect individuals, it is necessary to know what protections individuals actually need. Without such consultation, any new norms or treaties might miss an opportunity to be most effective. In this way, human rights treaties have also changed the traditional conceptions of international law. Just as states are no longer the only subjects of international law, nor are they any longer in exclusive control of the international law formation process.

While the development of international human rights law has resulted in individuals becoming generally recognized as subjects of treaty law, just as they have become active participants in human rights treaty formation, there has been little formal change in the traditional thinking about how CIL is formed. Traditional thinking about the process by which CIL is formed is among the last great stands of the exclusive sovereignty of states in international law. Here, and in few other places, it “is the sovereign State, with its claim to exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity.”<sup>73</sup>

Like human rights treaty law, the CIL of human rights aims to protect

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70. *Id.*

71. *Id.*

72. Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/Sub.2/2002/XX, E/CN.4/Sub.2/2002/WG.2/WP.1 (February 2002 for discussion in July/August 2002); see also David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 68–71 (2005).

73. LAUTERPACHT, *supra* note 69, at 61.

individuals, making individuals the subject of that law. Yet, with few exceptions, individuals have only very indirect mechanisms for participation in the formation of the CIL of human rights through their governments' words and occasionally conflicting actions. But it need not be this way. What individuals do and what they believe about which human rights currently are or ought to be afforded and protected in the civilized world should be a factor in any determination of whether a norm is accepted by the civilized world, thus making it part of the CIL of human rights.<sup>74</sup>

This is an underdeveloped idea. However, there is some evidence that others have considered the possibility that individuals ought to be consulted in the CIL formation process. Consider for example:

the liberal notion that private transnational behavior serves a quasi-public purpose in creating the web of economic interdependence between nations. 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 any other types of non-liberal States.<sup>75</sup>

While this idea may seem radical on first impression, the central assertion of this Article is that not only *ought* individuals be consulted when looking for evidence of CIL of human rights but that, in practice, *they already are*. Jordan Paust has articulated that “the reality of individual participation is another important feature of customary human rights law that is too often ignored or viewed less than comprehensively.”<sup>76</sup> Paust is among the few scholars who have attempted to articulate the role of the individual in the formation of the CIL of human rights.<sup>77</sup> He states:

Individual participation in the creation and shaping of customary human rights is less well-perceived, but no less real. All human beings recognizably participate in a dynamic process of acceptance or expectation which leads to patterns of *opinio juris* measurable at various

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74. Whether a norm is accepted by the civilized world is one of the criteria the *Sosa* decision established for future determinations of whether a claim brought under the ATCA is legitimate. See *supra* note 42 and the accompanying text.

75. David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN YEARBOOK OF INT'L LAW 198, 241 (1996).

76. Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 155 (1995-96).

77. See *id.* at 155-58, 162; Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 69-73 (1990); see also Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1245 (2004).

moments.<sup>78</sup> . . . Since each nation-state, indeed each human being, is a participant in both the attitudinal and behavioral aspects of dynamic customary human rights law, each may initiate a change in such law, or, with others, reaffirm its validity.<sup>79</sup>

Professors McDougal, Lasswell, and Chen have also considered the role of the individual in international law and specifically the importance of the individual in shaping the norms that come to make up the CIL of human rights. They view the world as a meshing of small and large, powerful and less powerful communities that are in constant contact with each other such that they and their values intermingle and interpenetrate. In this “comprehensive social process” individuals are constantly “engaged in the shaping and sharing of values.” These values, in turn, become “the human rights which the larger community of humankind protects or fails to protect.”<sup>80</sup>

Lung-chu Chen has taken a particularly critical view of what he calls the “Vattelian fiction,” which he describes as being contained in Emmeric de Vattel’s position that an injury to an individual was an injury to that person’s state. Under this conception of individual rights under international law, if the rights of a citizen of a given state are violated, only that state is permitted to carry the claims of the violated individual to the international plane.<sup>81</sup>

Chen goes on to explain, however, that the contemporary human rights movement has demanded a number of changes in the traditional methods of thinking about international law. For example, he points to the global concern for human welfare, such that human rights are “no longer matters of domestic jurisdiction” but have become matters of international concern.<sup>82</sup> As a result, international law has expanded its scope such that it now protects all human beings, not only from abuse by foreign governments, but also from abuses committed by their own governments.<sup>83</sup> “Indeed,” Chen states, “a state centered international law is being transformed into an international law of homocentricity.”<sup>84</sup>

These authors have considered the possibility and reality of consulting the actions of individuals as evidence of the CIL of human

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78. Paust, *supra* note 76, at 155 (citing LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 76–81 (1989); MCDUGAL ET AL., *supra* note 52, at 73–74, 80 n.208, 81, 86, 88–89, 96–107, 167–68, 173–79, 207–16, 269, 413, 416, 471; Paust, *Customary International Law*, *supra* note 77, at 69–73).

79. Paust, *supra* note 76, at 156–57.

80. MCDUGAL ET AL., *supra* note 52, at 94.

81. CHEN, *supra* note 78, at 77.

82. *Id.* at 78.

83. *Id.*

84. *Id.* at 79.

rights. Though Paust asserts that individual expectations can take part in the formation of *opinio juris*, neither Paust nor others articulate how individuals might express such expectations such that they take on the weight of evidence of CIL. McDougal, Lasswell, and Chen come close to doing so but in order to do this, they first must redefine “custom.” The following extract demonstrates their effort to accentuate the individual over the nation-state:

Through the concept of “custom,” that is, of law created by uniformities of people’s behavior and other communications, individuals and their private associations have always participated in the prescribing function.<sup>85</sup>

It is not clear whether the “custom” to which they refer is customary international law or whether it is some other sort of less-recognized custom. However, they go on to state that individuals have the ability to “invoke the authoritative application of transnational prescription” though their use of and appearance before national and international courts and tribunals.<sup>86</sup>

Even if one concludes, as this Article does, that the “custom” to which McDougal, Lasswell, and Chen refer is, or at least contributes to, CIL, what they seem to miss is the possibility that individuals exercising the invocation function—or appearing in courts and tribunals—has an effect on the formation of CIL.

National courts and the international courts and tribunals referred to by McDougal, Lasswell, and Chen, as well as mechanisms like the ATCA, provide avenues through which individuals might have direct participation in the CIL formation process. In submitting ATCA claims before a U.S. federal court, for example, individual plaintiffs formally express their expectations regarding the human rights protections to which they believe they are entitled.

When individuals are harmed and recognize that harm as wrongful, they may engage the legal system to seek redress. If they do so through a suit that claims a violation of their human rights under international law, they leave a pool of evidence about their beliefs regarding the protections international law actually affords or ought to afford them.

Such legal actions may rest on claims of violations of treaty law, customary law, or both. Most party briefs in such litigation will clearly indicate claims as treaty-based or CIL-based. Still, it may, at times, be difficult to discern to what extent the rights claimed are rights based on treaty law or customary law and may muddy the aid some legal actions

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85. MCDUGAL ET AL., *supra* note 52, at 177.

86. *Id.*

can bring to the question of what individuals believe their human rights are, as a matter of CIL.

Litigation under the ATCA is an exceptionally pure venue for this type of evidence pooling. Claims under the Act must be founded on violations of “the law of nations,” or CIL. The statute reads in its entirety: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations *or a treaty of the United States*.”<sup>87</sup> However, the United States has failed to accept any provision in any human rights treaty giving individuals the right to initiate private actions under such treaties. As a result, the ATCA has been limited to application in cases where the plaintiffs can point to CIL as the basis for their claims.

In all cases where claims are based on human rights violations, litigation under the ATCA is thus an excellent source of evidence of the beliefs of individuals as to the CIL of human rights. Through their ATCA suits, plaintiffs enter into discussions with the particular judges or panels of judges hearing their claims about what the CIL of human rights is and what it ought to be. In so doing, they also provide valuable information to nation-state representatives, the judiciaries of other nations, and to multinational bodies about which norms civilized people believe form the CIL of human rights.

This Article has already discussed the changeable character of the CIL of human rights. Given that this is the case, evidence seen through observing litigation under the ATCA is highly valuable in forming accounts of what individuals believe composes the CIL of human rights. This litigation can indicate what the individuals who make up the civilized world believe are their rights as citizens therein.

In liberal democratic societies, the beliefs and opinions of individuals as to what rights are and ought to be are important in their actual formation or mutation over time. Alexander Bickel has addressed this phenomenon in the domestic constitutional context:

The preliminary suggestions may be advanced that the rule of principle imposed by the Court is seldom rigid, that the Court has ways of persuading before it attempts to coerce, and that, over time, sustained opinion running counter to the Court’s constitutional law can achieve its nullification, directly or by desuetude. It may further be that if the process is properly carried out, an aspect of the current—not only the timeless, mystic—popular will finds expression in constitutional adjudication. The result may be a tolerable accommodation with the

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87. 28 U.S.C. § 1350 (2005) (emphasis added).

theory and practice of democracy.<sup>88</sup>

Like American constitutional law, the CIL of human rights is changeable. Thus, maintaining official venues for individuals to formally express their beliefs as to their rights is necessary to ensure that the CIL of human rights remains vibrant and relevant to ever-changing social, economic, and political conditions.

*D. Obstacles to Individual Participation in Forming  
the CIL of Human Rights*

1. Revisionist Views of CIL

Those versed in CIL literature may at this point be thinking about the concerns voiced by Professors Bradley, Goldsmith, Posner, Trimble, and others that allowing our judiciary to interpret CIL is undemocratic. Professor Trimble, for example, has argued that CIL is illegitimate because, *inter alia*, it is incompatible with the American political tradition.<sup>89</sup> Professor Trimble explains that U.S. judges must base their opinions on accepted reasons, such as the violation of constitutional rights. Courts cannot base their decisions on whether “the judge saw three crows cross the full moon the night before the decision;”<sup>90</sup> such an opinion would not be accepted by the American people. CIL, he argues, is analogous to a judge basing his decision upon the story of the crows, rather than upon accepted legal precedents.

Professor Trimble reaches this conclusion by arguing that the American political tradition is rooted in a limited government that is responsive to its constituencies. However, he argues that because CIL is created by foreign governments that “are neither representative of the American political community nor responsive to it,”<sup>91</sup> CIL cannot be reconciled with American political philosophy. This view seemingly fails to see the potential for, and the reality of, American participation in the CIL formation process.

American political organs do participate in the CIL formation process. Some have argued persuasively that, in fact, the United States has an overly influential role in the CIL formation process due to its power and

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88. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 28 (1986) (emphasis added).

89. Trimble, *supra* note 14 at 716–23.

90. *Id.* at 718.

91. *Id.* at 721.

persuasiveness. A recent essay by Michael Byers is useful in developing an understanding of the influence of power on the formation of CIL.<sup>92</sup> In it, he cites the work of Charles de Visscher, who observed in 1953:

international custom has been compared to the gradual formation of a road across vacant 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.<sup>93</sup>

The activity of helping a court determine the law is a democratic process in which the judiciary and the bar have been involved since the inception of the American legal system. The Memorandum for the United States as Amicus Curiae in *Filártiga v. Peña-Irala* illustrates this point.<sup>94</sup> The memorandum does not specifically argue that courts are acting consistently with the American political tradition in helping to define CIL. But the memorandum essentially accomplishes this task by presenting reasoned legal analysis, encouraging the Second Circuit to adopt the position that torture violates the law of nations.<sup>95</sup>

Determining the law is a judicial process as old as the judiciary itself. Rather than being inconsistent with the American political tradition, defining the contours of CIL is a function that U.S. courts have been engaged in for quite some time, and it is a process that is suitable for the judicial branch to undertake.

The concern expressed by CIL revisionist scholars is that the application of CIL by U.S. courts is undemocratic because CIL has not been formed through the American democratic process and is not part of our federal common law. Their concern is for the American democratic process, and this Article does not intend to diminish that concern.<sup>96</sup> But for all the consternation about the American democratic process, their concern fails to see the forest for the trees. It fails to see the broader potential for democratic participation in the formation of the CIL of human rights. The remainder of this Article will argue that it is

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92. See Michael Byers, *Introduction Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L. L. 81, 84–85 (2001).

93. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 147 (Percy Corbett trans., 1957), reprinted in Michael Byers, *Introduction Power Obligation and Customary International Law*, 11 DUKE J. COMP. & INT'L. L. 81, 84 (2001). Professor Byers also points to the work of Michael Reisman, Oscar Schachter, and Surge Sur in establishing the idea that powerful states influence the CIL formation process more than less powerful states.

94. Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*, 19 I.L.M. 585 (1980).

95. *Id.*

96. A proper investigation of the American constitutional arguments surrounding the ATCA is beyond the scope of this Article.

appropriate to consider and realize this broader potential because of a fundamental shift in society and a fundamental shift in our conception of ourselves.

## 2. Traditional Notions of Sovereignty

The greatest difficulty concerning individual participation in the constitutive process of CIL has historically been the exclusive focus on the role of the nation state. This view has traditionally resulted in great reluctance to see the role that the individual can and may play in the formation of CIL. While this view may have been well adapted to the international legal order before the end of World War II when individuals had minimal participation in international law as either subjects or objects thereof, the establishment of the human rights movement, which aims to protect individuals and which requires their participation to previously unknown extents, has made the exclusive focus on the sovereignty of nation-states simply outmoded.

The international legal order now recognizes that the nation-state can be both a protector and a violator of human rights. This is the reason human rights treaties protect individuals from state and state-sponsored abuses. The potential power of international human rights law to protect individuals from their own states is a well-settled example of a re-orientation of the concept of national sovereignty such that less power is being vested in the state and more in the individual. Nonetheless, individuals are not seen as participatory actors in the formation of the CIL of human rights, despite the likelihood of violations of the CIL of human rights being perpetrated by states.<sup>97</sup>

## V. COSMOPOLITAN IDENTITIES

A rethinking of CIL begins with a rethinking of who should be empowered in the CIL formation process. Ironically, though perhaps logically, this rethinking starts with Immanuel Kant, a contemporary of

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97. This failure to recognize individuals as participants in the CIL formation process creates some riddles that have long puzzled scholars on CIL. Take, for example, state A, which has signed treaties and made declarations regarding a protection against capital punishment. Regardless, State A continues to implement the death penalty. When assessing whether there has emerged a right to be protected from capital punishment, should one look to the treaties and statements of State A as evidence of emerging custom or should they look to State A's engagement in capital punishment as evidence that State A does not subscribe to a protection against capital punishment as a matter of CIL. This is known as the action-versus-words problem and is, as yet, unresolved. It is possible that an emphasis on the individual may help to alleviate this problem, though a detailed exploration of this question must be reserved for another day.

the first American Congress, which drafted the ATCA. Kant wrote in one of his many essays on peace and cosmopolitanism:

The peoples of the earth have entered in varying degree into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity.<sup>98</sup>

Although the notion of a “universal community” is not novel, the idea is more a reality today than at any time in the past.<sup>99</sup> The end of the Cold War, the emergence of global financial markets, and the explosion of global mass media have all contributed to the increased interconnectedness of the earth’s peoples. The globalization phenomenon has generated an astonishing amount of scholarship. A wide variety of disciplinary treatments has resulted in different approaches, interpretations, and appraisals of globalization.

The lack of any universally accepted consensus or narrative on globalization should not be seen as evidence that the phenomenon does not exist. Rather, scholars utilizing a variety of approaches have highlighted strikingly similar developments that indicate the reality of the formation of an increasingly global interconnectedness. The tug between local and global, and between homogeneity and heterogeneity, is a manifestation and symptom of this increasing interconnectedness.

This Article adopts the work of Benedict Anderson and his subsequent adaptation and interpretation by other scholars like Manuel Castells, who argue that the rise of the global economy and mass media—the two being inextricably linked—has created a nascent global community.<sup>100</sup>

Benedict Anderson’s essential argument in *Imagined Communities* is that the development of print capitalism provided the foundation for the development of national consciousness by creating a common, standardized language that allowed previously disconnected people to “imagine” themselves as part of a larger community, despite the fact that

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98. IMMANUEL KANT, KANT: POLITICAL WRITINGS 107–08 (Hans Reiss ed., H.B. Nisbet, trans., 2d ed. 1991), *quoted in* David Harvey, *Cosmopolitanism and the Banality of Geographical Evils*, 12 PUBLIC CULTURE 2, 529, 532 (2000).

99. DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 327.

100. *See* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991). Anderson’s central argument is that the development of print capitalism provided the foundation for the development of national consciousness by creating a common, standardized language that allowed previously disconnected people to “imagine” themselves as part of a larger community, despite the fact that these people never actually met.

these people never actually met. The development of national consciousness in Europe provides an illustrative case study in this process. Anderson demonstrates that, prior to the invention of the printing press, Latin was the overwhelmingly dominant language of educated Europe. Few books were printed in vernacular languages. Latin owed its dominance in large part to the dominance of the Catholic Church, and the two were inextricably linked. The development of the printing press, coupled with the “logic of capitalism,” led to an ever-increasing search for markets. Once the Latin-reading market had been saturated, printers began to expand into vernacular languages in order to expand their market. This undermined the sacral position of Latin as the dominant language and undermined the Catholic Church’s vise-grip on the communication of ideas.<sup>101</sup>

Having demonstrated the disruptive effect that print capitalism had on the status quo, Anderson moves to his argument about the power of the print languages to unite. He argues that print language united in three ways: (1) by creating a unified means of communication that would have been impossible in even spoken vernaculars (because of the huge varieties of English, Spanish, etc.), and thus fostering an awareness of other people in that “particular language-field, and at the same time that *only those* hundreds of thousands, or millions, belonged;”<sup>102</sup> (2) by giving “a new fixity to language which . . . helped to build that image of antiquity that was so central to the subjective idea of the nation;” and (3) by creating “languages-of-power” that essentially eliminated or assimilated certain variations while elevating those closest to the print language.<sup>103</sup>

Eventually, the print vernacular became adopted by the developing state bureaucracies as the language of business, and the rising bureaucracies were filled by the growing middle class, which was necessarily versed in the new vernacular. “The general growth in literacy, commerce, industry, communications and state machinery . . . created powerful new impulses for vernacular linguistic unification.”<sup>104</sup> This linguistic unification allowed physically disconnected people across large distances to imagine themselves as part of a community

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101. This is the foundation of Anderson’s thesis, and it has been somewhat simplified here in order to avoid tangentially related arguments about the elimination of “a conception of temporality in which cosmology and history were indistinguishable.” The central point is that the overthrow of a sacral language that was inextricably linked with a dominant social hierarchy undermined the seeming eternity and antiquity of the status quo, thereby allowing people to begin imagining themselves in new ways. *Id.* at 36.

102. *Id.* at 44 (italics in original).

103. *Id.*

104. *Id.* at 77.

based on this shared language.<sup>105</sup> As literacy increased, “it became easier to arouse popular support, with the masses discovering a new glory in the print elevation of languages they had humbly spoken all along.”<sup>106</sup>

Manuel Castells, through exhaustive empirical and historical research, has demonstrated that we are currently in a unique “information technology revolution” whose transformative capacity far exceeds that of the “industrial revolution.”<sup>107</sup> Building on Anderson’s work through a utilization of largely empirical economic and demographic data, Castells argues that the world is turning into a “network society,” with everything and everyone interconnected. According to Castells:

What characterizes the development of the informational, global economy is precisely its emergence in very different cultural/national contexts: in North America, in Western Europe, in Japan, in the “China circle,” in Russia, in Latin America, as well as its planetary reach, affecting all countries, and leading to a multi-cultural framework of reference.<sup>108</sup>

To exemplify this interconnectedness, Castells points to the “business-led explosive urban growth” of cities such as Bangkok, Taipei, and Shanghai, and Western cities such as Madrid, New York, and London. He reminds us that at various moments these cities together “went into a slump that triggered a sharp downturn in real estate prices and halted new construction. *This urban roller coaster at different periods, across areas of the world, illustrates both the dependence and vulnerability of any locale, including major cities, to changing global flows.*”<sup>109</sup> This might indicate a sort of business-elite-driven “cosmopolitanism” rather than a truly global and popular phenomenon. However, Castells convincingly demonstrates that, while New York, Shanghai, and Madrid are truly global cities in themselves in ways that Omaha, Nebraska, is not, Omaha is linked intimately in the “network” through its relation to more “local” Chicago or New York. Omaha might not be a global city in the way that New York is, but its fate is determined, at least in part, by global economic developments.<sup>110</sup>

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105. *Id.*

106. *Id.* at 80.

107. MANUEL CASTELLS, *THE RISE OF NETWORK SOCIETY* 39–40 (1996). Castells points out, “The average cost of processing information fell from around \$75 per million operations in 1960 to less than one-hundredth of a cent in 1990.” *Id.* at 45. This remarkable development of information technology was used to further accelerate the process of technological innovation. This helps account for the pervasiveness and rapidity of technological diffusion and development. *Id.* at 29–68.

108. *Id.* at 151.

109. *Id.* at 384 (emphasis added).

110. *Id.* at 378–86. Castells argues that while the megacities like New York, London, and

This realization has important consequences, because, as Castells points out, the increasing interconnectedness and interrelation of the global economy has seriously damaging effects on those who are excluded. Those outside of the global network are profoundly affected by it because of their exclusion.<sup>111</sup>

Mass media accompanied and helped to create this global network. Castells argues that the transformative impact of the multimedia world is unique because of the ease of access and interaction for individuals, and the extreme difficulty of any power structure (nation or otherwise) to censor or control the flow of information.<sup>112</sup> Furthermore, the global mass media allows “cultural products . . . to circulate on every continent. No state is disconnected completely from global telecommunications networks.”<sup>113</sup> This interconnectedness has resulted in the rise of “deterritorialization,” where culture, formerly tied to the local or regional level, exists instead in the abstract.<sup>114</sup>

Professor Arjun Appadurai has compared the role of the mass media in the formation of a global identity to the importance of print capitalism in the formation of national identity put forth in Benedict Anderson’s *Imagined Communities*.<sup>115</sup> The development of this ubiquitous global media network has induced “an *integration of all messages in a common cognitive pattern*.”<sup>116</sup> Just as the rise of print capitalism provided the impetus for breaking down social barriers created by the widespread variation of language, the rise of the global media is moving beyond language to allow communication and the exchange of ideas in a format that can be understood without the written or spoken word.<sup>117</sup> Thus, “more people than ever before seem to imagine routinely the possibility

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Shanghai are likely to retain their influence as command and control nodes on the network, the network is defined by its ability to quickly adapt, thus leading to a great deal of variability depending on shifting global conditions.

111. *Id.* at 133; see also ARJUN APPADURAI, *MODERNITY AT LARGE* 55 (1996) (“Where insulation from the larger world seems to have been successful and where the role of the global imagination is withheld from ordinary people (in places like Albania, North Korea, and Burma), what seems to appear instead is a bizarre state-sponsored realism, which always contains within it the possibility of the genocidal and totalizing lunacies of a Pol Pot or of long-repressed desires for critique or exit, as are emerging in Albania and Myanmar (Burma).”).

112. CASTELLS, *supra* note 107, at 341, 352.

113. HELD ET AL., *supra* note 99, at 427.

114. A.D. Smith, *Towards a Global Culture?*, in *GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY* 177 (Mike Featherstone ed., 1990); see also Jan Aart Scholte, *What is ‘Global’ about Globalization?*, in HELD ET AL., *supra* note 99, at 84.

115. APPADURAI, *supra* note 111, at 8.

116. CASTELLS, *supra* note 107, at 371 (emphasis in original).

117. See *id.* at 371; see also APPADURAI, *supra* note 111, at 194; ULF HANNERZ, *TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES* 21 (1996).

that they or their children will live and work in places other than where they were born.”<sup>118</sup> In addition, and more importantly for the purposes of this Article, Appadurai asserts that the reach of mass media allows previously unconnected peoples to begin to “imagine and feel things together.”<sup>119</sup> This ability to experience, believe, imagine, or feel things together has led to the rise of international organization of peoples across political boundaries in order to pursue common political, economic, or ideological goals.<sup>120</sup>

Akira Iriye has found that the marked increase in the number of international organizations suggests the development of a global community that identifies itself, at least in part, by connections and concerns that stretch across local and national boundaries.<sup>121</sup> According to Iriye:

For both intergovernmental organizations and international non-governmental organizations to emerge, nations and peoples had to be strongly aware that they shared certain interests and objectives across . . . national boundaries and that they could best solve their many problems by pooling their resources and effecting transnational cooperation.<sup>122</sup>

Iriye traces this development to the late nineteenth century, but clearly indicates that the movement has gained momentum in recent decades. For example, the number of intergovernmental organizations grew from 280 to 1,530 between 1972 and 1984, while the number of international nongovernmental organizations (NGOs) increased from 2,795 to 12,686 during the same period.<sup>123</sup> Thus, the increasingly international organization of peoples across political boundaries in order to pursue common political, economic, or ideological goals evidences the development of an increasingly imagined global community.<sup>124</sup>

Globalization has produced a transnational public sphere that can

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118. APPADURAI, *supra* note 111, at 6.

119. *Id.* at 8.

120. See Martin Kohler, *From the National to the Cosmopolitan Public Sphere*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 231 (Daniele Archibugi et al. eds., 1998). Many authors have articulated this phenomenon. See, e.g., APPADURAI, *supra* note 111, at 167–68.

121. AKIRA IRIYE, GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD 8 (2002).

122. *Id.* at 9.

123. *Id.* at 129. Iriye points out that the numbers are even more staggering if one includes the number of local offices rather than just headquarters (7,073 intergovernmental organizations and 79,786 international NGOs).

124. See Kohler, *supra* note 120, at 231. Surely, the exponential growth of multinational corporations adds to this interconnectedness across national boundaries. See also *supra* note 1 and accompanying text.

form the basis for a new global, social, and cultural solidarity.<sup>125</sup> Building on the work of Jürgen Habermas, Craig Calhoun suggests that the notion of a global community engaged and linked through the rational discussion of common problems, though helpful, produces “thin identities” that would be unlikely to provide sufficient cohesive force for its members in times of crises.<sup>126</sup>

Calhoun goes on to suggest, however, that in order to build a lasting solidarity, the global community must move beyond the mere recognition of overlapping interests and begin to engage in “shared projects of imagining a better future.”<sup>127</sup> He argues that the thin veneer of unity provided by a shared economic program can do little to substitute for shared notions of global humanity produced by “cultural creativity” and “mutual engagement.”<sup>128</sup>

Modern economic, political, and technological realities have created a globalized community of necessity. The cultural exchange that has accompanied these developments has reduced the centrality of location and territory to the formation of identity. The growing ubiquity of the mass media and its transcendence of language through the development of integrated audio-visual imagery are helping to produce an imagined community on a global scale. The transnational public sphere provides an existing framework to further develop the growing ties between the world’s peoples.

Philosophers, starting with the Stoics and leading to a number of the liberal philosophers including Kant, Locke, and Rawls, have been cited for evidence of cosmopolitanism.<sup>129</sup> As discussed herein, Habermas,<sup>130</sup> Anderson, Appadurai, Appiah, Castells, and Calhoun, among a litany of others, argue that globalization has produced a transnational public sphere that can form the basis for a new global, social, and cultural solidarity.<sup>131</sup> Modern economic, political, and technological realities have created a globalized community of choice, clearly, but also one of necessity—one that requires us to engage in projects that help us not just imagine a better future but also work toward securing that better future.

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125. Craig Calhoun, *Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere*, 14 *PUBLIC CULTURE* 1, 147 (2002).

126. *Id.* at 157.

127. *Id.* at 171.

128. *Id.*

129. Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 *CRITICAL INQUIRY* 617, 619–20 (1997); Hugh Harris, *The Greek Origins of the Idea of Cosmopolitanism*, 38 *INT’L J. ETHICS* 1, 8–9 (1927); Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 *J. POL. PHIL.* 1, 4–7 (1997).

130. See, e.g., Jürgen Habermas, *The European Nation-State and the Pressures of Globalization*, *NEW LEFT REVIEW*, 1/235, May–June 1999, 58, 46–59, available at <http://www.newleftreview.net>.

131. Calhoun, *supra* note 125, at 147.

The idea that our identities are no longer tied exclusively to one nation is convincing. Anthony Appiah, however, cautions against an imperialistic, deracinating form of cosmopolitanism.<sup>132</sup> Heeding Appiah's caution, this Article argues that our identities are both personal *and* local, both local *and* national, both national *and* cosmopolitan: that at least some small aspect of each of us is now cosmopolitan. This Article adopts the framework Appiah calls "Rooted Cosmopolitanism."<sup>133</sup>

Appiah has described the task of formulating the theory of Rooted Cosmopolitanism as a compromise between thick and thin identities.<sup>134</sup> Building on the work of Ronald Dworkin, Appiah analogizes the distinction between morality (what we owe others) and ethics (what kind of life is good for us to live) to the distinction between thick identities and thin identities.<sup>135</sup> Thus, while we may have thick identities based on our close relationships with others or our membership in a particular community, this does not obviate the thin identities that result from our desire and necessity for a well-ordered society. Rather, these identities impose dual loyalties that are not mutually exclusive, and are often blurred.<sup>136</sup>

Appiah describes the conflict between nationalists and cosmopolitans as resting largely on the perceived incompatibility of these dual loyalties. He argues that the thick nationalist identity that recognizes and praises "special responsibilities" trouble cosmopolitanism because it apparently disrupts the development of a universal morality. At the same time, cosmopolitanism bothers nationalists because universal morality allegedly undermines the role of "special responsibilities."<sup>137</sup> However, as Appiah demonstrates, defenders of both cosmopolitan and nationalist ideologies have praised the duty owed to a universal humanity while simultaneously arguing that local action is the best way to further the goal of making the world a better place.<sup>138</sup> In this respect,

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132. KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 214 (2005).

133. *Id.* "Rooted Cosmopolitanism" is the title of the last chapter of *The Ethics of Identity*.

134. *Id.* at 230.

135. *Id.* at 231.

136. *Id.* at 233–36.

137. *Id.* at 239.

138. *Id.* at 240. "Making the world a better place," though not used explicitly in this passage, serves as a theme for the entire chapter. Appiah introduces the chapter by describing his father's dying words that as a citizen of the world, he had a duty to leave it better than he found it. Appiah uses his personal history (English mother, Ghanaian nationalist father) to serve as a backdrop for the idea that nationalism and cosmopolitanism are not mutually exclusive. Rather, he sees them as sharing intellectual foundations in that both involve "imagined communities" and the appeal for a more universal identity.

Appiah endorses Michael Ignatieff's comment that "human rights has gone global by going local."<sup>139</sup> Thus, one can be, at once, a local, national, and cosmopolitan citizen.

Having recognized these disputes between nationalism and cosmopolitanism, Appiah seeks to find a common ground that can accommodate both special responsibilities and universalism. He contends that the "basic human capacity to grasp stories, even strange stories, is also what links us, powerfully, to others, even strange others."<sup>140</sup>

Cosmopolitanism presupposes the value of learning from different opinions, stories, and experiences. Even if those differences do not eventually lead to agreement, they can lead to understanding.<sup>141</sup> This is the essential goal of Rooted Cosmopolitanism: interaction and discussion between "others," even "strange others," in the hopes of leaving the world a better place.<sup>142</sup>

David Beetham argues that the international human rights regime provides a template for the development of a cosmopolitan democracy, and claims that the human rights regime actually functions as a democratic institution currently. He indicates that both human rights and democracy are universal values. Though he recognizes that there is a major weakness in the human rights system (the absence of any effective enforcement mechanism), Beetham contends that international human rights organizations have created a sort of international public forum where national governments can be held accountable in the court of international public opinion. Furthermore, he suggests that seemingly innocuous international treaties can have a dynamic that "drags member states along despite themselves" (presumably through the creation of CIL).<sup>143</sup>

Theoretical and empirical work on cosmopolitan identities is most active in the social sciences, as evidenced by the foregoing discussion. Legal scholarship, especially international legal scholarship, has incorporated these ideas as well. For example, in *Human Rights and World Public Order*, Myers McDougal stated: "The existence of a world community, in the sense of the long-term interdetermination of all individuals with regard to all values today is commonly recognized."<sup>144</sup>

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139. *Id.* at 260.

140. *Id.* at 257.

141. *Id.* at 271.

142. *Id.*

143. David Beetham, *Human Rights as a Model for Cosmopolitan Democracy?*, in REIMAGINING POLITICAL COMMUNITY 58, 65 (Daniele Archibugi et al. eds., 1998).

144. MCDUGAL ET AL., *supra* note 52, at 94.

Linda Bosniak, in *Citizenship Denationalized*, provides the argument that it is both desirable and empirically supportable to discuss the development and emergence of a type of global citizenship.<sup>145</sup> She realistically emphasizes that national identities and nation-states are not going to disappear in the foreseeable future, but recognizes that scholars have made a convincing argument for the development of identities that transcend national boundaries.

First, Bosniak inquires whether an emerging “postnational” or “transnational” community exists. She recognizes the same issues raised by Beetham: that the international human rights regime has some claim to this sort of community. She also points to arguments that resemble those of Iriye and Habermas: that there is an increased global activism that looks and acts like a global civil society. This political activity, she argues, is one component of citizenship. She also discusses citizenship in terms of “identity/solidarity,” echoing many of the social and cultural theorists discussed in this Article. Having identified these arguments in favor of emerging global communities, Bosniak questions whether these new identities should be encapsulated in the term “citizenship.”

Bosniak concludes by indicating that the term “citizenship” is important because it is a “powerful expressive term, one which conveys honor and recognition upon the social and political practices to which it is applied. The debate over the term’s scope of application is, consequently, a debate over the scope and extent of recognition we will accord various nonnational forms of collective life.”<sup>146</sup> She concludes that emerging global identities exist, and that describing those identities as “citizenship” represents an essentially ideological choice to advocate for further development of these transnational identities.

#### VI. CHANGING LAW TO ACCOMMODATE CHANGING CIRCUMSTANCES

If we take seriously the idea that individuals have become at least partially cosmopolitan, and that society and citizenship has palpably changed in the face of globalization, it is appropriate to think about how law ought to respond to this changed circumstance. That this rethinking is well underway is without debate, as indicated by the proliferation of literature struggling with new or changing forms of governance.<sup>147</sup>

145. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

146. *Id.* at 509.

147. See, e.g., Nancy Viviani, *Regional Arrangements and Democratic Reform of the United Nations*, in BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE: THE UNITED NATIONS, THE STATE AND CIVIL SOCIETY 312 (Albert J. Paolini et al. eds. 1998) (stating that in the emergence of post-Cold War governments, “we are witnessing the transformation of traditional state structures, the rise of new

If, as so many scholars assert, individuals are now at least partly cosmopolitan, there is something amiss in the lack of participation individuals have in the process of forming the CIL of human rights. The structure provided in brief by Lung-chu Chen for evaluating the role of the individual in international law is helpful here.<sup>148</sup>

*A. Individuals and International Law*

Chen's function-oriented framework is highly instructive, as it reveals the uncomfortable disjuncture in international law that this Article aims to elucidate and attempts to address. The functions filled by either states, individuals, or both in international law under Professor Chen's framework are the following: prescribing, applying, providing information (intelligence), invocation, and appraisal.<sup>149</sup>

Professor Chen has suggested that the international law functions in which states continue to occupy the prominent role are those of prescribing and applying the law. Individuals play important functions in other areas such as providing information or "intelligence," promoting international law, invoking the law, and making appraisals thereof.<sup>150</sup>

However, Professor Chen also notes, and this Article concurs, that these traditional conceptions of the functions of individuals and states are not so neatly separated. For example, individuals have long had a role in the prescription and application of international law. The creation of custom "through the widely congruent patterns of people's behavior and other communications" has served as a contribution to the prescribing function.<sup>151</sup> In addition, to "invoke the authoritative application of transnational prescriptions, individuals have had and continue to have access to national courts; they are increasingly afforded access to transnational arenas of authority, notably in the field of human rights protection."<sup>152</sup>

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regions detached from global institutions, the erosion of the influence of global governments including the UN and the renewed importance of social, economic and political movements within and across states"); *see also* ART OF THE STATE: GOVERNANCE IN A WORLD WITHOUT FRONTIERS (Thomas J. Courchene & Donald J. Savoie eds. 2003) (analyzing policy challenges presented by globalization as they relate to Canada); GLOBALIZATION AND GOVERNANCE (Ann Marie Bissessar ed. 2004) (discussing the implications of globalization on the governance of small states such as Barbados, Trinidad, and the Caribbean states).

148. CHEN, *supra* note 78, at 76–81.

149. *Id.* at 80.

150. *Id.*

151. *Id.*

152. *Id.*

### B. *Individuals and Human Rights*

The literature on human rights treaties often refers to the fundamental shift that has occurred within international law as a result of human rights treaties. Individuals rather than states are the subjects of these treaties.<sup>153</sup> Human rights treaties address the rights of individuals under international law rather than the rights of states thereunder. As mentioned previously, individuals are seen as stakeholders in human rights treaties and the issues addressed thereby, and are thus provided with opportunities to participate in the treaty formation process.<sup>154</sup> Similarly, treaty definition and interpretation continue to be informed through individual engagement with treaties after they have been signed and entered into force. This engagement occurs through the activities of NGOs, or through the petitioning process available to individuals under the First Optional Protocol to the ICCPR, or through the individual petitioning rights available under the European, American, and now the African systems for human rights.<sup>155</sup> Thus, there is general agreement that the last fifty years have seen a paradigm shift in international treaty law such that the individual is now both a subject *and* an agent under the treaty component of international law. CIL and, specifically for the purposes of this Article, the CIL of human rights has recognized no such paradigm shift. Perhaps it should.

### C. *Individuals and the CIL of Human Rights*

The CIL of human rights, no less than treaty law, has direct effects on individuals. It sees them as the subjects addressed by those provisions that have attained the status of CIL. Unlike treaty law, though, there is no space in the traditional formulation of CIL for individual participation in the CIL formation process. As a result, there is currently an uncomfortable disjuncture in the CIL of human rights. Individuals are its subjects but are not seen as legitimate participants in its formation. The chart that follows employs the functions-oriented framework described earlier to illustrate this incongruence.<sup>156</sup>

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153. The author would like to note that she acknowledges Professor Chen's discomfort with this use of subject/object terminology and expresses sympathy with his discomfort. They are used here because, despite their clumsiness, they are helpful in thinking about the gaps in traditional thinking about international law.

154. See *supra* note 72 and accompanying text.

155. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 312 U.N.T.S. 221; The American Convention on Human Rights art. 44, July 18, 1978, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 46, June 27, 1981, 21 I.L.M. 58.

156. For a brief discussion of these functions, see *supra* notes 147–52 and accompanying text.

FUNCTION PERFORMED	HUMAN RIGHTS TREATIES	CIL OF HUMAN RIGHTS
PRESCRIBING	States and Individuals	<b>States only</b>
APPLYING	States and Individuals	<b>States only</b>
INTELLIGENCE	States and Individuals	States and Individuals <sup>157</sup>
PROMOTION	States and Individuals	States and Individuals
APPRAISAL	States and Individuals	States and Individuals

This traditional state-centric conception of CIL, at least within the CIL of human rights, is incongruent with models of participatory democracy.

Robert Dahl, a modern political theorist, advances five criteria that are satisfied in a fully functioning democracy: first, there is voting equality—each person may express his or her preferences; second, citizens have adequate opportunity to participate in the decisionmaking process; third, citizens' preferences are informed or enlightened; fourth, the citizens set the agenda—they control the matters that are decided through the democratic process; and fifth, all adult residents are included in the citizenry.<sup>158</sup> These criteria rest on a few assumptions, including the assumption that decisions binding on a group of people (e.g., a citizenry) should be made by members of that group.<sup>159</sup> While scholars debate the issue of who may be included in the citizenry,<sup>160</sup> there seems to be agreement that democracy is defined as a “government by the many—not by single rulers or by small oligarchies,” and that it requires “active, possibly continual participation of large sectors of the population in the political process.”<sup>161</sup> A functioning democracy requires the active and direct participation of individuals. Furthermore, a representative form of government does not diminish the claim that

157. Though individuals have been included here, the only individuals afforded a role in providing intelligence for CIL under the traditional formulation are “the most highly qualified jurists.”

International lawyers sometimes also describe as “sources” the “judicial decisions and the teachings of the most highly qualified publicists of the various nations,” mentioned in Article 38(1) (d) of the Statute of the Court, *supra*. Those, however, are not sources in the same sense since they are not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law.

RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS § 102 (1987) and Reporters Note 1.

158. ROBERT A. DAHL, TOWARD DEMOCRACY: A JOURNEY 61–88 (1997).

159. *Id.* at 59.

160. *See, e.g., id.* at 68–88 (arguing against the aristocratic or meritocratic view that only those with a high degree of knowledge and virtue ought to govern).

161. S.N. EISENSTADT, PARADOXES OF DEMOCRACY: FRAGILITY, CONTINUITY, AND CHANGE 7 (1999).

democracy requires individual participation.<sup>162</sup>

It should be noted that, while political theorists disagree over the extent of involvement citizens ought to have in political decisionmaking,<sup>163</sup> participatory democracy theorists believe that citizens should be directly involved in making political decisions:

“The crucial issue of democracy is not the composition of the elite . . . . Instead the issue is whether democracy can diffuse power sufficiently throughout society to inculcate among people of all walks of life a justifiable feeling that they have the power to participate in decisions which affect themselves and the common life of the community.”<sup>164</sup>

Each of Dahl’s five criteria are useful in parsing what is meant by democratic participation. This Article is not interested so much in voting rights and democratic participation as it is in other means by which individuals can participate in society—simply put, this Article is more concerned with theories of participatory democracy. Dahl’s second and third criteria are particularly of interest here.

In a fully functioning democracy, citizens have adequate opportunity to participate in the decisionmaking process. It is admittedly difficult to conceive of the CIL formation process as democratic. However, this need not be as difficult as it has been to date. Among the major difficulties when trying to picture CIL formation as democratic is the fact that a vast number of individuals would need an opportunity to participate. This Article does not purport to state how each and every adult individual would be consulted as to particular provisions of the CIL of human rights. Pragmatically and politically, any such attempt may be difficult to achieve. Rather, this Article simply asserts that if we have a choice between allowing individual participation for those

162. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 159–61 (2001). The Framers of the U.S. Constitution realized that America could not be governed by a “direct democracy” in the sense of all the people coming together to enact laws. Instead, a representative form of government, which Madison called a republic, would be needed. This republic government, according to Madison, would “derive[] all its powers directly or indirectly from the great body of the people,” and it would be “administered by persons holding their offices during pleasure, or for a limited period, or during good behavior.” Thus, even in a representative government, individual participation is still required. *Id.*

163. Donald W. Keim, *Participation in Contemporary Democratic Theories*, in PARTICIPATION IN POLITICS 1, 9 (J. Roland Pennock & John W. Chapman eds., 1975).

164. *Id.* at 10 (quoting PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM 92 (1967)). At the other end of the spectrum, revisionist theorists argue that citizens do not need to play a direct role: “The task of the citizen in revisionist theory is to assess regime performance and to register preferences. This is generally accomplished by indirect means.” *Id.* at 9. At the other end of the spectrum, the assessment of these theories and the examination of theories lying between these extremes is beyond the scope of this Article. It can be said at this point, however, that it seems that all agree that individual participation—either directly or indirectly—is an essential requirement to democracy.

affected by the CIL of human rights, the choice ought to be in favor of increased individual participation.

Dahl also states that, in a fully functioning democracy, citizens' preferences are informed and enlightened. This Article explains the necessity of a fully functioning judiciary to ensure active and informed dialogue on important legal issues. The judiciary serves a crucial role in starting and informing dialogue among a citizenry. The active discourse over the separations of powers concerning whether courts may interpret and utilize foreign and international law provides an excellent example of the courts' power to stimulate such conversation. The courts' power to promote dialogue is perhaps even more evident when a court makes a controversial decision regarding individual rights.<sup>165</sup> Once again, if we can choose between facilitating the judiciary's role in protecting the democratic process through stimulating dialogue or, alternatively, disavowing such a role, the choice ought to be to encourage courts to create dialogue.

McDougal's observations of a wide diversity and great abundance of communication processes by which norms are created in the contemporary world do not weaken this assertion.<sup>166</sup> McDougal describes the various methods by which individuals currently participate in communicating expectations and experiences regarding matters including policy, authority, and control. He states, "it is a process of communication in this comprehensive sense which creates and maintains the contemporary human rights prescriptions."<sup>167</sup>

McDougal's observation is consistent with Habermas's model of participatory and deliberative democracy, which asserts that legitimate lawmaking arises from the process of active deliberation among the subjects of law.<sup>168</sup> It is also consistent with Rousseau's view that direct, or deliberative, democracy was the only route to true freedom, as it allows individuals the ability to participate in making the laws to which they are subject.<sup>169</sup>

In a representative democratic society, few avenues exist for direct, individual participation in lawmaking. Still, this Article submits that the emerging condition of cosmopolitanism presses us to rethink the CIL of

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165. Examples abound, including controversies surrounding the pledge of allegiance, enemy detainees, gay marriage, abortion rights, and capital punishment. For a further discussion of this idea, see *infra* Part VII.

166. MCDUGAL ET AL., *supra* note 52, at 264.

167. *Id.*

168. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 318 (1996).

169. See POLITICAL PHILOSOPHY: THEORIES, THINKERS, CONCEPTS 358 (Seymour Martin Lipset ed., 2001).

human rights such that individuals become not only the subjects of that law but also agents in its formation. There are few venues available for individual engagement with CIL, but the ATCA serves as one of those spaces. This makes it unusual and perhaps it is among the reasons it attracts so much interest and controversy. The process of democratization, after all, is rarely contested.

## VII. THE ROLE OF COURTS

Current discourse about CIL does battle over the proper role of federal courts in interpreting CIL. Some revisionist CIL scholars argue that federal courts are prohibited from interpreting CIL.<sup>170</sup> A position that seeks to limit the channels through which individuals can engage with CIL is, within the framework of participatory democracy and cosmopolitanism, an anti-democratic position. The project, instead, ought to be to increase sites of individual engagement with CIL. The claim of this Article is not that the judiciary is better equipped than the executive or the legislature to engage with CIL. Those are fine institutions—democratic in their nature as well—and fine sites for individuals' *indirect* participation in the CIL formation process. But the judiciary is part of the democratic model and ought not be excluded as proposed by some scholars who focus on the problems CIL might pose for American constitutional democracy in isolation.

As Paul Diamond and others have suggested, an essential role of the judicial branch is to promote dialogue. As we see during every Supreme Court term, controversial decisions promote heated discourse over the most pressing and controversial legal and political issues. Under this view, when a court issues an opinion, we either come to accept the court's decision, or the court's opinion will mutate and change over time such that legal rules promulgated by the court come to fit more closely with our general conscience about what the law ought to be. Diamond sees court rulings not as final judgments but as provisional rulings that foster an ongoing dialogue with the people.<sup>171</sup> Accordingly, rather than ending public debate, court decisions actually help to decentralize and democratize the debate.

The proliferation of literature on the ATCA and on substantive claims made thereunder certainly seems to substantiate Diamond's theory of provisional review. The amicus briefs filed in connection with the *Sosa*

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170. See Bradley & Goldsmith, *supra* note 10. This view is also present among Supreme Court Justices. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (Scalia, J., dissenting).

171. PAUL R. DIAMOND, *THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY* 155 (1989).

litigation came from a variety of foreign sources such as the European Union, the Commonwealth of Australia, the Swiss Confederation, and others. Other briefs were submitted by international interest groups including foreign legal scholars, the World Jewish Congress, and international jurists. After the decision, a quick search of international news stories related to the *Sosa* opinion provided ample evidence that the world is watching and talking about the ATCA. Simply put, without the ATCA and litigation thereunder, international awareness and discourse about human rights, corporate social responsibility, and CIL would all be impoverished.

Eliminating the ATCA or limiting its availability to plaintiffs through a substantive limitation of CIL or by claiming that application of CIL by federal judges is undemocratic will similarly diminish individual participation in the formation of CIL. At a time when a significant criticism of international law is that it is not democratic enough,<sup>172</sup> we ought not try to eviscerate the few tools available for such participation. Platforms such as the ATCA, which allow individuals the opportunity to engage with CIL and proliferate the potential sources to which one looks in making a determination about whether a particular right has attained the status of CIL, also have the potential benefit of mitigating the state-action-versus-state-words problem that has plagued CIL and fascinated legal scholars. But expounding on this is best left for another time.

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172. See, e.g., Jed Rubenfeld stating:

The antidemocratic qualities of the United Nations, the International Monetary Fund (IMF), and other international governance organizations—their centralization, their opacity, their remoteness from popular or representative politics, their elitism, their unaccountability—are well known. . . . World government in the absence of world democracy is necessarily technocratic, bureaucratic, diplomatic—everything but democratic. . . .

. . . . What sets [America's] teeth on edge [are] . . . binding agreements administered, interpreted, and enforced by multilateral bodies. . . . America's commitment to democratic self-government gives the United States good reason to be skeptical about—indeed, to resist—international legal regimes structured . . . around antinationalist and antidemocratic principles.

Reprinted in Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1497 (2004). See also Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001) (using the examples of the GATT/WTO system, NAFTA, and the European Union to demonstrate the democratic deficit to which many have pointed in the face of international integration).

## VIII. CONCLUSION

It is important to clarify that the substantive human rights provisions that have attained the status of CIL may not change under this Article's proposal. In the near term, the short list provided by the Restatement<sup>173</sup>—genocide, slavery, extra-judicial killing, disappearances, and torture or inhuman treatment—would probably not be supplemented, depleted, or altered. This is probably the way things ought to be.

Especially in light of the requirements set forth in *Sosa* that claims under the ATCA be predicated on norms that are definable or specific, universal, and obligatory, the CIL of human rights is one of those spaces where “we do not go wrong here if we resist designating everything we should devoutly hope for a ‘fundamental right.’”<sup>174</sup> Certainly an argument that CIL should be formed at least partially through the direct participation of individuals depends on a modest vision of which rights currently have attained and are likely to attain the status of CIL. For example, any right that has been at the center of conversations about cultural relativism will not likely become a right as a matter of CIL in the immediate or short-term future. A number of rights enumerated in human rights treaties also would likely not make the list. There is simply not agreement amongst the people of the civilized world about the status of these norms. It is beyond the scope of this Article to determine, as an empirical matter, which of the rights enumerated in the UDHR, the ICCPR, the ICESCR, or any of the other human rights treaties would be affected by official recognition of the importance of individual participation in CIL formation. However, it seems unlikely

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173. See *supra* note 40 and accompanying text.

174. APPIAH, *supra* note 129, at 266. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1993); see also Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1 (1999) (arguing against the proliferation of the calls for “new” international human rights). Glendon contends that part of the genius of the original 1948 Universal Declaration of Human Rights was its recognition of the cultural plurality of the United Nations' member states and its thus deliberate avoidance of codifying overarching theoretical or philosophical principles, instead couching the rights in ambiguous and general terms in order to provide for agreement on central concepts while providing enough room for interpretation. Glendon also displays hostility at the proliferation of calls for new rights, decrying the “trivialization of core freedoms by special interests posing as new rights.” *Id.* at 8. For Glendon, efforts to add to the list of rights by calling for new, specific rights undermines the widespread agreement ushered in the ambiguity of the original UDHR. Phillip Alston has registered similar concerns. See Phillip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984) (fearing that calls for new rights will undermine the established credibility of existing rights). In contrast to the rights set forth in the Universal Declaration of Human Rights, Alston notes that vigorous discussion and analysis have been absent from calls for new rights, leading to an “inordinate vagueness.” *Id.* at 613–14.

that the list of human rights that compose the CIL of human rights would change significantly from the currently agreed upon list under the proposal set forth in this Article.

Rather than suggest an expansion, contraction, or modification of the substantive norms that make up the CIL of human rights, this Article has attempted to convey the need to democratize the CIL formation process in order to afford the individual a participatory role in CIL formation. This democratization alone seems a worthwhile pursuit.

The natural question then becomes “how would the individual participate?” As has been suggested in this Article, a provisional response is that the individual, in very limited instances, already participates through mechanisms like the ATCA. Making the paradigmatic or procedural shift proposed herein may help the ATCA appear less anomalous or dangerous—as something that ought to be protected and propagated, rather than stifled, limited, or eliminated.