The Individual and Customary International Law Formation

Christiana Ochoa
Indiana University Maurer School of Law, cochoa@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the International Law Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/319
The Individual and Customary International Law Formation

CHRISTIANA OCHOA*

Introduction ............................................................................... 121
I. Building Blocks: Terminology and Doctrine ............................ 125
   A. Preliminary Terminology: Usage, Custom, Customary Law, International Custom ...................... 125
   B. Customary International Law ........................................... 129
      1. A Brief History .......................................................... 129
      2. The Modern Doctrine .............................................. 130
      3. Critiques of CIL Formation Doctrine ................. 132
II. Foundational Literature: Skepticism, Allusion, and Possibility................................................................. 135
   A. Skepticism ...................................................................... 136
   B. Allusion ......................................................................... 136
   C. Possibility .................................................................... 140
      1. Realism: Participation in International Legal Process .......................................................... 140
      2. Individuals Front and Center ..................................... 142
      3. CIL Has Long Recognized Non-State Actors ...... 145

* Associate Professor of Law, Indiana University School of Law – Bloomington. J.D., Harvard Law School, B.A. University of Michigan. The author would like to thank Professors Henry Steiner, Jordan Paust, Anthony D’Amato and Ben Chigara for their insightful comments on earlier drafts for this Article. In addition, this Article has benefited from the generous suggestions of the Indiana University School of Law faculty and the participants in the Big Ten UnTENured Conference, who have heard and commented on the ideas contained herein. The keen research assistance provided by Till Muller and Sean Santen was also invaluable, as were the comments and support provided by Timothy Lynch. Please send correspondence to the author at cochoa@indiana.edu. The author’s work, including this Article, can be found at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=439960.
4. Challenging the Doctrine to Include NGOs ....... 146
5. Doctrine Change, Yes; NGOs, No .................. 147
6. Private Actors in Other Areas of International Law ................................................................. 148

III. Doctrinal Bases for the Inclusion of Individuals in CIL ........ 151
A. International Law Doctrine ............................................. 152
   1. Individuals as Subjects of International Law ...... 152
   2. Individuals as Participants in International Law .. 154
   3. Individuals and Prescription ................................. 155
B. Human Rights Doctrine................................................... 158
   1. Human Rights Doctrine is Oriented Toward the Individual......................................................... 158
   2. Human Rights Doctrine Requires Information from Individuals as the Doctrine Evolves ........ 162
C. CIL Doctrine.................................................................... 162

IV. Modern Social/Philosophical Bases for Including the Individual: Globalization, Cosmopolitanism, Transnationalism, and Participatory Democracy .................................................... 164
A. Globalization ................................................................... 164
B. Cosmopolitanism and Cosmopolitan Citizenship ........... 166
C. Transnationalism, the Subaltern, and Globalization from Below ..................................................... 167
D. Participatory Democracy ................................................. 168

V. Operationalizing the Inclusion of Individuals ...................... 169
A. Including Individuals: Textual Change or Statutory Interpretation? ............................................ 169
B. Elements of Custom Among Individuals ..................... 175
C. Determining Public Opinion ........................................... 176
   1. General Assembly Resolutions ......................... 177
   2. Non-Governmental Organizations and Civil Society as Proxies for Individuals ...................... 179
   3. Empirical Data .................................................... 181
   4. Other Potential Approaches ............................... 184

Conclusion................................................................................. 184
“The essence of a customary rule lies in the fact that it arises from the conduct of those whom it binds.”

“[O]bedience to a law which we prescribe to ourselves is liberty.”

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

INTRODUCTION

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

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

---

formation, how would individuals participate? This Article will seek to address these questions.

Many discussions of CIL start, either conceptually or chronologically, with the Statute of the International Court of Justice. Of course, custom was part of customary international law long before the Statute was adopted. Taking just one step back in time, for example, one can note that the Statute of the Permanent Court of International Justice (the predecessor to the International Court of Justice (ICJ)) included text identical to that of the Statute of the ICJ in respect to CIL.4 Going back further in time, one finds familiar, if somewhat dated, definitions of custom in early international law treatises.5

In these earlier periods, theorizing about the relationship of custom to law was well underway in legal scholarship and other areas. This deeper theorization on customary law made clear that one of its legitimizing premises was that it was thought to originate in the actions and beliefs of those whom it later comes to bind – the subjects of the law.6 The belief that customary law originates from its subjects seems to have been translated directly into international legal doctrine. From the time custom was first identified as a source of international law until the fairly recent re-conceptualization and expansion of the subjects of international law,7 states have been the only entities recognized as subjects of international law.8 Thus, it was consistent to define CIL as law that was made from the acts and beliefs of states alone. Currently, however, individuals are widely recognized as subjects of international law.9 One question that arises logically from this recognition is its effect on the power of individuals to make international law, and specifically on their power to participate in the formation of CIL.

4. For a narrative discussion of the process by which Article 38 of the Statute of the Permanent Court of International Justice was adopted into the Statute of the ICJ, see THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 689–690 (Andreas Zimmermann et al. eds., 2006).


7. See infra Section III.A.1.

8. Some commentators have argued that this view of international law has always been opposed and has always been unrealistic. See, e.g., JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 14 (2005). Thank you to Jordan Paust for this and many other valuable comments.

9. See infra Section III.A.1.
Among the many authors who have discussed the problems inherent in the doctrine on the formation of CIL, many seem to have considered or briefly touched upon the prospect of individuals formally participating in CIL formation. None, however, have delved deeply into the possibility. This Article aims to do just that.

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

Second, the Article will address the existing literature on the individual as a subject of international law. The establishment of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR) caused commentators to take notice of a palpable expansion in the types of subjects of international law. At that time, scholars noted that individuals might be taking on a role as subjects of international law, as they were gaining enforceable rights and obligations under international law. In the intervening years, this idea has gained acceptance and legitimacy, especially as an increasing number of human rights treaties have included provisions granting individuals the right to personally seek redress10 and as various tribunals have provided avenues for individuals to make legal claims based on violations of their human rights as established in international law.11 In addition, the development of theories of individual responsibility for violations of international law, whether in the human rights or humanitarian law arenas, provides further evidence of individuals becoming subjects of international law. A relatively novel idea, however, is the potentially corresponding notion that individuals should be makers of international law. This Article will discuss important writings on the individual as the subject of international law in or-


11. One example is the use of U.S. federal courts as a forum for addressing violations of the “law of nations” through modern Alien Tort Statute litigation. See 28 U.S.C. § 1350 (2000). Further examples can be found in Section III.A.3 herein.
der to establish the groundwork for a relatively modest assertion of liberal democratic theory—that people ought to participate in making the law that governs and protects them.\footnote{12. ROUSSEAU, supra note 2, at 178.}

Finally, this Article will contribute to the literature on the participation of private actors in the international law-making process. Existing work has primarily described the increasing prominence of private actors, in the form of nongovernmental organizations (NGOs) or civil society, in the work of international institutions and in the norm and treaty formation process. This growing body of literature has not yet turned squarely to the role individuals might have in forming CIL, despite CIL’s relevance in governing and protecting individuals.\footnote{13. See 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, 71 (1995–1996) (arguing for new authors to approach CIL from a different perspective).}

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

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

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

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

I. BUILDING BLOCKS: TERMINOLOGY AND DOCTRINE

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

An inquiry into the formative process of customary international law asks how we make determinations of what behavior has become so commonplace or commonly accepted that a trespass against that commonality is believed to be admonishable by law. Along the road to becoming law, behavior may pass through various other characterizations describing its ubiquity, or lack thereof, in society as well as the attitudes of a social group towards that behavior. The behavior may become a common practice or usage, it may become customary, and it may ultimately take on a sense of being obligatory, such that a breach of that obligation would violate the expectations of the affected community. At this point, it may be said to have become customary law. This may be especially so if a tribunal has had the opportunity to disclose the sense that the behavior has come to be expected as a matter or law.14

Acknowledging the distinctions between the terms usage, practice, custom, international custom, customary law, and customary international law will be useful in the remainder of this Article. Long before

14. SADLER, supra note 6, at 8.
customary international law (as that term is currently understood and will be discussed below) was conceived, the idea of custom and its relation to law or customary law had been described and utilized with varying degrees of success. Custom is among those terms that is blurred around the edges and about which there can perhaps be no perfect clarity. Thus it is likely that customary law and customary international law, which integrate the root notion of custom in at least some respects, will similarly be blurry and are perhaps best understood as such. Nonetheless, a brief discussion of what is meant by these terms will be useful.

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

---

15. For a very useful exposition of the family of meanings attached to the word “custom,” see BURTON LEISER, CUSTOM, LAW, AND MORALITY: CONFLICT AND CONTINUITY IN SOCIAL BEHAVIOR 7–9 (1969) (explaining that a definitional approach that does not expect or seek perfect clarity has often been very fruitful in clarifying confusion caused by attempts to utilize overly precise terminology, and citing successful examples of this “ordinary-language” approach in contemporary scholarship).

16. The term “usage” originated in Roman law and, like each of the terms defined herein, is often interchanged with the others. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d ed. 1993).

17. BLACK’S LAW DICTIONARY 1172 (6th ed. 1990) (defining “practice” as “[r]epeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage”).

18. Id. at 1541 (“Usage cannot be proved by isolated instances, but must be certain, uniform and notorious.”).

It should, of course, be noted that there are many common uses of the term custom. Some refer to the practices of single individuals. 20 Given that this Article will concern itself with the role of the individual in forming customary international law, it is worth stating explicitly that this Article does not concern itself with the unique “customs,” or habits, of single individuals. Rather, it concerns itself with the customs that arise among and between people in society.

Custom. The Oxford English Dictionary defines custom as: “A habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community).” 21 Custom is thus sometimes used to be essentially synonymous with usage and thus means that set of practices of a people which are repeated, common, and notorious. This broad definition of custom refers to “all the social rules which are observed by the bulk of the members of a society.” 22 This definition, however, would accommodate the handshake example used above, as it makes no distinction between usage and custom that, within law, is significant. By this understanding, usage and custom are synonyms.

Others have used custom to denote the subset of usage and practice that has attained the status of law such that an authoritative body would recognize it as customary law and enforce it if given the opportunity to make explicit the status of the behavior. This is the distinction between usage and custom generally utilized in American legal doctrine, 23 which recognizes that widespread usage and acceptance can be an important source of law. Except where deviations are made explicit, this Article will employ the term custom in this latter sense. 24 Custom, then, is that body of practice that has become expected by a people to such a degree that it has become law.

Custom thus refers to those norms that are both usage and law. These norms are widespread, accepted, and, in many instances, of a longstand-
ing nature. Such norms become law as a result of uniform practice or acceptance and, at least theoretically, become law even before an authoritative or juridical body has an opportunity to assess their status aslaw. For example, one can imagine a society in which rules of the road were not codified in statutes. In such a society, it is plausible that some uniform rule about what drivers do at a four-way intersection would arise. Uniform practice might well arise dictating that the first to arrive at the intersection also would be the first allowed to drive through the intersection. If one day a driver violated this usage, a person harmed by this violation might sue the violator. If a reviewing authority—a court—would or ought to find the common practice enforceable such that the violator would be held liable to the injured party, one might say that even before the court reviewed the case, this driving usage had attained the status of law. It had become customary law. Used in this way, custom refers to the factual circumstance (such as the existence of a particular practice that is accepted among people as law), while customary law refers to a normative claim (for example, that a just court would recognize this usage as law or that a particular usage has been recognized as law). Custom and customary law are distinct from one another, but only procedurally. In relation to custom, no reviewing authority has had an opportunity to recognize the legal status of a usage, and in the case of customary law, a reviewing authority has both had this opportunity and has recognized the usage as law. This close connection between the terms custom and customary law allows them to be used synonymously in most instances herein.

The terms international custom and customary international law (CIL) will be used to refer to that set of practices to which attach international rights or legal obligations. Obligations and rights in respect to particular practices may “become international” for a number of reasons. First, international obligations and rights may attach because the practice itself has an international character. Second, international rights and obligations might attach because the entities engaged in that practice are states, the traditional subjects and objects of international law. State practice thus contributes to international custom. Third, rights and obligations might attach under international law because the practices relate to international or global problems such as nuclear war, global

25. For a thorough discussion of the process by which usage becomes law, see SADLER, supra note 6, at 50–54.

26. Karol Wolke has employed a similar demarcation of these terms in the international context. WOLFKE, supra note 16, at xx.
environmental concerns, the protection of human rights, etc. Finally, international rights and obligations might attach because sufficient uniformity about a practice has arisen internationally among the entities that will enjoy the rights or be burdened by obligations once the practice becomes CIL.

B. Customary International Law

1. A Brief History

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

Custom as a source of international law appears to have been recognized in an international treaty for the first time relatively recently. In 1874, Article 9 of the Conference of Brussels on the Laws and Customs of War stated:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.28


28. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, *reprinted in The Laws of Armed Conflicts* 25, 28 (Dietrich Schindler & Jiří Toman eds., 3rd ed. 1988) (emphasis added), *available at* http://www.icrc.org/ihl.nsf/WebART/135-70009?OpenDocument. This conference was convened by Russia to discuss an international agreement on the content of the rules of war. The delegates to the Conference were unable to agree on it as a binding treaty, and it was never ratified. Plausibly, then, its more enduring contribution to international legal doctrine is as the first such Convention that included a distinction between the laws of war and the customs of war. Other humanitarian law treaties of the time adopted this distinction without explicitly setting out what was meant by laws of war as opposed to customs of war.
In 1899, Convention (II) with Respect to the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land, stated in its preamble that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.29

This preamble is particularly noteworthy. Not only does it encompass laws of war and customs of war, but it also lists the sources of the “principles of international law” to which it refers. That list includes the public conscience as a source separate and distinct from the usages of nations.

2. The Modern Doctrine

The distinction between international laws of war and customs of war as found in these early humanitarian law documents has become entrenched in modern formulations of international law as the distinction between treaty and custom. All leading authorities recognize the importance of both treaty law and custom as sources of international law.30

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

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

---

and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

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

Section 102 of the Restatement (Third) of Foreign Relations Law of the United States also sets out the sources of international law:

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

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

Under both Article 38(1)(b) and Restatement Section 102, CIL is composed of two elements.37 The first is termed the objective or practice element, and it looks to the actual practice and behavior of states. The second is termed the subjective element, or the requirement that the particular norm is observed out of a sense of legal obligation. This second subjective element is known as the opinio juris requirement.38

3. Critiques of CIL Formation Doctrine

Both the objective and the subjective elements of CIL have undergone extensive scrutiny, and each has been analyzed from various perspectives.39 For example, in addressing the subjective element of CIL, Anthony D’Amato describes CIL’s inherent “circularity problem.” In his book, The Concept of Custom in International Law, he asks “[h]ow can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?”40

The practice requirement of CIL also has been highly scrutinized, as authors have asked how much time is necessary to create custom41 as well as how much consistency42 and widespread acceptance is required.43 In fact, one can find proposals in the CIL literature that argue

36. Id. at § 102(2) cmt. b.
37. See Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3) (“[T]he material of customary international law is to be looked for primarily in the actual practice and opinio juris of States.”).
39. One of the most comprehensive and coherent presentations of the various problems inherent in CIL can be found in ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). See also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 Reporters’ Note 2 (1987).
40. D’AMATO, supra note 39, at 66.
41. Id. at 58 (“[T]he literature contains no standards or criteria for determining how much time is necessary to create a usage that can qualify as customary international law . . . .”).
that either the objective element$^{44}$ or the subjective element should be eliminated all together.$^{45}$

Many critiques of CIL attempt to address the doctrine as a whole, often asserting new theories of CIL,$^{46}$ setting out alternatives to CIL,$^{47}$ or attempting to hobble or strongly curtail its validity or uses.$^{48}$ Occasionally, commentators make explicit whether they are addressing problems in the means by which CIL is formed,$^{49}$ the means by which states become obligated to observe CIL,$^{50}$ or the means by which it is implemented.$^{51}$ This Article will focus specifically on the means by which CIL is formed.

$^{44}$ For a well-articulated argument that the objective element can be eliminated, see id. at 149–58.

$^{45}$ For an argument that the subjective element is deeply flawed, see, for example, MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 140 (1999) (quoting Peter Haggemacher, La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONALE PUBLIC 5 (1986) (Fr.), which argues that there is no subjective element in CIL, and that the opino juris element is nothing more than an interpretation of state practice at the international level). See also Guzman, supra note 43, at 145 n.131 (“It is not in fact necessary to demonstrate the presence of the subjective element in all, or perhaps even most, instances...Where there is a well established practice, the Court and other international tribunals, not to mention the States themselves, tend to conclude that there is a customary rule without looking for proof of opino juris.” (quoting Maurice H. Mendelson, The Formation of Customary International Law, 272 RECUEIL DES COURS 165, 250, 289 (1998))).


$^{47}$ See Jonathan I. Charney, Universal International Law, 87 AM. J. INT’L L. 529, 550 (1993) (arguing that a significantly developed international legal system creates the opportunity for a universal international law binding on all States, and observing that “[c]ustomary international law, which has traditionally been a product of state practice and opino juris, is particularly vulnerable” to questions regarding the validity of international law).


$^{49}$ See infra Section I.B for discussion of modern critiques of CIL formation.

$^{50}$ See Bradley & Goldsmith, supra note 48; Guzman, supra note 43; Norman & Trachtman, supra note 46.

$^{51}$ An excellent roadmap of the debate on CIL implementation can be found in Ernest A. Young, Sorting Out the Debate over Customary International Law, 42 VA. J. INT’L L. 365 (2002).
The most commonly contemplated strands of inquiry in respect to CIL formation ask what counts as state practice, how many states need to participate in the practice in order for it to be considered CIL, and over what period of time such state practice must continue in order for it to be considered custom.

In addition to these questions, writers such as Michael Byers and Charles de Visscher question the principle of sovereign equality as it relates to CIL by asking what role is played by power in CIL formation.


55. These lines of inquiry roughly track an early effort to clarify how evidence of custom was to be derived. Judge Manley Ottmer Hudson, Special Rapporteur to the International Law Commission, stated in 1950 that the elements that must be present before a principle or rule of customary international law can be found to have become established were:

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

b. continuation or repetition of the practice over a considerable period of time;

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

d. general acquiescence in the practice by other States.


56. In a commonly quoted passage, de Visscher likens CIL formation to the formation of a dirt road across virgin land: “Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.” Charles De Visscher, Theory and Reality in Public International Law 147 (P.E. Corbett trans., 1957), quoted in Michael Byers, Power, Obligation, and Customary International Law, 11 Duke J. Comp. & Int’l L. 81, 84 (2001). Byers defines “power” broadly to include various types of non-legal power, such as military might, power derived from wealth (which affords states the possibility of applying economic pressures as well as diplomatic pressures on other states), and power derived from moral authority. He describes CIL formation as a process through which states use their power to develop, change, or maintain rules. Naturally, the strength of a given state’s power determines whether or to what extent that state is able to influence the formation and mutation of CIL. Byers, supra note 45, at 5–6.

Detlev Vagts extends this view in what he calls hegemonic international law. Others, adopting the theory of hegemonic international law, have described the proceedings of international institutions in order to illuminate the benefits and detriments of a hegemonic approach to international treaty and customary law making and/or subverting. See Detlev F. Vagts, Hegemonic International Law, 95 Am. J. Int’l L. 843 (2001); Jose E. Alvarez, Hegemonic International Law Revisited, 97 Am. J. Int’l L. 873 (2003).
What is remarkable in this literature is that virtually all of it has accepted the core premise that only states can form CIL. The idea that individuals ought to have a participatory role in CIL formation is nearly completely absent. Only a handful of commentators have suggested overtly that individuals ought to be included in the process of CIL formation. This commentary will be discussed at length in the Section that follows.

II. FOUNDATIONAL LITERATURE: SKEPTICISM, ALLUSION, AND POSSIBILITY

The literature on CIL includes writings in which individuals figure as shadows and whispers in relation to CIL. This literature can be broken into three categories. The first category is small and will fall under the rubric of “skepticism.” The skeptics explicitly mention the possibility of including individuals, but they dismiss the possibility outright. The second, larger category falls under the rubric “allusion.” The allusionists suggest some role for the individual without ever making this suggestion explicit.

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


58. The skeptics included only those commentators that have seen the possibility of including individuals. Of course, there are whole lines of international law theory that would see international law as a purely state-based enterprise. There are also commentators that see portions of international law (namely enforcement) as requiring a state-based system. See, e.g., Anthony D’Amato, Is International Law Really “Law”? 79 NW. U. L. REV 1293, 1303-1313 (1984). Thank you to Anthony D’Amato for this comment.

59. See infra Section II.C.

60. It is possible and likely that I have not captured every reference available with respect to these categories of literature. This is most likely in relation to the Allusionists; in this category, my purpose is to give examples that illustrate the prevalence of this idea in the underexplored shadows of other work. If I have failed to include key sources, I look forward to learning about those sources I have missed. My aim is not to create a bibliography of foundational literature, but to highlight existing work that provides theoretical footing for the ideas discussed in the main body of the present Article.
A. Skepticism

As stated previously, the foundational literature that explicitly but dismissively mentions the possibility of individuals participating in CIL creation is small. David Fidler, in Challenging the Classical Concept of Custom, points to the liberal notion that the cross-border activity of private parties serves a “quasi-public purpose” resulting in increased interdependence between nations, stating:

Perhaps it follows from liberal international theory that the CIL process should take into account the practice of private persons and enterprises as well as the practice of States. Such a notion is even more radical than the idea that the State practice of democracies should count more than that of dictatorships or other types of non-liberal States.  

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

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

B. Allusion

Compared to those authors who have addressed directly, either with skepticism or optimism, the possibility of individuals participating in CIL formation, the world of scholars alluding to individuals playing such a role is immense. In this second category, it is as if individuals ei-

61. David P. Fidler, Challenging the Classical Concept of Custom, 39 German Y.B. Int’l L. 198, 241 (1996). Professor Fidler is referring to the controversy among CIL theorists, see, e.g., supra note 56, that powerful states often do tread more heavily and more often on the path toward CIL creation, and that perhaps liberal, democratic, or free states ought to carry more weight in CIL creation.

62. Byers, supra note 45, at 139.

63. Id. at 139–140.
ther already play a role so recognized and accepted as to be unworthy of mention or are so disenfranchised within international law that explicitly mentioning the possibility is imprudent, or pausing upon it for reflection is not even considered. Either way, this literature is frustrating because it cannot be cited uncontroversially as forming a foundation for the inclusion of individuals in CIL formation.

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

The German Historical School of Savigny and Ranke holds that the *opinio juris* component of CIL is the legal consciousness of a people. For now, this bears mention because Anthony Carty has attempted to reintroduce such an approach, although rather than address the role that this form of *opinio juris* would play in CIL creation, he has focused more squarely on nationalism. Utilizing the language of *opinio juris* through a renegotiation of its most commonly accepted definition is one way to involve the individual in CIL formation. Unfortunately, this approach has not yet been thoroughly elaborated.

---

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


66. See ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 30–39 (1986); ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 21 (2d ed. 1992); see also BYERS, supra note 45, at 139. Their approach would require analysis of the historical, political, and social context in which Savigny and Ranke developed their ideas. This falls outside of the scope of the current Article, but will be discussed in a forthcoming article by the author.

In the literature on CIL formation, it is not uncommon for authors to stop just short of including non-state actors in the CIL process. One senses a push against the traditional barrier, which restricts participation to states alone. For example, in an interesting overview of the importance and creation of CIL in various international law fields, Anja Seibert-Fohr proposes a role for the “international community as such,” without indicating how or why she is making such a claim or specifying exactly to whom she is referring.68

Daniel Bodansky takes this type of allusion one step further when—against the accepted doctrine—he states that, “[a]ccording to the standard account of customary international law, claims about customary law are empirical claims about the ways that states (and other international actors) regularly behave.”69 Bodansky’s claim that the standard account of CIL formation includes states “and other international actors” is notable because the standard account does no such thing.70 For example, Section 102 of the Restatement (Third) of Foreign Relations Law of the United States refers only to states as CIL law-creators. My object, however, is not to correct Professor Bodansky, as he is well-versed in matters of CIL and many other international law topics, but to expose two rather common phenomena. The first is that it is not unusual to see claims that non-state actors have CIL formation powers. This instance is particularly useful because Professor Bodansky makes clear that he is referring to, “[f]or example, international organizations, transnational corporations and other non-governmental groups.”71 The second notable phenomenon, and here Professor Bodansky’s claim is a particularly clear example, is that it is not unusual to find allusions to a role for non-state or supra-state actors portrayed as “standard.” This raises twin questions. First, why are claims for including non-state actors being made? Second, why are such claims being conveyed as standard?

68. Anja Seibert-Fohr, Unity and Diversity in the Formation and Relevance of Customary International Law: Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order, in UNITY AND DIVERSITY IN INTERNATIONAL LAW 257 (Andreas Zimmermann & Rainer Hofmann eds., 2006).


70. One can scour the traditional texts on CIL and find no such reference. See, e.g., Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) and comments thereto.

71. Bodansky, supra note 69, at 108 n.17.
In a well-known article, the late Professor Jonathan Charney elaborated some of the shortfalls of CIL doctrine and demanded that international legal doctrine grow in its substantive coverage as well as in its universal enforceability. In his proposal for universal international law, he alludes to the utility, or perhaps the necessity, of broad and active participation by “all states and other interested groups” in the law-creation process if that process is to operate legitimately.

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

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

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

In a relatively full elaboration of what he means by his inclusion of “other subjects of international law,” Mendelson states that “[a] contribution to the formation of customary international law, in a broader sense, is also made by other types of entity, such as non-governmental international organizations...multinational and national corporations; and even individuals.” Unfortunately, in his explanation of how non-state entities participate in the formulation of international law, Mendel-
son does not return to the individual in particular. Rather, he treats all non-state actors as similarly situated. He acknowledges that all such actors may, in the current state of international law, have an indirect role in CIL formation, but he insists further that states “have…a tight monopoly over the law-making process.”

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

C. Possibility

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

I. Realism: Participation in International Legal Process

Professor Myres McDougal, writing together in 1967 with Professors Harold Lasswell and Michael Reisman, contemplates the various roles individuals might play in decisional processes related to international law and identifies the essential problem of individuals being “locked out.” Because their phrasing and language feels avant-garde even today, and because their work is highly relevant to this project, it bears quoting at length:

Most of us are performing...decision roles without being fully aware of the scope and consequences of our acts. Because of this, our participation is often considerably less effective than it might be. Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawnlike political impotence, of being locked

77. Id.
78. Id.
out of effective decision, is an equally unwarranted orientation. The limits of the individual's role in international as in local processes is as much a function of his passive acquiescence and ignorance of the potentialities of his participation as of the structures of the complex human organizations of the contemporary world....

A more systematic expansion of these impressionistic remarks about the individual human being's increasing role in, and responsibility for, world affairs would require the careful description of a comprehensive world social process, in terms of a set of interlocking, transnational, functional and geographic interactions; of the global or earth-space process of effective power which is an integral part of the larger transnational community matrix; and of the processes of authoritative decision, including a world constitutive process, maintained by the holders of effective power for identifying and securing their common interests. For our immediate purposes it will suffice merely to summarize that there is today among the peoples of the world a rising, common demand for the greater production and wider sharing of all the basic values associated with a free society or public order of human dignity; that there is an increasing perception by peoples of their inescapable interdependence in the shaping and sharing of all such demanded values; and that peoples everywhere, both effective leaders and the less well positioned are exhibiting increasing identifications with larger and larger groups, extending to the whole of mankind.79

McDougal, Lasswell, and Reisman are elaborating on the seven functions of effective decision process earlier articulated by Lasswell.80

---


80. Harold D. Lasswell, The Decision Process: Seven Categories of Functional Analysis (1956). These seven categories (intelligence, promotion or recommendation, prescription, invocation, application, termination, appraisal) are defined in Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, The World Constitutive Process of Authoritative Decision, 19 J. LEGAL EDUC. 253, 261 (1967) as follows:
   1. Intelligence is the obtaining, processing, and dissemination of information (including planning).
   2. Promotion (or recommendation) is the advocacy of general policy.
   3. Prescription is the crystallization of general policy in continuing community expectations.
   4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
tably, they were very aware that they were at the forefront of a significant change in “world social process” and, especially in early manifestations of their ideas, they called their own remarks “preliminary,” while sharing their sense about what a clearer elaboration would require.\(^{81}\) This project of elaboration is still underway.

2. **Individuals Front and Center**

In the chronological development of this idea, Lung-chu Chen is the next important figure, as his contribution sprang from work in which he engaged jointly with McDougal and Lasswell.\(^{82}\) And develop it they did, together with perceptible changes in international law. In 1980, when Professor Chen wrote with McDougal and Lasswell, even in a moment of inspiration in which they saw “almost unlimited democratic poten-

---

5. Application is the final characterization of concrete circumstances according to prescriptions.
6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and the responsibility therefor [sic].

This framework was central to a body of work by a number of international legal scholars, especially Lasswell, McDougal, Reisman, and Lung-chu Chen. See, e.g., id.; MYRES MCDouGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER ch. 4 (1980).

tial” as to the ability of individuals to participate in the intelligence, promotion, invocation, termination and appraisal functions of effective decision making, they hesitated as to the ability of the individual to participate in the prescription and application functions.83

As early as 1978, Professor Chen observed that individuals were increasingly demanding a voice in decisions that affect and determine their own value systems, which included a number of enumerated human rights. In addition, he noted that individuals were increasingly demanding full participation in decision making processes and value setting.84

A decade later, Professor Chen noted that “[t]ransnational structures of authority and procedures for application have been established and maintained…to secure greater compliance with…human rights.”85Remarkably, through these structures, “individuals and private groups are given increased, though still limited, access to arenas of transnational authority to bring complaints about human rights deprivations against even their own governments.”86

In relation to the participation of individuals in CIL formation, Professor Chen says, “[u]nder the concept of ‘custom’ that creates law through widely congruent patterns of peoples’ behavior and other communications, individuals and their private associations have always participated in the prescribing function.”87 In making this statement, Chen relies on a conception of CIL formation that appears to deviate from the traditional account. In order to make this leap, Chen breaks from legal formalism in respect to CIL formation and argues for what he believes is a more realistic assessment of how custom is formed.

While many may not be willing to stretch the traditional CIL doctrine to such extents, Chen’s framework is quite useful for its thoughtful realist approach to the actual participants in CIL. In keeping with the New

83. McDougal et al., supra note 80, at 193. “While the public functions of prescription and application are necessarily restricted, in terms of direct participation, to a very small, though hopefully, representative group, participation in all other functions presents almost unlimited democratic potential.” id. at 192–93.
85. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 79 (1989). Professor Chen goes on to state: “Although nation-states continue to play the most prominent role in the prescribing (and terminating) and applying functions, individuals and private groups play important roles in regard to other decision functions….“ Id. at 80.
86. Id. at 80.
87. Id.
Haven School of which he was a part, he articulates the realist’s important observation that individuals are the ultimate participants in every social process, whether as individuals per se or as part of private groups or states.\(^8\) By seeing through the nomenclature of CIL, which is highly reliant on states, Chen attempts to convince his readers that individuals are very active participants in international decision making processes generally, and in CIL formation particularly.\(^9\)

Professor Chen’s 1989 book on international law devotes one chapter entirely to a discussion of the changed and changing role of the individual in international law and the various means by which the changed and expanded role of the individual has distorted, perhaps beyond comprehension, the subject-object dichotomy in international law. Essentially, he observes, as others did before him, that the individual has become a subject of international law. For Chen, the traditional model of international law, which holds that states are its lone subjects, if it ever was accurate, is now simply outmoded.\(^9\) Both Chen and this Article agree, of course, that states play the most prominent role in some international law processes. Even if (or when) the individual is formally recognized as a legitimate participant in the creation of CIL, the state will continue to hold this position of prominence.

Professor Chen’s written work on the proposition that individuals ought to and do participate in international decision making processes spans decades.\(^1\) It overlaps with the work of Jordan Paust.

---

88. Id. at 80–81. The New Haven School was created and developed by McDougal, Lasswell and others, including Chen. Its inspiration is rooted in American Legal Realism; it uses its modalities to reconceptualize and recharacterize international law and relations. For Professor Chen’s own definition of the New Haven School, see Lung-chu Chen, Perspectives from the New Haven School, 87 AM. SOC’Y INT’L L. PROC. 407 (1993).

89. CHEN, supra note 85, at 80.

90. Id. at 76–81. This Article accepts this position and builds upon it. This Article discusses the expanded universe of subjects of international law, including individuals, in Section III.A.

3. **CIL Has Long Recognized Non-State Actors**

Professor Paust has pointed out that individuals have been and realistically are included in CIL formation. It is his position that:

The expectations of all human beings (“mankind,” “the world,” “the people”) are not only relevant to CIL but they also provide the ultimate criterial referent. Indeed, no other ultimate referent would be realistic, since all human beings recognizably participate in such a process of acceptance and the shaping of attitudes whether or not such participation is actually recognized by each individual or is as effective as it might otherwise be (e.g., even if apathetic "inaction" is the form of participation for some, a form that simply allows others a more significant role) (footnote omitted). It is this ultimate referent, moreover, that provides customary law with a built-in basis for its own general efficacy, resting as it does on actual patterns of generally shared legal expectation, and with a claim to being the most democratic form of international law.

In substantiating the view that individuals already do participate in CIL formation, Professor Paust asserts that leading authorities also have recognized the importance of individuals to determinations of CIL. He notes, for example, that a number of important historical Supreme Court decisions regarded the international law of nations as established by “the general consent of mankind,”

and that Blackstone stated that the “law of nations is a system of rules…established by universal consent among the civilized inhabitants of the world.”

This Article disputes that individual participation is historically and/or traditionally accepted by CIL doctrine. More accurate is Paust’s later characterization of the active role that non-state actors play in the CIL of human rights as a legal realist’s view of what actually happens in

---


94. *Id.* at 59 (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796)).

95. *Id.* at 60–61 (quoting 4 *William Blackstone, Commentaries on the Laws of England* 66 (1765)).
CIL formation. In this view, there is “no single set of participants...[l]ike all human law, [CIL] is full of human choice and rich in individual and group participation,” irrespective of the formal state-centric doctrine on CIL formation.

Professor Paust’s contributions, then, consist of holding to the view that individuals already participate in forming CIL and maintaining that they are acknowledged already in CIL doctrine.

4. Challenging the Doctrine to Include NGOs

Professor Isabelle Gunning has proposed that the CIL formation process be expanded to include states, intergovernmental organizations and non-state actors, especially NGOs. Approaching the subject of CIL and human rights from feminist and Afrocentric perspectives, she argues that human rights law challenges the doctrine of customary international law and its exclusive state-centric orientation. Globalization and cosmopolitan citizenship form the theoretical basis of connectivity herein, whereas for Professor Gunning, a feminist and Afrocentric lens leads to interconnectivity. Under either view, the logical extension of a non-state or supra-state interconnectivity is to open the CIL formation process to non-state actors.

Having arrived at the position that an exclusively state-centric view of CIL is no longer viable, Professor Gunning proposes a more expansive universe of participants in CIL formation. Perhaps because of the more communitarian approach that she takes, she does not address directly the inclusion of individuals. Rather, she proposes that CIL lawmaking potential be extended to international organizations and NGOs.

Although Professor Gunning does not arrive at the inclusion of individuals in CIL formation, her contribution to the current Article is notable because it articulates concrete proposals for including non-state actors. For example, she argues for an NGO certification process similar

97. Id. at 147.
98. Paust, Reality of Private Rights, supra note 92, at 1246.
100. Id. at 212. Gunning argues that “a feminist perspective represents the ability to ‘act in concert.’” Id. at 218 (quoting H. ARENDT, ON VIOLENCE 44 (1969)). In her view, this interconnectivity demands that each nation increasingly consider the interests of all others. Id. at 220.
101. Id.
102. Id. at 222–34.
to the consultative status granted to NGOs prior to their recognition before Economic and Social Council (ECOSOC) bodies. Professor Gunning points to ECOSOC Resolution 1296 (XLIV), which, at the time of her article, provided the requirements for NGOs seeking to receive consultative status. She argues that NGOs meeting these or similar guidelines should be seen as participants, “on a par with states,” in determining the content of CIL.

5. Doctrine Change, Yes; NGOs, No

Influenced by field work in Kosovo, Professor Julie Mertus also has expressed the view that a more inclusive international law process is desirable. Her position differs from that of Professor Gunning, however, due to the skepticism she has expressed about NGOs. While she advances a non-state based, participatory role in CIL, she is cautious about NGOs serving as a proxy for civil society. Her concern with a model for expanding CIL that would rely on NGOs in the manner Professor Gunning proposes is that there is already existing evidence that the ECOSOC rules for NGO consultative status favor some types of NGOs over others. Professor Mertus remarks, “ECOSOC itself has noted that its practices are far from perfect and that non-mainstream and Third World NGOs in particular may face a disadvantage at gaining access and rights of participation in such intergovernmental arenas.” In addition, similar to the position adopted in this Article, Professor Mertus is concerned that even if a wholly fair and inclusive process for NGO consultation could be devised, looking to NGOs to assess the beliefs and

103. Id. at 230–31.
108. Mertus, supra note 106, at 561.
109. Id. at 562.
expectations of individuals is imperfect since they may distort, disguise, or hide from view the difference and dissent that would be of paramount importance in assessments of the content of CIL.

6. Private Actors in Other Areas of International Law

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

Before proceeding to the theory and justification for the inclusion of individuals, one additional piece of scholarship bears mention for its relevance through analogy to this Article. Professor Janet Koven Levit, in a recent article, has exposed what she calls “bottom-up lawmaking” in trade-finance communities. She examines the rule-to-law making that transpires as the rule-setting processes engaged in by groups of private actors (individuals, banks, multinational corporations) and public actors in the trade finance sector congeal into hard law with legal consequences. For example, the rules set out in the Uniform Customs and Practice for Documentary Credits (UCP) are created by private bankers who organize through the International Chamber of Commerce. Despite the fact that the customary rules and practices articulated by this group are created by private individuals, rather than policy makers or states, and are not statutory law, courts in the United States and elsewhere frequently use them to decide letter-of-credit disputes.

Professor Levit observes that the process by which the rules set out by these private groups coalesce and slowly harden into law bears a

110. Id. at 561.
111. For further discussion on the role of NGOs, see infra Section V.C.2.
112. This term has been used by other commentators to refer to sub-state or sub-international organization law-making. See, e.g., BALAKRISHANA RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENTS, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); BOAVENTURA DE SOUSA SANTOS & CÉSAR RODRIGUEZ-GARAVITO, LAW AND GLOBALIZATION FROM BELOW (2005); JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 21 n.10 (2003).
114. Id. at 128.
strong likeness to the process of CIL formation. Nonetheless, she observes the traditional CIL doctrine and its attendant state-centric approach and concludes that the bottom-up law making she describes cannot therefore be CIL formation. For Professor Levit, because the actors engaged in this formation process are private actors – in some instances individuals – the process in which they are engaged cannot, by definition, be CIL formation.115

Rather than push against the state-centric approach to CIL, she opts instead to argue for the emergence of a new category of law or law making. In this way, Professor Levit appears to have adopted the sovereignty paradigm to which Professor D’Amato has referred.116 Some may observe that the phenomena Professor Levit describes may be distinguished from the processes with which this Article concerns itself. It might be said that her work observes and comments upon private international law or transactional law while this Article addresses paradigmatically public international law. However, Professor Levit herself argues quite persuasively that these classifications are not easily maintained, especially in light of her work.117 It might also be said that the rules set by the actors Professor Levit observes affect only the actors who create them, or at least only that type of actor (e.g., bankers generally), while CIL, and especially the CIL of human rights, affects all people everywhere. Again, Professor Levit herself would reject this distinction, as she aptly points out that the rules-come-law she describes have effects on people far beyond those who engage in making them.118

There are, however, key differences between Professor Levit’s bottom-up law making and the inclusion of individuals in the formation of the CIL of human rights. First, in at least some of the contexts she describes, the rules set by individuals and private actors have been recognized by adjudicating bodies as law.119 This is quite different from the current state of CIL. There is no identifiable precedent in which a court consulted the expectations or beliefs of individuals as to the content of the CIL of human rights. The second key difference is that the rule-makers featured in Professor Levit’s article are a very small set of people in comparison to the universe affected by their rules.120 This results

115. Id. at 130.
118. See id. at 131.
119. See id. at 128.
120. See id. at 131.
in a democratic deficit to which Professor Levit devotes considerable thought. In contrast, the inclusion of individuals in the CIL formation process would increase democratic participation in law making.

Most striking about Professor Levit’s article, however, is that the insights and motivations in observing a bottom-up approach to international law are very similar to those at work in this Article. It is fascinating that such work is being conceived in areas of international law that are traditionally seen as so dissimilar.¹²¹

The body of work discussed in this Section is rich and imaginative.¹²² Each, in some form or another, thinks beyond the exclusively state-oriented formulation of CIL. Perhaps the German Historical School’s position that opinio juris is the opinion of the people gave inspiration to the New Haven School’s realist observation that individuals currently do participate in CIL formation. It is certainly true that the New Haven School’s approach to international law and the observations made by its contributors regarding the participation of individuals in CIL, and international law generally, have provided valuable insights for Professors Chen, Paust, Gunning, and Levit, each of whom in turn provide their own very useful contributions to the current Article. Professors Chen and Paust further the realists’ insight that individuals already do contribute to CIL formation. Professor Gunning pushes for a role for NGOs and intergovernmental organizations. Finally, Professor Levit’s work observes private parties, including individuals, participating in “bottom-up law making” that is very much like custom formation, though in areas of trade finance.

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


¹²² It should be noted that this Section has likely not been exhaustive. There are related literatures that are highly relevant to the present Article. The proliferating literature on soft-law is one example. See, e.g., COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000). Thank you to Henry Steiner for this insight.
III. DOCTRINAL BASES FOR THE INCLUSION OF INDIVIDUALS IN CIL

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

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

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

1. Individuals as Subjects of International Law

States were once thought to be the only subjects of international law.123 In other words, states were thought to be the exclusive holders of rights and obligations under international law. If ever this assumption was a realistic description of international law,124 it no longer is. Rather, individuals have come to be recognized as the subjects of and participants in international law and as such are believed to possess rights and duties under international law.125

For some time, authors argued vigorously that individuals were the objects of international law.126 The view that individuals were mere objects of international law was the presiding understanding of the position of the individual.127 In essence, this view held that:

[F]irst, that the individual is not a subject or person of this law; that he has no rights and duties whatsoever under it or that he cannot invoke it for his protection nor violate its rules. Secondly, this doctrine predicates that, as object, the individual is but a thing from the point of view of this law or that he is benefited or restrained by this law only insofar and to the extent that it makes it the right or the duty of states to protect his interests or to regulate his conduct within their respective jurisdictions through their

123. See Restatement (Third) Foreign Relations Law of the United States, pt. II, introductory notes (1987) (“In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law.”); see also 1 Georg Schwarzenberger, International Law 140–41 (3d ed. 1957) (“[The] injured individual is merely the peg on which the State hangs its claim. It is the State which has been injured in the person of its subject. By asserting the claim of a subject, the home State demands respect for international law which has been violated by the injury inflicted on its national.”).

124. Some commentators have argued that states have never been the exclusive subjects of international law. Lung-chu Chen, for example, refers to this paradigm as the “Vattelian fiction” (referencing Emmeric de Vattel’s well-known dictum that an injury to an individual is an injury to that person’s state) and points to a number of examples to substantiate his position. For example, he states, “The transnational proscriptions of piracy, war crimes, and the slave trade, for example, were clearly directed to the individual.” Chen, supra note 85, at 77.

125. For arguments that the individual has become a subject of international law, see Edwin W. Tucker, Has the Individual Become the Subject of International Law?, 34 U. Cin. L. Rev. 341 (1965); Sean MacBride, Conference of European Jurists on “The Individual and the State,” 3 Int’l L. 603 (1969).


127. Id. at 428.
domestic laws. It predicates, further, that the individual as such, or as object, has no international right or claim against states to be made by them an object of their international rights and duties or to be treated by them according to international law once they have in fact made him an object thereof. Rather, it holds, the individual must look to states also in these respects. This theory maintains, thus, that men have no standing whatsoever as men in this law.\footnote{Id. at 428–29. This theory was widely accepted at the time of Manner’s article. In footnote 2 of his article, he provides ample citations for both express and tacit acceptance of this position.}

At the time that the object theory of the individual was established, it was such because “the very nature of international law necessitate[d] this view.”\footnote{Id. at 429.} By the early 1950s, the grounds for the object theory of the individual were significantly eroded and rested only on the circular argument that an individual is an object under international law because international law treats the individual as an object.\footnote{Id.} At this same time, a subject theory of the individual was increasingly advanced, mostly with specific reference to the fundamental shifts in the design of international law following World War II.\footnote{This theory was advanced even before World War II, on the observation that with respect to at least three groups of people—pirates, slaves and fishermen—international law incontrovertibly treated individuals as subjects of international law. See Philip Marshall Brown, The Individual and International Law, 18 Am. J. Int’l L. 532, 533–34 (1924). This editorial is a very early and strong critique of the state-centric power orientation in international law advanced by Bodin, Vattel and Grotius. Id. at 534. The majority of the literature regarding the status of the individual in international law, whether defending the object theory or observing a palpable shift to a subject theory, appeared after World War II. See, e.g., Aage Nørgaard, The Position of the Individual in International Law (1962), reviewed in 12 Int’l & Comp. L.Q. 1056 (1963).} This is in part because of the recognition, at least from the time of the Nuremberg Tribunals, that individuals also are bound by international law.

By the time the Restatement (Third) was drafted, it was widely acknowledged that the status of the individual had moved beyond that of mere object and was no longer akin to the status of rivers, cattle or real property.\footnote{Restatement (Third) Foreign Relations Law of the United States, pt. II, introductory notes (1987).} Individuals may now be seen as the subjects of international law, holding rights and obligations thereunder. Readers are now urged to recall a basic understanding of customary law doctrine: The essence of cus-
tumary law is that it is born from the conduct and beliefs of those whom it binds.

2. Individuals as Participants in International Law

While the debate about the proper status of individuals in international law has apparently settled, it is worth noting that underlying debates about the status of the individual are still relevant to the subject matter of this Article. For example, Rosalyn Higgins once suggested that the subject/object dichotomy is confusing in the context of international law. Rejecting the positivist school’s approach to international law as a set of rules, and building on the work of McDougal, Chen, and Lasswell, which views law as process, she argues that there are not objects and subjects in decision making processes. Rather, there are a variety of participants. “Individuals are participants, along with governments, international institutions and private groups.”133 Higgins observes that it is necessarily the case that individuals will only participate in processes that are relevant to individuals. As such, “they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to those presented by state participants.”134

Having ascended out of the status of object, the role of individuals has taken on significance and continues to be relevant. Much of this discussion has occurred using the conceptual thinking and terminology of the rights and duties of individuals. Some, however, have adopted the process-oriented approach of the New Haven School.135 In a robust analysis of the role of the individual in international law, this process-oriented approach is essential, as it allows both for thinking beyond the rights and obligations of the individual in the context of conflicts and for thinking about the various other functions in which individuals might participate.136

The roles individuals play in the intelligence, promotion, invocation, and appraisal functions are non-controversial and are of less importance to the central argument of this Article. The application function is largely within the ambit of adjudicators. Of particular interest for this

134. Id.
135. See id.
136. See supra note 80 for an elaboration of the seven functions in international law process articulated by Casswell, McDougal and Reisman.
Article, then, are the prescription and termination functions, which may be thought of as very similar, as they both relate to the making and unmaking of law.

3. Individuals and Prescription

a. Individuals and prescription by invocation

To the extent that the prescription function is influenced and affected by the invocation function, it is important to recognize that individuals may now enforce human rights law at the international and national level. Individuals may enforce human rights through domestic law, through constitutional provisions integrating human rights into a given country’s constitution, or through statutory mechanisms such as the Alien Tort Claims Act in the United States and universal jurisdiction statutes. Regional human rights systems provide for individuals to submit petitions and claims based on human rights violations. For example, in 2001, the European Court of Human Rights registered 13,858 applicants—so many, in fact, that the court’s ability to adequately handle legitimate claims was called into question. The Inter-American Commission and Court also allow petitions from individuals. Individuals also may now make claims based on human rights violations before non-regional international bodies. The United Nations accepts individual communications before four treaty bodies: the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), and the Convention Against Torture.

137. Colombia’s constitution, for example, provides individuals with the ability to make claims based on any constitutional rights, including those international human rights that have been incorporated thereby. See CONSTITUTION OF 1991 (Colom.).


b. Individuals and prescription in the area of treaty law

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

[A]ctive participation of NGOs in the development of new treaties and standards has always been and continues to be an important activity of NGOs. NGOs are frequently instrumental in the development and draft-
ing of human rights norms. Examples of NGO involvement in human rights standard-setting are plentiful and well documented. Often NGOs act as catalysts in the development of new human rights standards and participate actively throughout the preparation of human rights treaties…. In some bodies, participation of NGOs in standard-setting is a recognized practice….

Furthermore, it is neither the contention of this Article that NGOs actually make treaties, nor that NGOs are a perfect mechanism for the involvement of individuals in international governance. The relevant point is that individuals, through NGOs, have a formalized role in the treaty making process.

A recent example of individuals participating in setting standards in the UN system has been described by Professor David Weissbrodt. Professor Weissbrodt served as the principal drafter of the United Nations’ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In a recent article, he describes the process by which the norms were formed. Individuals, separate from NGOs, were among the participants in the consultation process that led to the creation of the Norms. The Norms are not yet and may not ever become treaty, but the process by which they were created is significant and is not at all unusual. Thus, especially in the area of human rights treaty making, individuals have had a formal, active, and direct role in standard setting and law making. Some may argue this has been the case from the outset.

153. See Marsiaj, supra note 149, at 59, 84.
c. Individuals and non-treaty prescription in other areas of international law

It also has been argued and demonstrated that non-state actors, including individuals, in other areas of international law participate in rule making in respect to their particular areas of interest. As discussed previously, Professor Levit has discussed three instances in the area of trade finance in which private actors make rules. In addition to making the rules, these actors also enforced the rules they participated in making.\footnote{154 See Levit, supra note 114, at 128.} While she takes the view that this rule making is not the same as making CIL, the rule making in which these actors are engaged does have the force of real law. Thus, in a distinct area of international law, the parties most affected by that law have a recognized and formalized role in creating the rules and law which matter to them.

Absent from accepted doctrine and even from the literature on CIL is a recognized role for the individual in the CIL formation process. Given the various locations where individuals do engage in the prescription function, this gap seems to be an uneven treatment of the law and of individuals. This Article will assert below that attention to this gap may help to alleviate some aspects of discord in CIL doctrine.

B. Human Rights Doctrine

1. Human Rights Doctrine is Oriented Toward the Individual

Perhaps more than in other areas of international law, including individuals in the making of the CIL of human rights is reasonable. The conceptual and legal shift within international law from a situation in which individuals were objects with no legal personality to a situation in which individuals are seen as subjects and active participants occurred in large part as a result of the creation of the human rights system and doctrine following World War II. As has been discussed previously herein, it is incontrovertible that individuals possess actionable rights under modern human rights law.\footnote{155 See supra Section III.A.} Individuals also participate in the making of standards, rules, and law in the area of human rights treaties. This is the only logical approach to individuals within a doctrine that is designed, in large part, to protect individuals from human rights violations that their own states may commit.
This orientation of human rights doctrine—an orientation that is necessarily cautious about the potential of states to commit all manner of human rights violations—inhertently recognizes that states will not always behave in accordance with the provisions found in the Universal Declaration of Human Rights, the ICCPR, the ICESCR, or subsequent human rights treaties, norms and declarations. This skepticism can be found in every admonishment to states to observe, protect, ensure, or otherwise provide their populations with the human rights enumerated in these various documents. It is partially for this reason that non-state actors have from the outset been granted consultative status within the United Nations on human rights matters. In such an atmosphere of skepticism toward states, it is odd at best that states would be left with the sole and exclusive domain over the creation of the CIL of human rights. This is especially so given that the skepticism toward states is perpetually proven to be warranted, as numerous state-perpetuated human rights violations occur annually.

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

The participation of individuals in the formation of CIL also potentially would challenge the volunteerist principle. Perhaps this would be the case, however, only in a confined universe of cases. In cases in which the expectations and beliefs of individuals are discernable and are found to have coalesced into custom, this information would be factored

156. E.S.C. Res. 1996/31, supra note 104.
157. The volunteerist, or consensualist conception of international law holds that in order to be bound by international law, states (traditionally the exclusive subjects of international law) must consent to be bound by that law. See generally O.A. ELIAS & CHIN L. LIM, THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW (1998). For a critique of the consent theory, see D’AMATO, supra note 39, at 187–99.
together with the traditional objective and subjective state elements in determining the content of CIL. Consider the following hypothetical examples.

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

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

Actual examples in which this might be the case are not difficult to imagine or come by. The current state of Myanmar (Burma) serves as an excellent example of a state that denies to its population the protection of human rights. Without more investigation, Myanmar is likely to serve as an exception that must be accounted for in any consideration of whether any given norm has become CIL. A large enough number of Myanmars, taken together, can serve to ensure that any given norm cannot be shown to have attained the requisite level of uniform acceptance to become custom. Under current CIL formation doctrine, this would be the result even if there is existing evidence that the people of Myanmar (or of the Myanmars of the world) have come to believe that they possess human rights and hold expectations that their human rights should be observed.

This is not merely a hypothetical situation posed for the purpose of illustration. The sitting government of Myanmar is signatory to no human rights treaties save CEDAW and the Convention on the Rights of the Child.\textsuperscript{159} Myanmar is also infamous for its ongoing violations of human

If a reviewing body were to look no further than the instance of Myanmar, it would have no choice but to see Myanmar’s words and actions as an example of a state where a given norm of human rights has not yet taken hold. For a large set of international law scholars, this would serve as evidence that the given norm may not be CIL. There is significant and mounting evidence, however, that the people of Myanmar believe they possess human rights and expect those rights to be protected. Under current CIL formation doctrine, this information cannot be considered, despite its obvious relevance.

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

This problem refers to the questions that arise when a state outwardly condemns a given practice or repeatedly signs on to human rights treaties, declarations, etc., prohibiting that practice while also engaging in actions that contradict their statements. For example, a state may condemn torture repeatedly while actively engaging in torture. The contradiction created by the conflicting actions and words may serve to denigrate or degrade the status of a norm against torture as prohibited by CIL. This is especially the case under the traditional view of CIL, which holds that only the physical acts of states count. It is, of course, plausible that the declarative acts of states and the opinions and expectations of individuals might well stand in agreement in condemning torture. Nonetheless, if individuals are not taken into account, and physical acts are given greater weight than declarative acts, then the continuing physical acts of torture by states may serve to denigrate a customary prohibition against torture. Again, this seems an odd result, especially in


161. There is currently a Burmese democratic constitution drafting process underway. The current draft of the constitution recognizes the rights of Burmese people under human rights instruments. Burmese Draft Constitution (on file with author). In addition, the well known Alien Tort Claims Act case between unnamed Burmese peasants and Unocal provides evidence that individuals within this country believe themselves to possess human rights that their state denies to them. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

162. For a recent discussion of this literature, see Guzman, supra note 43, at 116–17.

163. Id. at 152.

164. See D’AMATO, supra note 39, at 88. But see WOLFKE, supra note 16, at 84 (stating that all resolutions constitute acts of conduct and can lead to the formation of customary law).
an international order predicated on a commitment to democratic participation and one that aims to protect individuals from human rights violations.

2. Human Rights Doctrine Requires Information from Individuals as the Doctrine Evolves

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

Institutionalizing the inclusion of public opinion, after all, is among the rationales behind granting NGOs consultative status within the United Nations and also within the Council of Europe. The Council of Europe is very explicit about this rationale and states that “initiatives, ideas and suggestions emanating from civil society can be considered as a true expression of European citizens.” Commentators may do well to similarly include discussions of public opinion and expectation in their assertions that a given norm has coalesced into CIL. Reviewing bodies attempting to determine the content of CIL also may see the necessity of expanding their own competence to include peering through the veil of state sovereignty to ask about the beliefs and expectations of individuals in respect to human rights, rather than focusing solely on the behavior of states.

C. CIL Doctrine

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

167. Id.
Common criticisms of CIL include assertions that it suffers a legitimacy crisis.\textsuperscript{168} Ben Chigara has presented a very thorough accounting of the reasons for this crisis. In his view, the state practice + \textit{opinio juris} = CIL formula fails to describe the current international legal system. Chigara reminds us that Article 38(1)(b) was originally drafted in 1920 and integrated into the Statute of the ICJ without change in 1945.\textsuperscript{169} At the time the text was drafted, the state was the only recognized subject of international law. The volunteerist principle of international law was also largely unchallenged. Both of these essential premises of international law, however, have largely eroded since the text of Article 38(1)(b) was drafted.\textsuperscript{170} In arriving at this conclusion, Chigara points to many of the same factors already discussed in this Article, including the rise of the international human rights regime, the proliferation of NGOs and IGOs as international legal actors, and the creation of the International Criminal Court, as evidence that state sovereignty and state consent do not play the unique role they once did.\textsuperscript{171}

Given this fundamental change in conditions, Chigara argues that the twin-pronged approach of Article 38(1)(b) to CIL formation no longer fully represents the framework used in the decisions of the ICJ.\textsuperscript{172} He believes that the confusion surrounding CIL may be adduced as evidence that there are blind spots in the formulation, and in the interpretation of the formulation, of CIL. “These blind spots threaten the determinacy, coherence and legitimacy of customary international law.”\textsuperscript{173} As applied to the ICJ and CIL, Chigara seeks to examine whether the free play of the text\textsuperscript{174} of Article 38(1)(b) has contributed to the perceived legitimacy deficiencies in CIL.

The reader is urged now to recall the realists’ observation discussed earlier herein that individuals, in very real ways, currently participate in the formation of CIL.\textsuperscript{175} Although individuals currently do participate in CIL formation, the current text and/or interpretation of Article 38(1)(b) do(es) not allow the ICJ or any other reviewing body using the formulation provided by Article 38(1)(b) to outwardly recognize, acknowledge,

\textsuperscript{168} See Chigara, supra note 27.
\textsuperscript{169} Id. at 67.
\textsuperscript{170} Id. at 73.
\textsuperscript{171} Id. at 73–88.
\textsuperscript{172} See id.
\textsuperscript{173} Id. at 136.
\textsuperscript{174} The “free play of texts” refers to the Derridian idea that “often our use of language reveals that we mean more than we say, and also often say more than we mean.” Id.
\textsuperscript{175} See supra Section II.C.6.
or discuss this participation as relevant in their decision making process. This can result in a situation in which the ICJ has to engage in the free play of texts, thereby obscuring the true grounds for their decisions.

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

IV. \textbf{MODERN SOCIAL/PHILOSOPHICAL BASES FOR INCLUDING THE INDIVIDUAL: GLOBALIZATION, COSMOPOLITANISM, TRANSNATIONALISM, AND PARTICIPATORY DEMOCRACY}

A. \textit{Globalization}

The term “globalization”\textsuperscript{176} is a term used in many disciplines and discourses to describe a broad range of cultural changes that together create worldwide interdependence, interaction, and integration, and have allowed unprecedented connection between people.\textsuperscript{177}

Communication, technological development, rapid international transportation, and international law, especially in areas of trade and human rights, are all markers of and contributors to globalization. Globalization is felt as increased interdependence, a sense of living in a smaller world and a sense that what happens in one place has potential effects in a very distant part of the world. It is brought on not just by the

\textsuperscript{176} The term globalization has no agreed-upon definition. There is great debate about its meaning and content. See, \textit{e.g.}, PAUL HIRST & GRAHAME THOMPSON, \textsc{Globalization In Question: The International Economy and the Possibilities of Governance} (1996); PHILLIPPE LEGRAIN, \textsc{Open World: The Truth About Globalization} (2003); ROLAND ROBERTSON, \textsc{Globalization: Social Theory and Global Culture} (1992); SASKIA SASSEN, \textsc{Losing Control? Sovereignty in an Age of Globalization} (1996).

\textsuperscript{177} There is an important distinction between internationalization and globalization. See DAVID HELD ET AL., \textsc{Global Transformations: Politics, Economics and Culture} 52–58 (1999).
technological improvements made in travel, communications, and the media, but also as the result of the emergence of regional and global agreements and customs, especially when these agreements and customs create a consciousness of interconnectedness among people all over the world. ¹⁷⁸

A widely quoted definition of globalization is put forward by David Held and others as “a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power.”¹⁷⁹

It is this transformation of social relations that is most pertinent to this Article. It is precisely this “rapid growth of complex interconnections and interrelations between states and societies…along with the intersection of national and international forces and processes”¹⁸⁰ that present largely under-theorized problems for traditional democracy discourse.¹⁸¹

Traditional democratic theory has focused on democracy within the nation state and much less on the challenges that arise as a result of globalization and the attendant decline of state sovereignty. In the last decade, political theorists have begun to ask questions that have real significance for legal doctrine and process.¹⁸² The results have come in the form of fundamental re-thinking about the concept of citizenship

¹⁷⁸. The United Nations Sub-Commission on Human Rights said this about globalization in 2000:

From the information superhighway to the international trade in drugs and arms, to the phenomenal impact of MacWorld, Nike and the global media, the subject of globalization has come to concern all and sundry. At the core of most discussions of the issue is the extraordinary explosion of both technology and information, in ways that have considerably reduced the twin concepts of time and space. In particular, information and communications technology (ICT) has emerged as perhaps the most dominant force in the global system of production, albeit with significant ramifications in all other spheres of contemporary human existence.


¹⁸¹. Id.

¹⁸². David Held has articulated a sampling of these questions. Id. at x; see also Symposium, Democracy and the Transnational Private Sector, 15 IND. J. GLOBAL LEGAL STUD. (forthcoming 2008).
and the lock on citizenship and democracy enjoyed until recently by the state. This rethinking has resulted in a reemergence\(^{183}\) of a theory of cosmopolitan citizenship, cosmopolitan democracy, and “cosmopolitan democratic law”\(^{184}\) that draws into question the legitimacy of current frameworks for democratic law generally, especially given developments in international law that rely on notions of democracy and human rights.\(^{185}\)

Some legal scholars, including scholars of international law, long ago came to the conclusion that changes in international law and the changes brought on by globalization create a new condition – a new terrain for individuals: “In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case.”\(^{186}\)

B. Cosmopolitanism and Cosmopolitan Citizenship

In a previous writing, the author has presented initial thoughts on the emergence of a global community, not merely as a philosophical matter, but as a real phenomenon.\(^{187}\) Briefly, that article presents the work of social scientists and legal scholars that point to the emergence of a cosmopolitan community.

The identification of the emergence of a global community has led, in turn, to observations of an emerging global, or cosmopolitan, citizenship.\(^{188}\) Professor Linda Bosniak, for example, has concluded that emerging global identities exist and that viewing the activities pertaining to global identities as acts of citizenship is a choice toward further developing transnational identities.\(^{189}\)

---

\(^{183}\) As students of political philosophy will know, cosmopolitanism and cosmopolitan citizenship are not new ideas. Immanuel Kant was a great proponent of the idea of universal community and cosmopolitanism. See, e.g., IMMANUEL KANT, KANT: POLITICAL WRITINGS 107–108 (Hans Reiss ed., H.B. Nisbet trans., 2d enlarged ed. 1991).

\(^{184}\) HELD, supra note 177, at 270–71.

\(^{185}\) See id. at 99–121; see also James Crawford, Whewell Professor of Int’l Law, Univ. of Cambridge, Inaugural Lecture: Democracy in International Law (Mar. 5, 1993) (providing an insightful analysis of the effects of the development of international law on traditional notions of state sovereignty).

\(^{186}\) H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 63 (1950).

\(^{187}\) Ochoa, supra note 57, at 128.

\(^{188}\) See Linda Bosniak, Citizenship Denationalized, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

\(^{189}\) Id. at 489.
It is not the author’s view that individuals have become de-nationalized. Nation states will not disappear in the foreseeable future. Professor Ann-Marie Slaughter, for example, has argued convincingly that the nation state is strong and remains central and important, even after the assent of transnationalism and globalization.\textsuperscript{190} Rather, what is important to note is that individuals have added global or cosmopolitan identities to their already multi-leveled, or plural, political identities. The emergence of a cosmopolitan citizenship creates a new circumstance requiring a rethinking of the appropriate locations of citizen participation in government and governance.\textsuperscript{191} This context is relevant to the proposal that individuals should be included in the CIL formation process.

C. Transnationalism, the Subaltern, and Globalization from Below

Another highly relevant and connected social and political phenomenon is that which has been described and documented under a variety of names by scholars of the subaltern, such as Boaventura de Sousa Santos, César Rodríguez-Garavito,\textsuperscript{192} and Balakrishnan Rajagopal.\textsuperscript{193} This approach grasps the richness of globalization and seeks to see and study the activities of the “vast set of networks, initiatives, organizations, and movements that fight against the economic, social, and political outcomes of hegemonic globalization.”\textsuperscript{194} This set of groupings and activities is another face of globalization—the globalization that occurs outside of, and sometimes in reaction to, the neo-liberal and elite-oriented globalization.

Counter-hegemonic globalization and its attendant legal, illegal, and extra-legal activities (which take the form of cross border group formation, activism, rallies, protests, petitions, etc.) presents new and real op-


\textsuperscript{191} See Ochoa, supra note 57, at 136.

\textsuperscript{192} See LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César Rodríguez-Garavito eds., 2005).

\textsuperscript{193} See BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).

\textsuperscript{194} Boaventura de Sousa Santos, Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY, supra note 192, at 29.
opportunities to include the beliefs and expectations of individuals from all sectors of the world in respect to human rights.

D. Participatory Democracy

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

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

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

195. For a more comprehensive set of the questions raised, see HELD, supra note 180, at ix–x.
196. Interested readers may find a somewhat expanded articulation of these connections in a forthcoming article by the author. See Christiana Ochoa, The Relationship of Participatory Democracy to Participatory Law-Formation, 15 IND. J. GLOBAL LEGAL STUD. (forthcoming 2008).
197. See ROUSSEAU, supra note 2. Although Rousseau is often credited with the theory of participatory democracy, the Athenian model was one of direct democracy. Montesquieu and Machiavelli are also cited as having elements of this theory in their writings. See POLITICAL PHILOSOPHY: THEORIES, THINKERS, CONCEPTS 358 (Seymour Martin Lipset ed., 2001).
V. OPERATIONALIZING THE INCLUSION OF INDIVIDUALS

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

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

The second question asks what should be measured. This Article uses the terms “belief” and “expectation” to indicate what it is about individuals that one would seek to ascertain when seeking to determine the content of CIL. It uses these terms tentatively, however. There are various meanings for the term “expectation,” for example, and these must be explored. Also, there are other elements in respect to individuals that may be apt evidence of custom formation.

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

A. Including Individuals: Textual Change or Statutory Interpretation?

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

Article 38 of the Statute of the International Court of Justice sets out the sources of international law as follows:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.199

On the evidence of international law, Section 103 of the Restatement provides that:

2. In determining whether a rule has become international law, substantial weight is accorded to:
   a. judgments and opinions of international judicial and arbitral tribunals;
   b. judgments and opinions of national judicial tribunals;
   c. the writings of scholars;
   d. pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.200

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

cluded from addressing, the expectations of people among other considerations, especially in compelling cases.

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

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

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

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

Proposal by Baron Descamps:
“[I]nternational custom, being practice between nations accepted by them as law.”

Amended text submitted by Mr. Root:
“[I]nternational custom, being recognized practice between nations accepted by them as law.”

Proposals presented by the President (Baron Descamps) and Lord Phillimore, as amended by Mr. Ricci-Busatti:
“[I]nternational custom as evidence of common practice among

---

202. Id. at 344.
said States, accepted by them as law."  

Root-Phillimore Plan:

"International custom, as evidence of a common practice in use between nations and accepted by them as law."  

Text proposed by Drafting Committee, of a draft scheme for the establishment of a Permanent Court of International Justice:

"[I]nternational custom, as evidence of a general practice, which is accepted as law." (This version is of particular relevance since it is here that all reference to states and nations disappears from the formulation of CIL.)  

Text adopted in first reading:

"[I]nternational custom, being the recognition of a general practice, accepted as law."  

Draft-Scheme:

"[I]nternational custom, as evidence of a general practice, which is accepted as law."  

Final text adopted by the committee:

No change.  

Present Text of Subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice:

"[I]nternational custom, as evidence of a general practice accepted as law."  

The rules of statutory interpretation arguably cut in favor of an interpretation that the "general practice" to which Article 38(1)(b) refers can, may, or does include states as well as other actors. Anyone ambitious

203. Id. at 351.
204. Id. at 548.
205. Id. at 567. It is both fascinating and frustrating that the Proces-Verbaux of the Proceedings of the Committee includes neither discussion of the reasons for this change nor the arguments surrounding it, if any were made.
206. Id. at 666.
207. Id. at 680.
208. Id. at 730.
enough to take up that position, however, should be aware that it would require strong modifications to significant quantities of well established commentary on Article 38(1)(b) that has held an exclusively state-centric view as a central assumption.  

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

This is not to suggest, of course, that the Restatement might not be worded quite differently in its next incarnation. The Introductory Note to Part II of the Restatement alludes to significant changes in international law that were only starting to take hold in the legal imagination at the time it was finalized in 1987. It recognizes that while it had historically been assumed that individuals

were not persons under (or subjects of) international law…[i]n principle…individuals…can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals…have been accorded such aspects of personality in varying measures.

This note is particularly provocative in light of the manner in which individuals were regarded under the 1967 Restatement Second. In the twenty years between 1967 and 1987, individuals moved from being treated largely as objects to being recognized as subjects of international law. It is not a far stretch to imagine that in drafting the next Re-

210. Little attention has been given to the state-centric assumption. The basic premise of this assumption is the volunteerist view which holds that the international legal system is consensual vis-à-vis states. See supra note 158.
211. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added).
212. Id. at pt. II, introductory note (emphasis added).
213. It may be of interest to compare the language of these two Restatements. Restatement (Second) states:

f. Rights of individuals under international law. International law imposes upon states duties with respect to individuals. Thus, it is a violation of international law for a state to treat an alien in a manner which does not satisfy the international standard of justice under the rule stated in § 165. However, in the absence of a specific agreement, an individual does not usually have standing to complain of such a violation before an international tribunal. Generally, it is the state of which he is a national that has the standing to bring the complaint. Moreover, the state of nationality may usually decide whether to exercise the right. For example, under the rule stated in § 73, a diplomatic representative is immune from the exercise of the jurisdiction of the state to which he is accredited. The state that he represents may, however, waive this immunity. International law does not prohibit states from granting to individuals rights which
statement, the American Law Institute will recognize that the status of individuals has shifted in significant ways since the 1987 Restatement Third. In fact, the phenomena of globalization, cosmopolitanism, and transnationalism described only briefly herein (but much more thoroughly in other venues and by other authors) has largely come to be described, analyzed, and understood only since 1987.

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

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

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

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

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

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

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

C. Determining Public Opinion

In determining CIL, courts have relied on “international agreements; domestic constitutions or legislation; executive orders, declarations or recognitions; draft conventions or codes; reports, resolutions or decisions of international organizations; and even the testimony or affidavits of textwriters.”214 It is not required that every item on this list be included in such determinations, nor that any one source or set of sources be given preference over the others. The difficulty of assessing state practice and the \textit{opinio juris} of states necessitates flexibility in this respect.

In making determinations about the content of CIL, courts and commentators attempting to assess public expectation similarly would do well to look at a number of sources. As in the states-only context, it is unlikely that every item discussed herein would be useful or necessary in every determination and it is also unlikely that any source or set of sources should consistently be given preference over the others. Rather, a rich array of potential sources of evidence would be necessary in order to allow for the “process of continuous interaction, of continuous demand and response” among those engaged in the law formation process.215 This Section will discuss the use of General Assembly Resolu-

---

214. Paust, \textit{Customary International Law}, supra note 92, at 70–72. Paust provides a lengthy set of footnotes detailing cases in which each of these sources have been relied upon.

215. Credit for the concept of the call and response nature of CIL is granted to Myres McDougal. He described this call and response as a process which allows for the reciprocal tolerances that lead to the expectations that power will be exercised in some uniform pattern. \textit{See} Myres McDougal, \textit{The Hydrogen Bomb Tests and the International Law of the Sea}, 49 \textit{Am. J. Int'l L.} 356, 357–58 (1955).
tions, NGOs, litigation, and public opinion polls of evidence about the beliefs and expectations of individuals in respect to human rights.

1. General Assembly Resolutions

Professor Paust has put forth a proposal of how public opinion might be assessed for the determination of custom.216 In his view, General Assembly resolutions are the most apt sources for the collection of evidence about public opinion. He is not the first to take the view that the actions of the General Assembly are useful in any attempt to arrive at world public opinion.217 Professor Chen has referred to such resolutions as potentially “a new institutional mode by which the peoples of the world can clearly communicate expectations of authority and control.”218 While somewhat doubtful of such a utopian characterization of General Assembly resolutions, this Article agrees that such resolutions can be useful points of information. This position seems in keeping with the intent of the Restatement, which calls the evidentiary value of the resolutions of international organizations “variable.”219 Still, when resolutions of universal organizations are “adopted by consensus or virtual unanimity”220 they ought to be given “substantial weight.”221

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

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

217. See, e.g., United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 1946-1949, 3, 979 (1950) (“The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact.”), quoted in Paust, Customary International Law, supra note 92, at 75 n.28.
218. CHEN, supra note 85, at 364–65.
219. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. c (1987). The Statute of the ICJ does not mention such resolutions in its list of sources for evidence. This is largely believed to be due to the fact that the Statute was drafted before resolutions of international bodies took on their current importance. Id. at § 103 cmt. c, Reporters’ Note 2.
220. Id. at § 103 cmt. c.
221. Id. This is the standard employed by the Restatement for use of the work of universal organizations as evidence of law.
ple and that somehow the actual vote reflects what would have been a weighted voting pattern based on population numbers.\footnote{Paust, \textit{Customary International Law}, supra note 92, at 75.}

Each resolution of the General Assembly, taken alone, is not sufficient in determining what individuals have come to believe are their rights such that they should be recognized as CIL. It would be an odd result if it were otherwise, and any resolution of the General Assembly became CIL. Rather, a consistent and sustained pattern of General Assembly resolutions, showing some degree of consensus (if not uniform agreement), should be required. Professor Paust agrees with this proposition: “When one can identify a series of such resolutions through time, one can also rightly assume that such preferences or expectations are relatively stable within a given period and if they are matched with generally conforming behavior, one has evidence of a relatively stable customary norm.”\footnote{Id; see also \textit{RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES} § 103 cmt. c (1987).}

In its 1996 Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ similarly stated:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an \textit{opinio juris}. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an \textit{opinio juris} exists as to its normative character. Or a series of resolutions may show the gradual evolution of the \textit{opinio juris} required for the establishment of a new rule.\footnote{1996 I.C.J. 226, 254–55, para. 70 (July 8).}

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

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

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

Other authors, even those who might favor expanding the participants in the CIL formation process, have objected to this approach. For example, Professor Mertus has made clear her skepticism about the ability of NGOs to represent people democratically, well, or accurately. Professor Charlsworth has also noted her skepticism of including NGOs in the CIL formation process, though on grounds that seem to apply equally well to state and non-state actors. Her objection is that including non-state actors would have the effect of “generating weak norms on a wide-variety of topics.” Indeed, there is a non-intuitive observation to be made in the space between the objections of Professors Mertus and Charlsworth.


227. Id. at 230–34.
228. See supra note 105 and accompanying text.
Professor Gunning’s well-meant proposal to certify a relatively small (though perhaps unpredictable) number of NGOs to serve in consultative roles for the purpose of CIL formation is unworkable. Limiting the universe of NGOs qualified to participate in providing information about individuals’ expectations and beliefs will raise questions almost immediately about the delineations between those NGOs certified as competent to provide information and those not certified as competent. Some questions may require the expertise of large, international NGOs while others may require the insights of smaller, domestic organizations. Some may require the advice of NGOs with expertise in a particular subject, while others may require a whole different knowledge base and approach. The exclusionary process of certification will and should give rise to the skepticism raised by Professor Mertus. Maintaining an open process, which allows for the participation of a wide base of civil society, is a better approach. This more open approach should satisfy the concerns raised by Professor Charlsworth as well.

It should at no point be forgotten that the process in which individuals are to be included is one designed to assist in determinations of what constitutes CIL. In order to achieve the status of CIL, it must be shown that there is sufficient uniformity of views about a given norm, such that it can be said to have become custom. If there is not sufficient uniformity, a norm cannot possibly be customary law. In order to employ NGOs as proxies for individuals, such that they can convey the expectations and beliefs of individuals, it is necessary to include many different kinds of NGOs, broadly defined. To do otherwise would run afoul of legitimate and real concerns expressed by Spivak and others regarding the trend toward western hegemonic representation of people’s beliefs. A broad inclusion of civil society is the more advisable approach when opening and formalizing a path for bottom-up law making.

Even with a broad view of these potential proxies for individuals, it is necessary to keep in mind that in many (if not most) cases, this ap-

230. After all, such a norm may express the aspirations of many without having become custom.
231. Gayatri Chakravorty Spivak, Can the Subaltern Speak?, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988). Spivak’s essay warns that the subaltern are not a heterogeneous group. Thus, any assumption of solidarity among the subaltern will run into inevitable problems. First, it will create a new and deepened assumption that the subaltern are a singular collective group. Second, among the subaltern, it will create a dependence on western scholars to speak for them, rather than assuring routes to speak for themselves.
approach, taken alone, likely will not provide information sufficient to determine the content of CIL.

3. Empirical Data

a. Human Rights Litigation

This Article has discussed already the relatively recent ability of individuals to initiate litigation or other proceedings on the grounds that their human rights have been violated. Litigation of this nature can serve as a source of information about both the rights that individuals have come to believe are theirs and the rights which they expect to have protected, promoted, or enforced.

The complaints and petitions received by international tribunals and national courts are valuable pools of information regarding the content of people’s expectations and beliefs. Such claims may be based in treaty or in custom and this variation, of course, may make clear analysis of the utility of such claims difficult at times. Nonetheless, empirical data about these claims will be valuable. Information regarding the content of these complaints, the norms being called into play, the number of complaints based on any particular norm, and the broad or narrow geographic origins of the claims can serve as very useful information from individuals regarding whether a given norm has attained the level of custom.

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

232. This ability is recent relative to the creation of the Statute of the ICJ and the era in which the object theory of the individual and the volunteerist principle in international law were paradigmatically accepted.
233. See supra Section III.A.
234. The author has presented this idea previously, arguing that litigation under the Alien Tort Claims Act (ATCA) serves as an unusually “pure” source of such information, given that ATCA litigation must be based on a claim that the law of nations, or CIL, has been violated. See Ochoa, supra note 57, at 124.
This Article does not propose that a small number of petitioners or plaintiffs would, through their litigation, grant to a future adjudicator the power to declare a norm to have become CIL. Rather, precisely because the project before the adjudicator would be to determine if the norm has in fact become custom, only a relatively large number of claims, with broad geographic origins, expressing very similar views about the norms claimed by the petitioners or plaintiffs would serve as evidence that a particular norm may have become CIL. In the absence of these characteristics, litigation or petitions alone would be of only little value, and scholars or adjudicators making an analysis of the status of a norm in the public opinion would do well to look to other sources as well.

b. Public Polling

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

Since the Statute of the ICJ was drafted, the emergence and growth of the public opinion poll has been one of the greatest developments of research into public opinion. The global spread of the internet has created a previously unthinkable ability to attain data on a broad number of topics. This Article is by no means an attempt to encapsulate this history or the importance of this development. Rather, this Article discusses two very relevant examples of projects that illustrate the viability and potential utility of large scale polling for the purpose of assessing beliefs, expectations, and practices.

---
A project called Eurobarometer has been in place since 1973. It is made up of a number of public opinion surveys performed regularly for use by the European Commission.236 The goal of Eurobarometer is to aid the European Commission in assessing “the evolution of public opinion in the Member States, thus helping the preparation of texts, decision-making and the evaluation of its work.”237 The surveys and studies “address major topics concerning European citizenship: enlargement, social situation, health, culture, information technology, environment, the Euro, defence, etc.”238 Among its projects, Eurobarometer performs qualitative studies which “investigate in-depth the motivations, the feelings, and the reactions of selected social groups towards a given subject or concept.”239

Similarly, an international group of political scientists has founded a collaborative survey research project that measures public opinion on democracy in eighteen African countries.240 Through native language personal interviews with a broad cross-section of the population of a number of African countries, this group of political scientists has arrived at groundbreaking data and has made accessible previously unknown information about public sentiment.241 There are similar barometer projects in Latin America,242 Asia,243 and East Asia.244 All of these “barometer” projects have collaborated and agreed to methodologies that will allow the various barometers to be compared with one another. This project is called Globalbarometer.245

Although it does not appear that any of the barometer projects have taken on the role of attempting to directly assess public opinion in re-

237. Id.
238. Id.
239. Id.
240. This project, called Afrobarometer, attempts to track public sentiment and changes therein over time. For information about this project and its methods, see Afrobarometer Africa Public Opinion Research, at http://www.afrobarometer.org (last visited Apr. 22, 2007).
241. See MICHAEL BRATTON ET AL., PUBLIC OPINION, DEMOCRACY AND MARKET REFORM IN AFRICA (2005) (using the data collected through the Afrobarometer project to describe what large numbers of ordinary Africans believe and expect about democracy and market reform).
spect to CIL or even any given norm, the salience of these projects to the proposal contained herein is remarkable and bears further investigation.

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

4. Other Potential Approaches

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

CONCLUSION

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

In 1949, shortly after the adoption of the Statute of the ICJ, the United Nations General Assembly’s International Law Commission commissioned a memorandum meant to assess the materials one might consult in attempting to determine the content of CIL.247 Submitted

246. The barometers are currently oriented toward determining public opinion with respect to issues of democracy and the market. The barometers thus indirectly provide information with respect to human rights that are particularly relevant to civic participation such as freedom of speech and assembly. This could already be of use, for example, in attempts to determine the customary or non-customary content of some civil and political rights.

247. The Secretary-General, Ways and Means of Making the Evidence of Customary International Law More Readily Available, delivered to the General Assembly International Law Com-
sixty years ago, it is a rudimentary report, listing the available documents produced by various states that could serve as sources of evidence of the actions and *opinio juris* of states. The short list of potential sources of evidence for assessing the beliefs and expectations of individuals provided and discussed herein is even more rudimentary than this report, but it can serve as a starting point to larger discussions on how individuals can be included in CIL formation.

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

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

This is important to remember because readers may feel uncomfortable with the proliferation of sources required by including individuals in CIL formation and the variety of methods presented herein for determining public opinion. They would do well to remember that the very nature of CIL determinations is indeterminate. This proposal would not

---

248. *Byers, supra* note 45, at 211.
muddy an otherwise clear and well-established methodology. This is not to say that it might not make CIL determinations slightly more complex. It may, and this is a serious and legitimate concern. It is at least arguable, however, that the risk and increased costs that might result are outweighed by the increased legitimacy brought to determinations of the content of CIL and, thereby, to CIL itself.