Research Paper

Governance beyond the State: Delegating Law-Creating Power to Private Actors and Rethinking Authorities in International Law-Making

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Abstract

The traditional approach to international law granted states an absolute monopoly in making international law and it discussed the rights and powers of states as a sole subject of international law. However, the proliferation of norms made by non-state actors raises questions with regard to the status of the actors as well as the legitimacy of the norms in the international fora, while it also challenges the state-centric orientation of international law. In consideration of the foregoing, customary law—whichwas traditionally comprised of two state-based elements of practice and *opinio juris*, as an important source of international law—has been faced with a strand of inquiry: can non-state actors generate international customs? Through 1) an in-depth survey of scholarly arguments regarding law-making in certain circumstances that could also belong to private parties; and 2) a close examination of the *lex mercatoria* as an example of existing international customs developed by non-state actors, this article tries to clarify a) the legitimacy crisis of a more inclusive approach to international law and b) proposes opportunities whereby non-state actors could participate in the law-making process.

Keywords: Customary International Law, Individual participation, Interactional theory, Legitimacy crisis, State-centric doctrine

1. Introduction

In the nineteenth century, international law developed as a discipline by philosophers and theologians mostly to "provide guidance to monarchs in their international intercourse and to provide a framework for trade and some constraints on war" (Brunnée & Toope, 2010, p 2). The traditional narrative of international law grants states an absolute monopoly in making international law. In this view, "international law is primarily a law for the international conduct of states, and not their citizens … [and] the subjects of the rights and duties arising from international law are states solely and exclusively" (Jennings & Watts , 1996, p 16). Individuals then are rendered as a mere object of international law:

> [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 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 (Jennings & Watts , 1996, p 16).

The state-centric doctrine, likewise, notes customary international law (CIL) as the oldest source of law that is state oriented. Discussions on CIL often begin with the Statute of International Court of Justice (ICJ) that introduces custom as a means by which international law is formed. Article 38 of ICJ sets out the sources of international law:

> 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 (Statute of the International Court of Justice, 1945).

According to the Statute, therefore, customary law is to be derived from the "general practice of states." The International Law Association has provided the following working definition of customary international law:

> (i) Subject to the Sections which follow, a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.

(ii) If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law". Subject to Section 15, such a rule is binding on all States (International Law Association, 2000).

Some aspects of the ICJ's notion of the application of Article 38(1)(b) are reflected by its decision in the *North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G v. Netherlands)*. In light of these statements, CIL is purely state centric and is comprised of two elements: state practice and *opinio juris*. The first element, which is called objective, refers to the consistent and general practice of states while the second one, the subjective element, observes whether a particular practice is derived from a sense of legal obligation (D'Amato, 1971).

However, the proliferation of private actors challenges the institutional aspect of international law. The emergence of actors such as transnational corporations in the investment sector, for instance, raises questions not only about how to engage private parties in the law-making process but also about whether the nature of norms in international law should be differently conceptualized. Moreover, the goal of great powers' domination over the law-making process also confines the role of non-state actors in customary law formation to develop soft norms without legal effects. Since CIL was thought to have originated from the actions and beliefs of those whom it later comes to bind, the limited role for individuals raises concerns that the traditional formation of CIL lacks legitimacy to describe the current international legal system and to embrace the emergence of new international entities.

These questions require me to examine CIL from a new perspective that seeks to justify the expansion of the domain of international subjects in order to include non-state actors and

introduce a different set of legitimacy criteria to create a sense of legal obligations out of what initially started as non-binding standards.

The debate on a more inclusive framework for CIL formation is reflected in abundant scholarships to the extent that, in its relatively recent draft on the foundations of CIL, the International Law Association declares:

> A rule of customary international law is one which is created and sustained by the constant and uniform practice of States *and other subjects of international law* in or impinging upon *their international legal relations*, in circumstances which give rise to a legitimate expectation of similar conduct in the future (International Law Association, 2007, p. 719). [Emphasis added].

From this standpoint, scholarly arguments over the decades have focused on whether individual entities could launch international claims against another subject of international law. However, the focus of this paper is on how the activities of such entities and their expressed views can also be part of the process of creating international customs in both theory and practice.

That in turn requires following a two-step methodological approach which comprises of:

1) an in-depth survey of scholarly arguments that believe the law-making may in some circumstances also ow to private parties, and
2) a close examination of existing international customs that are developed by non-state actors.

This article contributes to the work of McDougal, Lasswell, and Reisman and investigates the law-making role of non-sate actors in the field of commercial law. In Section 2, I delve into the existing

literature which argues that, if non-state actors have formulated a corporate code of conduct in a soft form, the code can become not only a precursor for but also a catalyst of CIL. This is due to the increasing role of non-state actors accompanied by the changing normative landscape within which the definition of CIL has been operationalized for the longest time.

The second step of the case study in this article provides a critical analysis on the normative aspects of the *lex mercatori* in the field of commercial international law. Section 3 is more pragmatic whereby I examine how globalization has doubted the efficiency of state regulations in the field of commercial international law and elaborate on the contemporary law-making process for commercial activities that gives testimony of an emerging legal regime characterized pertaining to the legal nature of its non-binding norms that have been developed by non-state actors.

This two-step methodological approach will enable me to:

1) elaborate on the legitimacy crisis of a more inclusive approach to international law, through the section titled "Theoretical framework: Legitimacy Crisis", and
2) propose opportunities whereby non-state actors could participate in the law-making process, through the section titled "Practical Avenues: Individuals Participation in CIL".

2. Literature Review

Globalization is defined by Held and McGrew 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" (Held & McGrew, 2000, p 54). It emerges as a result of not only technological improvements

but also international agreements and customs that create a global community with a consciousness of interconnectedness among people all over the world. The identification of the global community then let, in turn, to observe the global activities of individuals as acts of global citizenship that represent a choice toward cosmopolitan identities (Bosniak, 2000). The rise of cosmopolitan identities motivates legal scholars to re-evaluate the status of individuals in international governance and examine their participatory role in the CIL formation process.

The chronological development of the field of international lawsuggests that theliterature expanding the domain initiated with the work of McDougal, Lasswell, and Reisman as the leaders of the New Haven School in confirming the participatory role of individuals in CIL formation. In "The World Constitutive Process of Authoritative Decision", they demonstrate seven roles that might be played by individuals in decisional processes related to international law (McDougal et al., 1967).[1] One year later, in

1. The process-oriented approach of New Haven School not only goes beyond the rights and obligations of individuals in international disputes, but about the various other participatory functions they might play in international law:
   a. Intelligence is the obtaining, processing, and dissemination of information (including planning).
   b. Promotion (or recommendation) is the advocacy of general policy.
   c. Prescription is the crystallization of general policy in continuing community expectations.
   d. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
   e. Application is the final characterization of concrete circumstances according to prescriptions.
   f. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
   g. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and the responsibility therefor [sic] (McDougal et al., 1967, p. 261)

"Theories About International Law: Prologue to a Configurative Jurisprudence", they explain challenges raised by individuals "locked out" of the international decision-making process:

> Most of us are performing...decision roles without being fully aware of the scope and consequences of our acts. … Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawnlike political impotence, of being locked out of effective 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 (McDougal et al., 1968, p. 193).

An Introduction to Contemporary International Law: A Policy-Oriented Perspective is the second important corpus of writing that observes the participatory role of individuals in the decision-making process that affects and determines value systems such as human rights (Chen, 1989). In this book, Chen writes that in the current structure of international law, "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 governments" (Chen, 1989, p. 80). With regard to CIL formation, he notes that "[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" (Chen, 1989, p. 80). In this statement, Chen deviates from the traditional approach of CIL and undertakes a more realistic assessment of the actual participants in international customs. In accordance with the New Haven School, Chen goes beyond the subject-object dichotomy in international law and expands the domain of international subjects to include individuals. He then argues that individuals are actively participating in international law-making and have a demanding voice to legitimately participate in CIL formation, given the prominent role of states in international decisions.

One step further, Paust refers to the already existing participatory role of individuals in CIL making, with a view that 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" (Paust, 1995, p. 147). He believes that the subjective element of CIL should be evinced in shared legal expectations among humankind, not exclusively among nation-states. This belief

is defined in "Customary International Law: Its Nature, Sources, and Status as Law of the United States":

> The expectations of all human beings ("mankind", "the world", "the people") are not only relevant [to CIL] but they also provide the ultimate criteria 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 (Paust, 1990, p. 62).

"A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments", is another piece of scholarship that relates directly to the project at hand (Levit, 2005). Levite, in this article, examines the rule-making process of the Uniform Customs and Practice for Documentary Credits (UCP), which—although developed by private actors within the financial sector and congealed into hard law—it is now applied by courts in the United States and elsewhere to decide in letter-of-credit cases.

The foundational literature reviewed herein provide an in-depth exploration on the participatory role of individuals in CIL formation. However, it lacks both 1) a theoretical analysis on non-state-based norms that could be transformed into CIL and 2) a thorough consideration of how individual participation can be operationalized practically in developing CIL. In the following chapters, I make my contribution to this line of scholarly arguments

by using interactional law theory as a theoretical framework with a more inclusive approach to international law-making process. I also seek to expand the above-mentioned literature by proposing avenues whereby non-state actors could acquire participatory roles in law making.

3. The Lex Mercatoria

The participatory role of individuals in CIL formation can be seen in the field of commercial law where merchants began to introduce their general commercial customs, the *lex mercatoria,* to determine the applicable law in resolving contract disputes (Goode, 1997). As Corte articulates "the *lex mercatoria* is a transnational expression of one source of law: customary law" that is developed through repetition of coherent practices over a certain period of time, in particular international commercial contracts (Corte, 2012, p. 346).

In the 1960s the *lex mercatoria* was primarily revived as "an informal and flexible net of [commercial] rules" in the form of commercial conducts (Michaels, 2007, p. 448). Later on, with the rapid development of international trade as well as the growing importance of foreign investment flow, in the 20th century, the new *lex mercatoria* moved "from an amorphous and flexible soft law to an established system of law with codified legal rules... and strongly institutionalized court-like international arbitration" (Michaels, 2007, p. 448). Therefore, owing to practical, economic, and political reasons, the *lex mercatoria*-- which initiated in the forms of local commercial conducts-- ultimately evolved into a transnational commercial custom with a capacity of being applied in commercial dispute resolutions.

The autonomous and private legality of the *lex mercatoria* has raised an academic debate over its legal nature in resolving transnational commercial disputes. Opponents of the *lex mercatoria* deny its legal character due to the lack of legislators to draft international commercial laws as well as lack of international commercial courts to develop a precedent for international commercial disputes. Advocates, however, maintain that the *lex mercatoria* does exist, or can be sufficiently ascertained, to provide transnational legal principles to govern commercial transactions. Julian Lew, for instance, notes, "[t]his system of law comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade" (Lew, 1978, p. 436). Berman elaborates on the universal recognition of the *lex mercatoria* and confers "[t]he integrity of the new system of mercantile law, that is, the structural coherence of its principles, concepts, rules, and procedures, derived mainly from the integrity and structural coherence of the mercantile community whose laws it was" (Berman, 1983, p. 354).

The consensus in the commercial practices of merchants and their coherent customs induce arbitrators to apply the *lex mercatoria* as "alternative solutions to avoid the application of national law to their transactions" (Rodriguez, 2002). The reason behind avoiding the application of national law to their transactions is explained by Steinhardt where he explains that the *lex mercatoria* is created by merchants to meet the expectation of the relevant business community:

> One determinant of a merchant's sustained prosperity was his ability to conform to the expectations of the market, which were formalized only over time into law; there were concrete commercial consequences for any merchant insufficiently

> committed to the abstract standards of good faith that underlay the pragmatic doctrines in the law merchant. When internalization failed and disputes did arise, they were typically resolved by the merchants themselves through mercantile councils and guilds or through informal, expeditious forms of mediation and arbitration- not by professional judges in the formal setting of a courtroom. When a dispute became sufficiently serious or prolonged that the local courts became involved, the law that governed was - directly or indirectly - what the merchants had themselves adopted to facilitate ethical and uniform trade practices (Steinhardt, 2008, p. 947).

Accordingly, parties to an agreement are allowed to subject their dispute to a rule of transnational law in international arbitrations. "This understanding is based on the observation that, in practice, a number of arbitral tribunals have applied transnational law to the merits of the disputes submitted to them, i.e. they have applied *lex mercatoria* as the 'law' governing the contract" (Petsche, 2014, p. 491). For instance, in a 1995 decision, the International Chamber of Commerce tribunal applied "what is more and more called *lex mercatoria*" on the grounds that "the application of international principles of law offers many advantages" and "takes into account the particular needs of international relations" (Berman, 1983, p. 345).

This observation reveals how a consistent practice of non-state actors could result in the emergence of CIL and then legitimize its application in resolving commercial disputes. Investigating this example in which individuals effectively participate in the law-making process is prudent to illuminate the legitimacy of a non-state-based approach to international law.

4. Theoretical Framework: Legitimacy Crisis

Even if the above literature review and the case study of the *lex mercatoria* demonstrate the participatory role of individuals in international law, the legitimacy of CIL developed by non-state actors is still unclear . As, observers such as Chigara note, that the legitimate rules of international law should embrace the emergence of new international entities (Chigara, 2001), and the legitimacy crisis arising from critiques of CIL is a logical place to discuss whether CIL doctrine needs to accept the participatory role of individuals in the law formation process. In this context, I use interactional theory initially discussed by Fuller (Fuller, 1969) and then enriched by Brunnée and Toope (Brunnée & Toope, 2010) as a theoretical framework for a more inclusive approach to international law-making process. The interactional theory is of paramount importance to uphold the legitimacy of CIL raised out of non-state actors' practice.

The interactional theory highlights that a legitimate rule of law ought to have roots in the conducts and beliefs of those whom it later comes to bind. This process-oriented theory captures how international law depends upon shared understandings, upon diversity, upon criteria of legality, and upon congruent practice in international society. Communities of practice should exist in international settings, such as the trade and environment areas, wherein various actors including state and non-state participants interact to build shared understandings (Adler, 2005). Adherence to the criteria of legality could then promote a sense of obligation among actors and foster compliance with their joint enterprise. Ultimately, these legal norms should be preserved by means of continuous practice of legality in order to develop a legitimate rule of interactional international law.

The prominent factor in law-making is "[the] perception of a rule as legitimate by those to whom it is addressed" (Franck, 1988, p. 712). Legitimacy "accommodates a deeply held popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied" (Franck, 1995, p. 7). In the interactional account, known as a theory of obligation, legitimacy is built primarily through communities of practice and broad participation in constructing collective social norms. The legitimacy of the social norms is enhanced when they substantially satisfy the criteria of legality. The legal norms should then be upheld through a continuous practice of legality in order to increase the legitimacy of the day-to-day application of the norms.

Firstly, to guide human interaction, international law must be raised from shared understandings. *Communities of practice* provide a setting wherein actors sustain their mutual engagement and generate social norms that later become structures to "shape how they perceive themselves and the world, how they form interests and set priorities, and how they make arguments or evaluate others' arguments"(Brunn ZOTERO_ITEM CSL_CITATIO). Wenger compares this setting to a constitution, which is "empty without the participation of the citizens involved", but which at the same time "is crucial to the kind of negotiation that is necessary for them to act as citizens, and to bring together the multiple perspectives, interests, and interpretations that participation entails" (Wenger, 1998, p. 62). The concept of growing normativity reveals that without the mutual interactions among social actors, formal norms cannot simply impose social influence. Adler also notes that although it does not aspire to create a deep value coalescence, communities of practice should engage various actors and "cut across state boundaries and mediate between states, individuals,

and human agency, on one hand, and social structures and systems, on the other" (Adler, 2005, p. 15).

Secondly, since international law does not have roots in a hierarchy of rules, its existence depends "on effective interaction and cooperation between citizens and lawmaking and law-applying officials" (Postema, 1999, p. 260). What follows is that the interaction theory of law considers a diversity of participants due to the necessity of *reciprocity* in creating rules of law. This reciprocity grounds that legal obligations can exist only when all actors interact to construct shared understandings. Besides the engagement of various actors, communities of practice should accommodate diverse priorities. As Adler stresses, the "joint enterprise of members of a community of practice does not necessarily mean a common goal or vision", but that members "must share collective understandings that tell [them] what they are doing and why" (Adler, 2005, p. 22). It means a deep engagement in diversity and robust interaction would bring together state and non-state actors to create shared understandings on basic objectives. However, legal understandings alone do not make law and it is only when the criteria of legality are met and embraced by a community of practice, that legal obligations emerge.

Thirdly, to maintain reciprocity among actors, social norms should reach a threshold of legal normativity through fulfilling the criteria of legality. Legal norms must be general: actors are prohibited, required, or permitted to adopt certain conducts. They must be promulgated: actors know what the law requires. They should be prospective: actors take rules into account in their future decision making. They must be clear: actors understand what is permitted, prohibited, or required. They should not be contrary: actors are not required, permitted, or prohibited to do contrary

conduct at the same time. They should not demand the impossible: actors can realistically do certain conducts. They should be constant: actors are continually required to do constant conduct. Finally, they should be congruent with officials' conduct: actors could acknowledge congruency between legal norms and the actions of official agencies. The criteria of legality are not just a checklist for the existence of legal norms; rather, international actors must know that adhering to them means engaging in an ongoing practice of legality.

Fourthly, in the interactional account, a sense of legal obligation or fidelity to law is generated by the requirements of legality and is then upheld by the *practice of legality*. This account views international law-making as an enduring challenge that is shaped and maintained via ongoing struggles of social practice. It is "the work of its everyday participants, a continuous effort to construct and sustain a common institutional framework to meet the exigencies of social life in accordance with certain ideals" (Winston, 1999, p. 63). This theory suggests that fulfilling the requirements of legality is important to produce shared understandings. Nonetheless international law would emerge only when the practice of legality persists and fuses shared understandings. Law can guide self-directed human interactions if it is not raised out of only shared understandings but also anchored in stable patterns of expectation between the governed and the governing bodies. Postema refers to this idea as the congruence thesis, emphasizing that "legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society generally" (Postema, 1999, p. 24). Hence, law deviation from the common practices and shared understandings of society makes it unintelligible to its subjects. And when implemented rules

are irrelevant to states' practice and other international actors' behavior, fidelity is destroyed.

This four-step process introduced by the interaction theory "acknowledge[s] that law-making and compliance are not radically distinct. Rather, they are points on a continuum of legal interaction" (Brunn ZOTERO_ITE 2010, p. 98). Indeed, international obligations will be built through the law-making process as do the foundations for compliance. Like obligations, compliance is not simply expected from willing or unwilling recipients; rather it is fostered mostly via interactive practices of legality. The self-binding influence of interactional obligations cannot be posited. However, their principles should show a quite good congruence with shared understandings, fulfill the criteria of legality, and represent a practice of legality in order to cultivate the sense of obligation that pulls towards compliance.

In turn, enforcement is not merely a method for imposing compliance with the existence of interactional law. Rather, it constitutes a part of the practice of legality where interactional law sustains. In interactional law, enforcement is "an expression of the intention of international society in advance of any actual breach of a norm to punish the breach through the use of some form of force ... It is the promise and the reality of collectively imposed punishment" (Brunn ZOTERO_ITEM CSL_CITATION). Accordingly, enforcement measures, similar to compliance mechanisms, must be embedded in the shared understandings and the practice of legality. Furthermore, the absence of enforcement could be indicative of a lack of congruence between international norms and social understandings. Thus, in law-making, paying attention to the prerequisites for interactional obligations builds the foundations for law's compliance pull and enforcement measures.

Through the lens of the interaction theory, compliance mechanisms and enforcement measures are not outcomes produced by legal norms, but part of the continuing process of making legitimate international law. When a posited law is consistently undermined by actors without legal consequences, the law is compromised because the community of practice recognizes that the declared rule is hypocritical. Enforcement and compliance, therefore, matter here not because the force is peremptory for law-making, but because compliance is necessary, and enforcement can support or diminish compliance.

5. Practical Avenues: Individuals Participation in CIL

Similar to the state-centric approach, non-state-based CIL is also comprised of two elements: beliefs/ expectations and conduct/actual behavior. Operationalizing the participation of individuals in CIL formation requires opinion-evidence sources to determine the beliefs and expectations of individuals. Expectations refer to what individuals come to normatively expect from states regarding the ways in which they ought to behave. Beliefs here are similar to the notion of *opinio juris* and are utilized to explain individuals' beliefs about how states and other entities ought to behave as a matter of law. Individual practice is the second element in CIL determination. Additionally CIL will be derived from the conduct and actual behavior of individuals in conjunction with their beliefs or expectations.

In traditional CIL, courts mostly rely 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 text writers" to determine state practice and *opinio juris* (Paust, 1990, p. 70). In the context of individual participation, looking at a rich array of opinion-evidence sources is necessary to understand the ongoing interaction, demand, and response among individuals for creating CIL (McDougal, 1955). For instance, General Assembly resolutions, non-governmental organizations (NGOs), litigations, and public opinion polls could be used by courts to make claims about individuals' beliefs and expectations.

5. 1. General Assembly Resolutions

In discussing how public opinion could be assessed, a number of scholars refer to the General Assembly resolutions as a useful point of information. Paust, for instance, considers General Assembly resolutions to be the most proper source for the collection of evidence about the beliefs and expectations of individuals. Chen also notes that such resolutions have the potential to be "a new institutional mode by which the peoples of the world can clearly communicate expectations of authority and control" (Chen, 1989, p. 364). However, each resolution is not sufficient in determining individuals' rights that should be recognized as CIL. In order to bear "substantial weight", "a consistent and sustained pattern of General Assembly resolutions, showing some degree of consensus (if not uniform agreement), should be required" (Ochoa, 2007, p. 178). Paust clarifies this proposition by stating that, "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" (Paust, 1990, p. 75). The ICJ also emphasizes the

importance of consensus in granting normative value to the General Assembly resolutions:

> 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 *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 opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule (*Legality of the Use or Threat of Nuclear Weapons [1996] ICJ*, n.d., p. 254 para.70).

Although General Assembly resolutions could determine the content of CIL, there are some cases in which the widely adopted resolutions cannot be indicative of international customs.

5. 2. Non-Governmental Organizations

The proliferation of individuals in most areas of international law, in particular, commercial law leads to a suggestion that they could be included in the customary law formation through their consultation and advice. Gunning makes a similar argument with regards to the consultative role of individuals in international affairs; she notes that "[a]s these groups mobilize widespread support," they need to be involved in the CIL creation process (Gunning, 1990, p. 222). The United Nations Charter also allocates a formal consultation role to NGOs in General Assembly resolutions. As Caroline E. Schwitter Marsiaj writes:

> [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 drafting of human rights norms. Examples of NGO involvement in human rights standard-setting are plentiful and well documented. Often NGOs act as catalysts in the development of new human rights standards and participate actively throughout the preparation of human rights treaties... In some bodies, participation of NGOs in standard-setting is a recognized practice (Marsiaj, 2004, p. 24).

To include NGOs as a proxy for the beliefs and expectations of individuals, various NGOs should be incorporated and the sufficient consistency of views about a given norm must be shown. However, even with a broad view of NGOs participation, in many cases, this approach will exclusively fail to determine the content of individual-generated CIL.

5. 3. Litigations

The recent ability of individuals to initiate litigation before international/national tribunals on the breaching of their human could be used as a source of information about their beliefs and expectations. Although variation amongst such complaints makes their analysis and then their use in the CIL process difficult, Ochoa notes that "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" (Ochoa, 2007, p. 181). Thus, although adjudicators should determine whether a norm has become CIL based on claims they receive, only specific types of claims that are large in number,

broad in geographic origins, and analogous in views could indicate that a particular norm may have become custom. In the absence of such characteristics, adjudicators should look into other sources as well in order to make an analysis about the status of a norm.

5. 4. Public Opinion

Public opinion is another evidence of the beliefs and expectations of individuals. But how to drive public opinion is a persistent question in disciplines outside of law. Civil and common law approaches, for example, are relatively detached from public opinion and strongly rooted in stipulating rules and procedures. In this way, however, customary law would be uniquely beneficial in deciphering public opinion on whether a particular norm should become CIL.

6. Conclusion

The traditional approach to international law grants an absolute monopoly to states to develop the rules of international law. However, the proliferation of non-state actors' international fora has challenged this state-centric orientation and proposes a more inclusive approach which enables non-state actors to participate in the customary international law-making process. Despite the fact that customary law is an important source of international law, there are inherent difficulties in determining whether non-state actors may generate international customs.

In light of an in-depth survey of scholarly arguments initiated by the New Haven School towards the participatory role of non-state actors in the law-making, this article examines how individuals

acquire subjective status in developing the *lex mercatori* to become an international custom in resolving commercial disputes. The interactional theory then has been discussed in this article to address the legitimacy crisis which was the main confrontation between non-state-developed international customs and the traditional approach to international law through a four-step law-creating process. Operationalizing the participation of individuals in CIL by means of General Assembly resolutions, NGOs, litigations, and public opinion is also discussed to identify opinion-evidence sources to determine what individuals have come to believe and expect their rights to be.

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