

## Methodological Individualism

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Tamar Megiddo\*

*International law, we are taught, is the law made by states to govern their relations. Unsurprisingly, international law scholarship has traditionally embraced a corresponding methodological statism. Despite common perceptions, statism remains dominant: at most, elite non-state actors are studied alongside states. This article advocates a turn to “constructivist methodological individualism”: a commitment to studying the making, interpretation, implementation, development and breaking of international law by ordinary, individual people, together with the reciprocal engagement of international law with them.*

### INTRODUCTION

It seems almost tautological that academic study of international law is most commonly explored and interpreted as a matter of inter-state relations. According to the dominant view, international law is the law entered into by states and which governs their relations and their actions as a direct result of their sovereign consent to be bound by it.<sup>1</sup> Without discounting this view, this article argues nevertheless that scholarly research of international law must aim to study not only how international law figures in the relations between states and in the actions of states but also, as a central methodological commitment, explore how it is made, implemented, interpreted, developed, or broken by ordinary, individual people.

The We Are Still In coalition in the United States is a collectivity of businesses, universities, cities, faith groups, tribal communities and others who have vowed to cut their greenhouse gas emissions to the extent needed to compensate for the Trump administration’s expected failure to meet the United States’ undertaking under the Paris Agreement on climate change. Combined, their economic activity accounts for half of the United States’ economy and is equivalent to the world’s third-largest economy and fourth-highest generator of pollutants. If these actors deliver on their promise, the United States will find itself in compliance with its undertaking, notwithstanding President Trump’s opposition to the Agreement. The imaginary mirror-example is equally illustrative: suppose an equivalent coalition of cit-

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\* Research Fellow, TraffLab Research Project, Tel Aviv University, Buchmann Faculty of Law. I thank Yael Lifshitz, Mor Mitrani, Yuval Shany, Sivan Shlomo-Agon, and Moran Yahav for their comments on earlier drafts, as well as Miriam Streng, Elad Uzan, and fellows of the Zvi Meitar Center for Advanced Legal Studies at the Tel Aviv Faculty of Law. All errors are mine. All rights reserved. Do not copy without the written permission of the *Harvard International Law Journal*.

1. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., (ser. A) No. 10, at 18 (Sept. 7).

izens, groups and businesses decided to block the efforts of an administration committed to upholding its undertaking under the Paris Agreement. In both examples, individual actors, including many who hold no formal office, have a significant influence over whether, and the extent to which international law will be implemented in a particular context. Therefore, individuals, groups and businesses may, in a manner distinct from their states, contribute to shaping the everyday life of international law. This is the ontological observation on which this article's methodological proposal builds. Of course, the state is hardly an insignificant actor. But it is not the only relevant actor. As suggested by the We Are Still In movement and by other examples addressed in this article, studying the practice of international law by the state alone would render a highly partial description and understanding of international law.

Methodological statism entails a commitment to study states as the sole or primary actors of international law. This Article claims that an exclusively statist methodological outlook constrains and distorts academic research of international law by obfuscating the significant contribution that individuals make to the practice of international law. It submits that individuals' contributions to the practice of international law is distinct from the practice of international law by states. Moreover, individual actors are often motivated by their individual interests, ideology or values, as distinct from the motivations that may be attributed to their states. For this reason, their contributions to the practice of international law merits independent scholarly exploration. Under-representing their practice in the field's scope of research constrains scholarly investigation of an important engine of developments of international law, and, as a result, our understanding of it.

The Article therefore develops and defends a methodological approach to the study of individual people's contributions to the everyday working of international law. Dubbed "*constructivist methodological individualism*" ("CMI"), this approach stands on three pillars: first, a commitment to viewing individuals as the most basic social unit and as the root of social norms, institutions and ideas, including law. At the same time, second, a view of society as influencing individuals and shaping individuals' ideas, beliefs and actions. Third, a commitment to a dialogical view of the social life, recognizing the interaction between each individual and society.

When applied to international law, constructivist methodological individualism entails studying the making, implementation, interpretation, development and breaking of international law (all of which I shall hereinafter collect under the umbrella term of "the practice of international law") as ultimately carried out by individual people. Importantly, such individuals are not necessarily political leaders or elite actors, but also, potentially, any ordinary, private individual. At the same time, this approach recognizes that individuals are also influenced and shaped to a great extent by their social surroundings, which include international law. A third simultaneous meth-

odological commitment is therefore to recognize the reciprocal flow of influence between individuals and international law.

This approach's central focus on individual agents and their capacity to influence, and interact with their social circumstances merits its conceptualization as individual. Its recognition of the reciprocal influence between society and social structure and individuals renders it constructivist. It aims to trace, specifically, the causal paths of influence between the person and international law. Finally, it is methodological due to its focus on the form, or process, of social occurrences, rather than on any specific content or event.<sup>2</sup>

The Article critiques international law scholarship for underplaying the significance of non-state actors, and particularly individual persons in the practice of international law. It identifies the literature's actual limited attention to individuals with a surprisingly persistent methodological statism. As I show, although many have assumed that the field has left statism behind together with other old-school realist perceptions, this has not been the case. Instead, even scholars working with a liberal approach to international law, namely, who aim to take a particular focus to individual people in the context of international law cannot be said to have adopted an approach akin to CMI. This is the case in two respects. First, as Andrew Moravcsik explains, liberal scholars of international law try to give bottom-up explanations, seeking to identify how international law is influenced by people. Second, they often make efforts to explain how people influence states' preference formation, and such preferences, in turn, are assumed to explain states' behavior at the international sphere.<sup>3</sup> These scholars therefore remain interested in explaining the preferences of states, and a particular causal direction: from individuals to the state, rather than also considering the direct engagement and influence of international law on individuals.

Similarly, prominent constructivist scholars have explained state behavior as a product of social learning processes that states undergo and peer pressure to which states are subject.<sup>4</sup> These scholars have identified the relevant

2. See Georg Simmel, *The Problem of Sociology*, 6 ANNALS AM. ACAD. POL. SOC. SCI. 52, 54 (1895) [hereinafter Simmel (1895)]; Georg Simmel, *The Problem of Sociology*, 15 AM. J. SOC. 289, 295 (1909) [hereinafter Simmel (1909)]. It is worth noting that some have opined that Simmel seems to confuse his discussion of the relationship between the individual and society on the ontological and methodological levels. See Kurt H. Wolff, *Introduction in GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL* xxviii (Kurt H. Wolff trans., 1950); see also LARS UDEHN, *METHODOLOGICAL INDIVIDUALISM: BACKGROUND, HISTORY AND MEANING* 76–77 (2001).

3. As Andrew Moravcsik explains, "the critical quality of liberal theories is . . . that they are 'bottom-up': states and international law are perceived to be influenced and shaped by actions of domestic and transnational actors. Andrew Moravcsik, *Liberal Theories of International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 83, 87 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). However, as Moravcsik concedes, liberal theories can only serve as a "first stage," explaining only the distribution of states' underlying preferences but not their choice of specific legal norms or international law's compliance pull, tasks that such scholars leave to other theories. *Id.* at 91.

4. See, e.g., John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 879 (1998); RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES* 38 (2013); Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT*

social sphere as composed only of state actors and overlooked the contributions to international legal life by non-state actors. Although not all constructivists exhibit such statism, central writers defend it forcefully.<sup>5</sup>

The Article discusses some notable exceptions in the scholarship and suggests building on them to develop a better understanding of individuals' contributions to the everyday life of international law. It notes, however, that although important scholarly works have recognized the contribution of certain non-state actors to the practice of international law, such recognition has often been confined to a limited cache of individual actors: state officials, such as judges<sup>6</sup> or central bankers,<sup>7</sup> or non-governmental organizations' ("NGO") activists.<sup>8</sup> Other individuals have not been equally accounted for. Think of factory owners, religious leaders or migrant workers; as I suggest in this article, each and every one of us is a potential contributor to the practice of international law.

The Article engages with a variety of empirical examples which serve a double role: they are brought, first, to illustrate what it would mean to apply CMI to international law and, second, to showcase the ostensible dividends of doing so. I describe and analyze various international legal processes in which individuals take part, and which would not be noticeable or appreciable without scaling down to the individual level. As these examples demonstrate, the dividends of applying CMI in research of international law include underscoring the agential capacity of individuals in their engagement with international law. CMI enables, further, to expose this engagement between international law and individuals as reciprocal, revealing causal links that are bottom-up as well as top-down. In addition, as I explain below, CMI is intrinsically called-for by a lawyerly perspective to the study of international law, since law is inherently connected to the humanity of its subjects. Finally, CMI demonstrates that every individual is potentially a participant in the everyday practice of international law.

The Article proceeds as follows: Part I provides a critical overview of international law literature, demonstrating its methodological statism. Part II discusses the concept of methodological individualism and develops the proposed approach of constructivist methodological individualism. It also discusses what the application of this approach to international law entails. Part

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POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 3, 13–21 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 902–03 (1998).

5. See, e.g., ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 9 (1999); Ruggie, *supra* note 4, at 879.

6. See, e.g., Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009).

7. See, e.g., Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006).

8. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

III provides a number of empirical examples of individuals' contributions to the practice of international law. A conclusion follows.

## I. THE PERSON IN INTERNATIONAL LAW SCHOLARSHIP

The role of ordinary people in the practice of international law has been underappreciated by the academic scholarship on international law. As this Part shows, even when non-state actors, individuals and organizations, have been the subject of scholarly examination, their practice has often been studied as a proxy for understanding state action. Research has, furthermore, often been confined to particular kinds of non-state actors and thus missed the larger picture in which each and every one of us is a potential participant in the practice of international law.

### A. *Statism and Compartmentalization*

The literature's under-appreciation of individuals' practice of international law is closely connected to its statism, although such statism is usually methodological rather than ontological. Ontological statism is the perception according to which states are the sole, or primary actors of international law. Methodological statism entails that states alone warrant scientific investigation. However, methodological statism does not necessarily stem from ontological statism. In fact, for many scholars, statism is a methodological choice but not also an ontological position, and many even actually implicitly hold some version of ontological individualism.<sup>9</sup> Methodological individualism, too, is implicit in certain strands of the scholarship. Nonetheless, as I now show, methodological statism is widespread and it is prevalent among scholars working with widely differing theoretical approaches. Moreover, I argue that this is the case for canonical authors, texts and schools of thought that have not been traditionally understood to espouse such a position. It is therefore suggested that these texts should be reappraised in light of their methodological statism.

The scholarship's methodological statism can be traced, at least in part, to the prevalence of interdisciplinary research of international law. For the past several decades, international law scholarship has drawn extensively, and increasingly on the social sciences. This is due, to a great extent, by non-

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9. Note, however, that in International Relations (IR) literature on international law, statism is so fundamental that the term "methodological individualism" is sometimes used to connote a methodology that focuses on individual states (and contrasted with focusing on the state society or international political structures). See, e.g., Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 *WORLD POL.* 324, 326, 341–42 (1998) (reviewing MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter Katzenstein ed., 1996); AUDIE KLOTZ, *NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID* (1995)).

lawyers' increasing interest in international law.<sup>10</sup> In addition, on some occasions, lawyers have joined hands with scholars from other fields in interdisciplinary study of international law.<sup>11</sup> On other occasions, lawyers who have also trained in other disciplines relied heavily on these additional disciplines.<sup>12</sup>

The academic research of international law as a socio-political phenomenon has been particularly dominated by the perspective of International Relations (IR) scholars and IR, by definition, studies the relations between states. One could, perhaps justifiably, protest that IR, as a discipline, could hardly be blamed for underplaying individuals' contributions to the practice of international law. Its premise is that states compose the particular society in which international law operates and are the relevant units of analysis. It is thus not unreasonable for IR scholars to dedicate much of their attention to states. Yet, as Jeffrey Dunoff and Mark Pollack argue, the collaborative project of IR/international law research will benefit from a greater intellectual balance between the disciplines.<sup>13</sup>

Without discounting the considerable academic value of interdisciplinary research on international law, it is important to recognize that, for the most part, the field has adopted the perspectives and methodologies of extra-legal disciplines.<sup>14</sup> Often, this has meant that theories originally developed to explain human behavior in human society are replicated unto an international background where the person is replaced by a state and the society and domestic legal system are replaced by the international society of states and international law. This is often done without offering a justification for why such move is valid.<sup>15</sup> As a result, the human person is eliminated from view and the state is championed as the central object of interest.

Methodological statism is reflected in at least four choices made by scholars of international law. First, in the choice of the state as the sole or primary unit of analysis. Second, in the acceptance of the division of international law and politics into two spheres of action: the national and the international. Third, in the pervasive selection of the international level as the level

10. See generally Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L. L. 47 (2012) (reviewing the field of political science research on international law).

11. Lawyers have most commonly collaborated with political scientists or international relations scholars: one could mention Jeffrey Dunoff (law) and Mark Pollack (political science); Jutta Brunnée (law) and Stephen Toope (IR), or Eyal Benvenisti (law) and George Downs (political science).

12. See, e.g., GOODMAN & JINKS, *supra* note 4. Both are trained lawyers and sociologists.

13. See Jeffrey L. Dunoff & Mark A. Pollack, *Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 3, at 626, 627, 649–53.

14. See Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 3, at 3, 10.

15. But see David A. Lake, *The State and International Relations*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 41, 42–46 (Christian Reus-Smit & Duncan Snidal eds., 2008) (discussing possible justifications).

of analysis. Finally, fourth, it is evident in the scholarly use of individual people's practice or positions as a proxy for state action or policy as opposed to factors that are relevant for international legal practice in their own right.

Addressing states as the primary unit of analysis often translates into personifying them and discussing their value systems, beliefs, reasons for action, interests and so on. However, as Max Weber has observed, while it may be convenient to address social collectivities as individual persons, only individuals "can be treated as agents in a course of subjectively understandable action."<sup>16</sup> In other words, we must, at the end of the day, reckon with the fact that states are legal and political constructs whose values or beliefs are mere proxies or generalizations.

Furthermore, IR literature often divides the international social and legal system into two separate spheres: national and international. This division echoes the oft-referenced "two-level game" metaphor.<sup>17</sup> One problem with such compartmentalizing is the consequent denial of the fluidity and depth of interconnectedness between the two levels. The two spheres are in fact not mutually exclusive nor are they easily separable zones of activity.

In addition, scholars have often chosen to break a particular piece of the puzzle and study it in isolation from the others. Often, this has been done by confining their description and analysis to a single level of analysis. As I explain in the next Section, some IR schools have elected to study the international level of analysis, and another has focused on the domestic level. Both camps, however, have been particularly interested in the state. The former schools studied how the state, as an agent, is affected by the social context in which it operates, the state system. The latter regarded the state as a structure constituted by sub-state agents. By maintaining such methodological compartmentalization into different levels of analysis and by privileging the state as a unit of analysis, the scholarship implicitly accepts and prescribes methodological statism, since the division into spheres is built around states which are perceived as the exclusive axis of influence. This division itself should therefore be called into question.

The literature is vast and a thorough overview is beyond the limited scope of this article. Nonetheless, in what follows, I strive to cover a range of approaches and writers that represent its diversity.

### *B. International Law Literature: A Critical Review*

For IR scholars working with a realist approach, a focus on states is a core tenet and a central assumption.<sup>18</sup> States are assumed to be unitary actors,

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16. MAX WEBER, *ECONOMY AND SOCIETY* 13 (Guenther Roth & Claus Wittich eds., 1978).

17. This metaphor was introduced by Robert Putnam, although he actually used it in order to show the strategic use that states make when alternating between the two spheres. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

18. See, e.g., Richard H. Steinberg, *Wanted – Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 3, at

their internal dynamics of little importance for studying their behavior internationally.<sup>19</sup> It does not follow that realist scholars deny, for instance, that people act on behalf of states. Even Hans Morgenthau, a prominent realist, speaks of statesmen as those navigating states,<sup>20</sup> and acknowledges their freestanding motives, ideological preferences, and potentially irrational behavior. But he thinks that researching these factors is “futile and deceptive” for they are illusive and easily distorted, and cannot be shown to correlate with foreign policies.<sup>21</sup> He presumes, instead, that statesmen will distinguish between their “‘official duty,’ which is to think and act in terms of the national interest, and their ‘personal wish.’”<sup>22</sup> Similarly, although Kenneth Waltz admits that states are not in fact unitary, purposive actors, he defends the assumption that they are such actors as useful in explaining international politics.<sup>23</sup> In other words, both defend methodological statism.

These statist assumptions, prevalent in the now much less popular school of IR realism also extend to contemporary realist-flavored accounts dealing more specifically with international law.<sup>24</sup> Jack Goldsmith and Eric Posner, for instance, cast a rational, interest-maximizing state as the lead actor in their theory of international law. While they do take into account the interests of certain individuals—political leaders—these serve as proxies for explaining state action.<sup>25</sup> Richard Steinberg similarly defends realist statism.<sup>26</sup> He acknowledges that one limitation of realism is that it offers no explanation for the formation or change of state interests.<sup>27</sup> Yet, while he recognizes that individuals interact with international law, including, for instance, judges interpreting and applying international norms, he denies that they are able to make a significant impact on international law and politics.<sup>28</sup> The consequence is a realist commitment to the state as the unit of analysis and to the international level as the level of analysis, in addition to a choice not to consider the domestic sphere or individual people as pertinent for scholarly investigation of international law.

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146, 148; EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919-1939* 226–27 (1949); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 4–12 (Kenneth W. Thompson ed., 1985); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* 94 (1979); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4 (2005); JOHN J. MEARSHEIMER, *The False Promise of International Institutions*, 19 *INT'L SECURITY* 5, 10–13 (1994).

19. See WALTZ, *supra* note 18, at 118.

20. See MORGENTHAU, *supra* note 18, at 5–6; GOLDSMITH & POSNER, *supra* note 18, at 7.

21. MORGENTHAU, *supra* note 18, at 5–6.

22. *Id.* at 7.

23. See WALTZ, *supra* note 18, at 118–19.

24. See Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 *INT'L SECURITY* 5, 6–8 (1999) (arguing that realism's theoretical core and theoretical distinctiveness have been undermined by contemporary realists who have sought to complicate its account and ended up subsuming traditional counterarguments); see generally Steinberg, *supra* note 18 (discussing scholars' dislike of realism, and defending it as a useful tool for positive analysis of international law).

25. See GOLDSMITH & POSNER, *supra* note 18, at 4–6.

26. See Steinberg, *supra* note 18, at 158, 160.

27. See *id.* at 166; see also ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* 17 (2008).

28. See Steinberg, *supra* note 18, at 162.



However, methodological statism is by no means limited to realists. As Barbara Koremenos explains, institutionalist authors also identify states as central actors and are agnostic to domestic dynamics and to how or why states formulate their preferences:<sup>29</sup> their interest is in explaining the rational design of international law through inter-state cooperation.<sup>30</sup> While institutionalism is not at odds with the liberal theories that do study the domestic arena, the two approaches address “two distinct sets of questions,” with liberalism exploring states’ formation of preferences while institutionalism assumes that states have “a set of given preferences, taking these as the starting point.”<sup>31</sup>

What is perhaps more surprising is that prominent IR constructivist theorists also manifest such statism and compartmentalization.<sup>32</sup> Constructivists “focus attention upon the role that culture, ideas, institutions, discourse, and social norms play in shaping identity and influencing behavior.”<sup>33</sup> When applied to individuals in society, constructivism explains the mutual constitution of people and social structure.<sup>34</sup> When applied to the international legal system, one would expect that in addition to investigating states’ construction by international social structure and their state peers, such theories would also account for processes driven by individual actors, contributing to constructing not only states but also international reality.<sup>35</sup> However, while they acknowledge that states are indeed shaped to a large extent by domestic processes (ontologically), influential IR constructivist accounts maintain a strict methodological commitment to states as the sole actors of interest.<sup>36</sup> Alexander Wendt explicitly affirms sharing realist assumptions, including a “commitment to states as units of analysis.”<sup>37</sup> John Ruggie seeks to “problematize the identities and interests of states and to show how they have been socially constructed,”<sup>38</sup> but rejects the neo-liberal turn to domestic politics for doing so. Instead, he emphasizes the role of international (namely, inter-state) interaction in generating state

29. See Barbara Koremenos, *Institutionalism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, *supra* note 3, at 59, 69, 74; see also ROBERT O. KEOHANE, *AFTER HEGEMONY* 245 (1984); ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27 (1995).

30. See Koremenos, *supra* note 29, at 61–62.

31. *Id.* at 69.

32. See Alexander Wendt, *Constructing International Politics*, 20 *INT’L SEC.* 71, 72 (1995); see also Ruggie, *supra* note 4, at 879.

33. Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, *supra* note 3, at 121.

34. See Checkel, *supra* note 9, at 326.

35. See *id.* at 344.

36. See ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 9 (1999).

37. Wendt, *supra* note 32, at 72. Defending this choice, he says: “it makes no more sense to criticize a theory of international politics as ‘state-centric’ than it does to criticize a theory of forests for being ‘tree-centric.’” WENDT, *supra* note 36, at 9. In fact, even without any expertise in forestry, it seems plausible to think that study of other plants, insects and animals ought to be considered a cardinal part of the forest’s ecosystem.

38. Ruggie, *supra* note 4, at 879.

identity.<sup>39</sup> Hedley Bull too champions states as the central actors in his vision of *The Anarchical Society* of states.<sup>40</sup>

Methodological statism and compartmentalization are also found in accounts proposed by constructivist lawyers. Take, for instance, Ryan Goodman and Derek Jinks, both lawyers with training in sociology. They explore the socialization of states and stipulate that states are their primary target of interest.<sup>41</sup> Although they express their appreciation of the importance of the sub-state level, the theoretical account they propose allocates little theoretical weight to individuals and to sub-state dynamics. In their account, individuals serve only as agents of states, and moreover as mere receptors of exogenous input.<sup>42</sup> Individuals' role in this model is limited to serving as the axis through which international law influences states.

Fortunately, there are exceptions to the literature's methodological statism: accounts that have conceptualized the role of non-state actors in shaping their own states' policies and even the international legal system more generally. These theories are sometimes characterized as "disaggregationist."<sup>43</sup> They pierce the sovereign veil and explore the actions of groups, organizations and individuals, or coalitions of such actors in international law and international politics.<sup>44</sup> Disaggregationist scholars normally embrace more or less loosely liberal or constructivist theoretical approaches. They may emphasize, for instance, as Charles Kegley does, that state motives and interests may change;<sup>45</sup> or study, like Anne-Marie Slaughter, Beth Simmons or Martha Finnemore and Kathryn Sikkink, the various courses of action taken by government officials and NGO activists in order to apply pressure on governments to change their policies and comply with international norms.<sup>46</sup> These scholars have also investigated transnational epistemic communities in which officials and non-officials liaise and collaborate with peers in other countries to promote compliance with international norms.<sup>47</sup> Fur-

39. See *id.* at 879. Cf. KECK & SIKKINK, *supra* note 7, at 2–3, 29–32; Finnemore & Sikkink, *supra* note 4, at 896 (discussing "norm entrepreneurs").

40. HEDLEY BULL, *THE ANARCHICAL SOCIETY* 44–49 (2002).

41. GOODMAN & JINKS, *supra* note 4, at 39.

42. *Id.* at 40–41.

43. JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 32 (2005).

44. KECK & SIKKINK, *supra* note 8; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503, 508 (1995); Moravcsik, *supra* note 3, at 83, 87–88; Finnemore & Sikkink, *supra* note 4, at 896–98.

45. See Charles W. Kegley, Jr., *The Neoidealist Moment in International Studies?*, 37 *INT'L STUD. Q.* 131, 137 (1993).

46. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* 126–48 (2009); Slaughter, *supra* note 44, at 518–28; Finnemore & Sikkink, *supra* note 4, at 896–98.

47. See, e.g., Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords*, 1 *GLOB. GOV.* 119, 142–43 (1995); Slaughter, *supra* note 44, at 518–28; Emanuel Adler, *Constructivism and International Relations*, in *HANDBOOK OF INTERNATIONAL RELATIONS*, 104, 109–10 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); KECK & SIKKINK, *supra* note 8, at 2–3, 16–25, 29, 209–14; SIMMONS, *supra* note 46, at 128, 131; Moravcsik, *supra* note 3, at 86.

ther, it has been argued that such actors consequently generate effects not only in their own states, but also transnationally and internationally.<sup>48</sup>

Some liberal theories have focused specifically on domestic dynamics. They have viewed individuals and groups as primary actors in international law, and have claimed that state preferences are determined by the aggregation of preferences of individuals and groups.<sup>49</sup> Andrew Moravcsik explains that the critical quality of this strand of theory is that it is “bottom-up”<sup>50</sup>: states and international law are perceived to be influenced and shaped by actions of domestic and transnational actors. However, Moravcsik notes that liberal theories can only serve as a “first stage,” explaining the distribution of states’ underlying preferences. They do not account for the ultimate choice of specific legal norms or international law’s compliance pull, tasks that such scholars hand off to other theories. Put differently, liberals explain the choice of ends, but do not also address the matching of means and ends or strategic interaction between states.<sup>51</sup> The upshot is that while individual actors are studied by liberals, they mostly serve to explain state preferences and state practice in relation to international law. Note that this structure of argument embraces the two-level edifice image, choosing to describe the bottom (domestic) floor, as opposed to the top (international) floor which they leave to other schools.

Constructivist scholars, on their part, place primary emphasis on reflexivity and two-way interactions: combining bottom-up as well as top-down causal paths. Such theories explore the reciprocity and mutual construction that occur in the international legal system in interaction with and among its community members.<sup>52</sup> The promise of this scholarship is constrained, however, by the persistent statism of influential authors who confine the study of reciprocal interaction to the top level of the edifice.<sup>53</sup>

Even scholars working with a disaggregationist approach have too often confined their work to a limited cache of individual actors—state officials, such as judges<sup>54</sup> or central bankers,<sup>55</sup> or NGO activists<sup>56</sup>—and have refrained from meaningfully evaluating the role of individuals outside those few recognized influential elites.<sup>57</sup>

Only a handful of scholars have, in various ways, directed attention to individuals outside such “immediate suspects.” Simmons, as well as Jutta

48. See Moravcsik, *supra* note 3, at 83, 86.

49. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 508 (1995).

50. Moravcsik, *supra* note 3, at 87.

51. See *id.* at 91.

52. See KECK & SIKKINK, *supra* note 8, at 1–3, 7, 213; Brunnée & Toope, *supra* note 33, at 123–27, 132–34.

53. Checkel, *supra* note 9, at 341–42.

54. See, e.g., Benvenisti & Downs, *supra* note 6.

55. See, e.g., Barr & Miller, *supra* note 7.

56. See, e.g., KECK & SIKKINK, *supra* note 8.

57. See Checkel, *supra* note 9, at 343.

Brunnée and Stephen Toope have discussed political mobilization and the role of “ordinary” citizens in generating state behavior in response to binding international norms.<sup>58</sup> According to Brunnée and Toope, for law to successfully function, it must be congruent with socially “shared understandings.”<sup>59</sup> Although power differentials do play a role, they insist that all social actors have some power to influence these shared understandings.<sup>60</sup> Accordingly, they assess the existence of shared understandings from the changing perceptions of individuals and publics, relying, among others, on public opinion polls and popular TV shows’ ratings as indications of these perceptions.<sup>61</sup> Simmons explores how international treaties alter domestic politics, empower local actors, and enhance their strategies and their intangible resources to pressure governments to comply with their international commitments.<sup>62</sup> She discusses how human rights treaties raise the expected value of mobilization, focusing particularly on the mobilization of non-elite, average citizens.<sup>63</sup> George Downs and David Rocke have also explored the influence exerted by protectionist pressure groups on domestic formulation of state preferences—and on international relations and international institutions.<sup>64</sup>

It is this vision of the engagement with international law by the person on the street that I think it is imperative to embrace in order to give rise to a new generation of international law research: one which accounts for individuals not as proxies of states, but as actors in their own right, proactively influencing their reality both in states and independently of them and across borders.

Another prominent contributor to this discussion is Harold Koh. Koh’s “transnational legal process” model goes a long way in accounting for individuals’ sub-state action promoting state compliance with international law.<sup>65</sup> Koh gives a place of pride to non-state actors in his theory, including government bureaucrats, media people, NGO activists, and “committed individuals.”<sup>66</sup> Ultimately, however, Koh is interested in state “obedience” to international law which he says follows from the internalization of international norms into the domestic legal system.<sup>67</sup> He therefore maintains the

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58. See SIMMONS, *supra* note 46, at 136–48; JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 5 (2010); see also Galit A. Sarfaty, *Why Culture Matters in International Institutions*, 103 AM. J. INT’L L., 647, 672–73 (2009).

59. BRUNNÉE & TOOPE, *supra* note 58, at 65–70.

60. See *id.* at 85.

61. See *id.* at 233–50.

62. See SIMMONS, *supra* note 46, at 135–55.

63. See *id.* at 138–39.

64. See GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? 3, 130–31 (1995).

65. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

66. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 415 (2017); see Koh, *supra* note 65, at 184–85.

67. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657–58 (1997); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003) (“The most overlooked determinant of compliance is what I call ‘vertical process’: when international law

state as the key axis around which the practice of international law ought to be studied. Furthermore, Koh too focuses on elite actors, which he categorizes according to their relation to the government. He is particularly interested in the actions of government lawyers and other official insiders on the one hand, and in NGO activists exercising outsider strategies as part of the transnational legal process.<sup>68</sup>

To conclude, the literature has either chosen to refrain from studying individuals' practice of international law, or has restricted its recognition to the practice of a limited set of actors in limited circumstances. It is true, of course, that elite actors often have a claim to generate more influence on how international law is made, interpreted, and implemented. However, as many authors have noticed, and as I now turn to elaborate, elite actors do not singularly shape the practice of international law. Other, non-elite actors also take part in the everyday practice of international law. By focusing exclusively on the former, we have missed the contributions of the latter.

### C. *The Missing Persons of International Law Literature*

Individuals' contributions to the everyday practice of international law have not been adequately described and theorized by international law scholarship. Beside its methodological statism, the scholarship has also maintained a bias toward government officials and toward elite actors. It has not equally accounted for the ordinary, non-official person and her contribution to the everyday practice of international law. This article's argument is that these methodological biases should be reconsidered, for they lead to the exclusion of important aspects of the life of international law, including how it is made, implemented, and developed.

Note, however, that my critique of insufficient engagement with the role of individuals in the everyday practice of international law should not also be read as discounting the work done by scholars with respect to non-state collectivities, groups, or organizations. Nevertheless, one reason I am stressing the need to evaluate the distinct contribution of individuals is that the scholarship on non-state actors has often been confined to discussing such collectivities or at most, to studying elite individual actors. It has not equally accounted for the ordinary, individual person.

Furthermore, the disaggregationist scholarship has often focused on the irregular; on the exceptional actions of actors operating outside a certain national comfort zone. It has studied, for instance, central bankers not in

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norms are internalized into domestic legal systems through a variety of legal, political, and social channels and obeyed as domestic law.”); see also, Harold Hongju Koh, *Jefferson Memorial Lecture-Transnational Legal Process after September 11th*, 22 BERKELEY J. INT'L L. 337, 340 (2004); Harold Hongju Koh, *How Is International Human Rights Law Enforced*, 74 IND. L.J. 1397, 1411 (1998). For a more in-depth analysis and critique of Koh's work, see Tamar Megiddo, *The Domestic Standing of International Law: A Non-State Account*, 57 COLUM. J. TRANSNAT'L L. (forthcoming 2019), Part II.

68. See Koh, *supra* note 66, at 416–17.

their day-to-day work, but in conferencing with their peers from other countries;<sup>69</sup> or activists when they choose to operate transnationally, perhaps after despairing of the domestic arena.<sup>70</sup> The scholarship does not also account for the boring, ordinary, everyday engagement of each of us with international law. By broadening the lens to capture more actors as relevant for discussion, the approach of constructivist methodological individualism developed in the next part would divert attention to the rule, rather than the exception, of the everyday practice of international law.

One could argue that statism and individualism complement each other; that each one deals with a distinct set of questions; that no one theory can do the work of accounting for the whole of international law's life both domestically and internationally; that it makes sense to make different methodological choices for different kinds of actors, practices, and dynamics, and certainly, for different scholarly fields. This argument supports endorsing the 'two-level game' as a premise and adopting different methodologies for each of the spheres.

I submit that we should resist this argument. I accept that statism is a valid methodological choice which offers certain explanatory payoffs and certainly contributes to the desired goal of theoretical parsimony. However, accepting the argument in favor of a two-level game paradigm misses an important point. Erecting an imaginary wall between the domestic sphere and the international sphere—theoretically and methodologically—has a price. It restricts and decontextualizes our understanding of occurrences in each space. It limits our theoretical imagination and our ability to identify, study, and conceptualize action that is, in reality, often unencumbered by this alleged barrier. It hampers our ability to recognize the constant dialogue between the different spheres of action. And, most importantly in our context, it arbitrarily hides from view the contribution to and interaction with international law by ordinary, individual people. Thus, to the extent that statism and disaggregationism can both be maintained, albeit by different schools, I submit that the field must make room for one more outlook: one which recognizes the reciprocal relations between the domestic and the international; one, moreover, that rejects the image of a world split into two separate spheres and studies it, instead, as one.

Constructivist methodological individualism, which I propose in the next Part, aims to outline a way forward that is responsive to these critiques. It suggests seeking to identify the contribution of individual people to the everyday practice of international law, and their reciprocal engagement with it. This approach does not deny that practice of international law may also take place through groups or organizations, but it is committed to not limit

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69. See, e.g., Barr & Miller, *supra* note 7.

70. See KECK & SIKKINK, *supra* note 8, at 12–13. But see SIMMONS, *supra* note 46, at 3–5.

international law research to these collectivities, as much as it is committed to not limit it to states.

## II. METHODOLOGICAL INDIVIDUALISMS

The term ‘methodological individualism’ has been used to denote widely differing concepts in several scholarly fields. It is therefore helpful to map the different approaches and clarify which of these concepts I propose to bring to the theory of international law. Following the conceptual discussion, I describe in more specific terms what CMI for international law entails.

### A. *Methodological Individualism and Methodological Holism*

Although coined by Joseph Schumpeter,<sup>71</sup> the concept ‘methodological individualism’ refers to a central tenet of the sociology of Max Weber.<sup>72</sup> Weber’s stated goal was to explain social communities,<sup>73</sup> but he stressed that only the actions of individuals are subjectively understandable and all social collectivities must be regarded as resulting from the “particular acts of individual persons.”<sup>74</sup> Such a position, according to which any social phenomenon must be disaggregated to the actions of particular individuals is a radical version of methodological individualism.

Different versions of methodological individualism may be positioned on a sliding scale. Weberian radical methodological individualism would occupy one end of the scale. Methodological holism would occupy the other end of the scale. Holism connotes that individuals and individual actions are in fact determined by society or social structure, and therefore all individual action is traceable to social structures, norms, and interactions.<sup>75</sup> Both radical approaches are probably best understood as Weberian ideal types: simplified models helpful for theorizing. Ideal types do not purport to facilitate a full representation of reality, but rather allow for the abstract explanatory generalization of certain aspects of social reality.<sup>76</sup> Further, neither of these radical approaches necessarily corresponds to an equally radical ontological position.<sup>77</sup>

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71. The first English appearance of the phrase methodological individualism appears in Joseph Schumpeter, *On the Concept of Social Value*, 23 Q.J. ECON. 213, 231 (1909). Schumpeter is also responsible for the coining of the parallel German phrase the prior year. See UDEHN, *supra* note 2, at 104.

72. See Joseph Heath, *Methodological Individualism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 21, 2015), <https://perma.cc/Y7NE-AXAE>.

73. See WEBER, *supra* note 16, at 18.

74. *Id.* at 13.

75. See Alex Viskovatoff, *Holism*, in THE HANDBOOK OF ECONOMIC METHODOLOGY 229 (John B. Davis, D. Wade Hands, & Uskali Maki eds., 1998).

76. See MAX WEBER, *METHODOLOGY OF SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch trans., 1949).

77. For instance, Weber’s radical methodological individualism ought to be juxtaposed with his complex ontological position. His work has in fact often also acknowledged the influence of social traditions

Nonetheless, on the scale between these two ends lie intermediate approaches. I propose that one approach, constructivist methodological individualism, be embraced for the study of international law. I now survey the various approaches in greater depth.

Radical methodological individualism entails the position that all social structures, norms, and events are to be explained exclusively in reference to human action and consequently, that all social influence on an individual is reducible to the direct influence of other individuals.<sup>78</sup> Such an approach might be attributed to Friedrich von Hayek, whose methodological individualism emerged as a rebuttal to what he viewed as a holistic bias in economics literature. As a challenge to the then-prevalent strictly macro-theoretical paradigm in economics, Hayek called for the inclusion of micro-theories and stressed that individuals' motives, and therefore actions, are not necessarily aligned with, nor explicable by those of society as a whole, or of their social or economic class.<sup>79</sup> His approach was intended to give room to considering the individual point of view in order to emphasize, among others, individuals' limitations, including biases or partial information.<sup>80</sup>

J.W.N. Watkins' defense of Karl Popper's methodological individualism is another radical rendering of the idea.<sup>81</sup> This theory assumes that any social occurrence or phenomenon is reducible to individuals' actions, dispositions, and circumstances. Explanations which are not deduced "from statements about the dispositions, beliefs, resources, and inter-relations of individuals" are doomed to remain "unfinished or half-way."<sup>82</sup> They are contrasted with "rock bottom" explanations which do take individuals' contribution into account.<sup>83</sup> Watkins' central assumption is that individuals are the ultimate constituents of the social world, and any social tendency may be altered by individuals who so choose and who have the appropriate information.<sup>84</sup> Watkins' methodological individualism is also not mirrored by an ontologi-

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and religious ideas on the actions and beliefs of people. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (2d ed. 1976).

78. See Heath's discussion of atomism and its difference from methodological individualism, Heath, *supra* note 72; see also *infra* Part II.D.

79. Hayek explains the acute need for a micro point of view through the example of the way a track is made through a forest, as each individual carves his own path pursuant to the surrounding constraints, but not due to the central planning or decision of anyone. See Friedrich A. Hayek, *Scientism and the Study of Society (Part I)*, 9 *ECONOMICA* 267, 289 (1942).

80. See Heath, *supra* note 72.

81. Karl Popper adopted a methodological individualistic approach: "the task of social theory is to construct and to analyse our sociological models carefully . . . in terms of individuals, of their attitudes, expectations, relations, etc. — a postulate which may be called 'methodological individualism.'" KARL R. POPPER, *THE POVERTY OF HISTORICISM* 136, 157–58 (2d ed. 1972).

82. J.W.N. Watkins, *Historical Explanation in the Social Sciences*, 8 *BRIT. J. PHIL. SCI.* 104, 105–06 (1957).

83. *Id.* at 105–06.

84. See *id.* at 107.



cal individualism and he admits that assuming the latter is counterfactual and metaphysical.<sup>85</sup>

A final radical account that I mention here is the one proposed by Jon Elster. Responding to Marxist holistic explanations, Elster claims that there are three kinds of scientific explanations: causal, functional, and intentional. The social sciences ought to adopt a causal-intentional approach which tracks the intentional activity of social actors, *i.e.*, individuals. There is, however, no room in the social sciences for a functionalist approach such as the one prevalent in the natural sciences, since there is no basis for viewing society as a single organism whose different “parts” necessarily fulfill a function of the “whole” (in the way a bodily organ fulfills for the body, for instance).<sup>86</sup> Only individuals are intentional actors,<sup>87</sup> and their interests are often not aligned with their class.<sup>88</sup> Further, individuals’ bounded rationality explains collective action problems and the failure of Marxist predictions and explanations to materialize.<sup>89</sup> This could only be corrected by clinging to strict methodological individualism, says Elster. It should be underscored that methodological individualism does not necessarily assume that people are rational actors, although all theories so far discussed do make this additional methodological assumption.<sup>90</sup>

The mirror image of the radical methodological individualist approach is methodological holism. Holism is a view according to which “the parts forming a whole cannot be adequately understood or described individually but only by considering their relation to the whole.”<sup>91</sup> In a social context, radical methodological holism would entail the view that individuals’ actions are in fact wholly determined by social causes: that our interests, val-

85. *See id.* As Joseph Agassi, another student of Popper, explains, Popper does not deny the existence of social “wholes,” such as social groups or institutions, but he insists that their aims and interests are designated by individuals and traceable to them. Joseph Agassi, *Methodological Individualism*, 11 *BRIT. J. Soc. Soc.* 244, 247–48 (1960).

86. It may be helpful to clarify in this context that my proposed approach, CMI, does not presuppose any particular understanding of the function of international law for the social whole, however defined. It also does not entail explaining the development of international law as owing to its fulfilling any such function. As Elster suggests, the possible problem with a functional framing of the discussion is that functionalism assumes a purposive-like action (for instance, the development of international law) without a purposive actor (since the social body, for instance, is not in reality a purposive actor). Functionalism in this context lends mysteriousness to a process that is, to my understanding, in fact composed of a multitude of the most ordinary everyday actions of many people. Aggregately, CMI proposes that people’s actions generate a certain result which embodies the making, implementation or development of international law. But these people did not intentionally plan or decide to promote the said result in advance.

87. *See* Jon Elster, *The Case for Methodological Individualism*, 11 *THEORY & SOC.* 453, 454 (1982).

88. *See id.* at 460.

89. *See id.* at 463.

90. *See* Heath, *supra* note 72 (“As a result of Elster’s arguments, methodological individualism became synonymous in many quarters with the commitment to rational choice theory. Such an equation generally fails to distinguish what were for Weber two distinct methodological issues: the commitment to providing explanations at an action-theoretic level, and the specific model of rational action that one proposes to use at that level.”).

91. Viskovatoff, *supra* note 75, at 229.

ues, and actions are completely dictated by society. This is an extreme view. It seems, moreover, that there are few examples of genuine methodological holists, and the approach seems to serve as a strawman against which scholars such as Watkins present their methodological individualism.<sup>92</sup>

A subtler version of holism is found in the work of Weber's contemporary, sociologist Emile Durkheim. Durkheim's holism is often juxtaposed with Weber's individualism, although neither is probably as neatly pigeonholed into its respective position as it might first appear.<sup>93</sup> As Emmanuel Picavet explains, Durkheim's holism acknowledges the complex relationship between society and the individual.<sup>94</sup> Social facts and societal beliefs, in fact, originate to a large extent from individual initiatives and innovations.<sup>95</sup> Nonetheless, as a kind of anti-reductionism, Durkheim's holism maintains that some facts about the social world cannot be traced back to facts about individuals and yet exercise causal power over them.<sup>96</sup>

Note that ontological holism is compatible with some form of methodological individualism. This is the case when, alongside positing that certain social facts are irreducible to individual components, it is recognized that individuals have goals and interests which have explanatory value for human conduct.<sup>97</sup>

A third approach and the one I propose to adopt for the study of international law is constructivist methodological individualism, or CMI, for short.

### B. Constructivist Methodological Individualism

Georg Simmel is one of the forefathers of social constructivist theory, and, to my knowledge, also the earliest—albeit not the most coherent—modern constructivist methodological individualist.<sup>98</sup> Although he presents at times as a radical methodological individualist, elsewhere he seems to fully acknowledge the significant influence of society on individuals, including those in powerful positions.

Simmel's constructivism is manifested in his interactive, intersubjective view of society. On the one hand, he views society—and social collectivities such as the state<sup>99</sup>—as anchored in reciprocal relations between individu-

92. See Heath, *supra* note 72.

93. See Daniel Little, *Methodological Individualism*, in *ENCYCLOPEDIA OF POLITICAL THEORY* 880, 906 (Mark Bevir ed., 2010); Viskovatoff, *supra* note 75, at 229.

94. Note that Durkheim's holism is social or collectivist, as opposed to Marx's holism (criticized by Elster), which is structural. The entity against which the individual is examined, in other words, is different for each author: Marx speaks of structure, whereas Durkheim speaks of society, as a collectivity of individuals. See Elster, *supra* note 87, at 460.

95. See Emmanuel Picavet, *Methodological Individualism in Sociology*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 302, 303 (2015).

96. See Little, *supra* note 93, at 907.

97. See Picavet, *supra* note 95, at 303.

98. See, likewise, Udehn's suggestion that Simmel is a "structural individualist," UDEHN, *supra* note 2, at 77.

99. See Simmel (1909), *supra* note 2, at 296.

als.<sup>100</sup> On the other hand, according to Simmel, individuals are influenced by their social situation. First and foremost, “man is determined by the fact that he lives in reciprocal relationship with other men.”<sup>101</sup> Interactions define the relationship between people, as well as between each person and society.<sup>102</sup>

Simmel explains that often, beneath the semblance of pure superiority and pure passivity, a highly complex interaction is hidden. “All leaders are also led,”<sup>103</sup> he says. For instance, a speaker, or a teacher, is highly influenced by the reactions of their audience, even if this audience seems passive and muted at first glance.<sup>104</sup> Similarly, even the most tyrannical relationships are in fact mutually determined by both the tyrant and the subjects. Both interact and exercise a certain degree of choice.<sup>105</sup> Simmel stresses that coercion rarely excludes all spontaneity and choice. More often, it presents us with a choice which entails sacrifices we would never make or a price we are not willing to pay.<sup>106</sup>

The same is the case with respect to social institutions such as the law. However unilaterally coercive it may appear, a legal system is in fact easily revealed to exist in interactions, and to depend on them. “If the absolute despot accompanies his orders by the threat of punishment or the promise of reward, this implies that he himself wishes to be bound by the decrees he issues.”<sup>107</sup> The subjects are participants<sup>108</sup> and the “law-giver, in giving the law, subordinates himself to it as a person, in the same way as all others,”<sup>109</sup> if the law is to remain effective.<sup>110</sup>

100. See Simmel (1895), *supra* note 2, at 54; Simmel (1909), *supra* note 2, at 302. He explains that as a sociologist, he is interested in the form, rather than the content, of society, and this form is constructed through interactions between individual people. Simmel (1895), *supra* note 2, at 54.

101. Simmel (1909), *supra* note 2, at 292.

102. “[B]etween society and its component individuals a relation may exist as between two parties.” GEORG SIMMEL, ON INDIVIDUALITY AND SOCIAL FORMS: SELECTED WRITINGS 15 (Donald N. Levine ed., 1971). He stresses, however, that individuals have in them not only those aspects influenced or shaped by society, but also such that are not, and the different aspects interact. “[T]he way in which he is sociated is determined or codetermined by the way in which he is not.” *Id.* at 12, 14. See also SIMMEL, *supra* note 2, at 28.

103. SIMMEL, *supra* note 2, at 185.

104. See *id.* at 185–86.

105. See *id.* at 182–83.

106. See *id.* Think of a robber pointing a gun at you. Even though one might plausibly say that you have been coerced to hand over your wallet, you have in fact been given a choice: the wallet or your life, and you chose what you perceived to be the lesser sacrifice.

107. *Id.* at 186–87.

108. See *id.* at 187–88.

109. *Id.* at 262. Note, the interaction here is double: both between the despot and his subjects, and between the despot and his law. In this sense, Simmel’s constructivism accounts for both society and structure in their interaction with individuals.

110. Fuller’s King Rex and his conclusion that law on the books must be compatible with the law on the ground for it to retain the quality of legality immediately spring to mind. See LON L. FULLER, THE MORALITY OF LAW 39–40 (rev. ed. 1969). This is not coincidental; Fuller was inspired by Simmel and refers to his work. See *id.* at 39 n.1.

Here, although in still underdeveloped form, one may find what I view as the grounding principles of constructivist methodological individualism. This is therefore an opportune moment to introduce the three pillars on which it stands. First, this approach entails a methodological commitment to viewing individuals as the most basic social unit and as the root of social norms, institutions, and ideas. At the same time, second, it entails the simultaneous commitment to a view of society as influencing individuals and shaping individuals' ideas and actions. Note, this is a view that is not reductive in either direction: it does not perceive either individuals or society as wholly determining the other, or as collapsing into the other.<sup>111</sup> Rather, it holds a dualistic, relational view of the social life. The relational aspect is embodied in the third pillar, which entails a methodological commitment to recognizing an interaction between each individual and her social context, which includes other individuals and collectivities as well as social institutions.

This vision is individualistic as it maintains the central role and agential capacity of people to shape and influence their world. It is constructivist as it also recognizes the reciprocal influence of people on each other and on society and social structure, on the one hand, and of society and social structure on the individual and her actions and views, on the other hand.<sup>112</sup> It is methodological as it is focused on tracking the form, or process, of social occurrences, rather than their content.<sup>113</sup> Put differently, it speaks to the way social developments occur and the method of scholarly inquiry that follows them, prior to any specific social setting or situation.

CMI does not fit easily with either ontological individualism or ontological holism. In fact, it may even be a logical consequence of a relational ontological approach, positing individuals, society, and the relationship be-

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111. Cf. Giddens' Structuration theory denies a dualism of agents and structures, and suggests instead a "duality" in which neither is an independently given set of phenomena. "Structure is not 'external' to individuals," he writes. "Structure has no existence independent of the knowledge the agents have[.] . . . [b]ut human knowledgeable ability is always bounded. The flow of action continually produces consequences which are unintended by actors." ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 25–27 (1984); see also Michael Reed, *The Agency/Structure Dilemma in Organization Theory*, in *THE OXFORD HANDBOOK OF ORGANIZATION THEORY* 289, 290 (Hardimos Tsoukas & Christian Knudsen eds., 2003) (classifying Giddens' structuration theory as "conflationist" and "collapsing structure into agency and consequently treating it as a 'virtualized reality'").

112. Note that in my discussion of relational or reciprocal interaction, I have included individuals' engagement with society as well as with social structure. This is because I see no advantage in preferring one over the other or in strictly separating the two in the present discussion. I refer to them or to a person's social context, or social surroundings, interchangeably. My aim is to echo the intuition that a person is in constant interaction with the social world around her, be it other people or human collectivities, or social structures, including social norms or institutions—and that she simultaneously influences them and is influenced by them. CMI seeks to trace this interaction.

113. See Simmel (1895), *supra* note 2, at 54; Simmel (1909), *supra* note 2, at 295. Some have opined that Simmel seems to confuse his discussion of the relationship between the individual and society on the ontological and methodological levels, but see Wolff *supra* note 2, at xxviii; UDEHN, *supra* note 2, at 76–77.

tween them as objective social facts; in other words, of what might be termed ontological constructivism.<sup>114</sup>

Later versions of constructivist methodological individualism are found in the writings of Pierre Bourdieu, Roy Bhaskar, and John Searle, among others. A modified version appears in the IR school of constructivism, which I have discussed and criticized in Part I. As one may perhaps see with greater clarity at this point, IR constructivism's methodological individualism has not held constant the human person as the relevant individual agent, replacing it, rather, with the individual state. This choice has various implications which I discuss in Section C below. The work of these central constructivist thinkers I now review is compatible with the version of CMI that I have outlined here.

Bourdieu tracks the power of social institutions and ideas in shaping individual actions and positions. His concept of "*habitus*," or a person's set of dispositions, encapsulates the internalization by people of social past and present.<sup>115</sup> The social "*field*" in which a person operates is the social structure and the relationships that form her social universe.<sup>116</sup> Nevertheless, social influence on a person is not mechanical or deterministic. Rather, society serves as a set of constraints within which a person may make her own strategic calculation.<sup>117</sup> Bourdieu therefore recognizes the fundamental agency of individuals to act on their own interests and desires within social constraints.<sup>118</sup> Moreover, the practice of individuals is necessary to uphold social institutions.<sup>119</sup> Finally, to the extent that Bourdieu's position on methodology can be inferred, it seems plausible to suggest a relational approach, in line with his substantive theory which recognizes both individual agency and social construction, and therefore likewise in line with CMI.<sup>120</sup>

Roy Bhaskar maintains that individuals and society each have their own separate ontological existence.<sup>121</sup> Like Bourdieu, he believes that society is shaped and upheld by human action, beliefs, and intentions and it is dependent on them for its reproduction. Nevertheless, despite society's dependence on people, society constrains us and influences us; it serves as a condition for our agency and supports our ability to express it.<sup>122</sup> Further-

114. Cf. Geoffrey M. Hodgson, *Meanings of Methodological Individualism*, 14 J. ECON. METH. 211, 215 (2007).

115. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 56 (Polity Press, trans., Stanford Univ. Press 1990).

116. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 806–07 (1986); see Peter Jackson, *Pierre Bourdieu, the "Cultural Turn" and the Practice of International History*, 34 REV. INT'L STUD. 155, 166–67 (2008).

117. See BOURDIEU, *LOGIC OF PRACTICE*, *supra* note 115, at 53.

118. See Bourdieu, *Force of Law*, *supra* note 116, at 847.

119. See BOURDIEU, *LOGIC OF PRACTICE*, *supra* note 115, at 57 (remarking that individuals continuously pull social institutions "from the state of dead letters, reviving the sense deposited in them, but at the same time imposing the revisions and transformations that reactivation entails").

120. See *id.* at 228–30; UDEHN, *supra* note 2, at 164.

121. See ROY BHASKAR, *SCIENTIFIC REALISM AND HUMAN EMANCIPATION* 83 (2009).

122. See *id.*

more, society is not a product of people's intentional design, conceptualization or discourse, nor is it a figment of our imagination: people do not "create society," he explains. Rather, "it always preexists them."<sup>123</sup> Therefore, Bhaskar emphatically rejects the idea that either the individual or society can be "identified with, reduced to, explained in terms of, or reconstructed from the other."<sup>124</sup> Instead, the dynamic interplay between them is doubly constituted by both.<sup>125</sup> Much like CMI, Bhaskar situates his relational model midway between individualism and holism.<sup>126</sup>

Although Searle is not directly engaged in conversation with Bhaskar or Bourdieu, he seems to put forward a similar model. Searle's concept of "*the Background*" is similar to Bourdieu's *habitus*, as both try to capture the human mechanism which reflects internalized social conceptions and norms and serves to direct action.<sup>127</sup> The Background itself is "causally sensitive" to social institutions and social facts.<sup>128</sup> At the same time, Searle views social institutions as permanently dependent on human support and reiteration.<sup>129</sup> Social facts are thus dependent on collective human intentionality.<sup>130</sup> Searle's ontological relational approach translates in his work into a methodological commitment to recognizing and theorizing both the role of the individual

123. Stephen Ackroyd & Steve Fleetwood, *Realism in Contemporary Studies*, in *REALIST PERSPECTIVES ON MANAGEMENT AND ORGANIZATIONS* 4, 10–11 (Stephen Ackroyd & Steve Fleetwood eds., 2000). As Bhaskar summarizes the point, "[i]f society is the condition of our agency, human agency is equally a condition for society, which, in its continuity, it continually reproduces and transforms." BHASKAR, *supra* note 121, at 83.

124. ROY BHASKAR, *THE POSSIBILITY OF NATURALISM* 39–40 (3d ed. 1998).

125. Reed, *supra* note 111, at 300–02. See also Robert Willmott, *Structure, Culture and Agency*, in *REALIST PERSPECTIVES ON MANAGEMENT AND ORGANIZATIONS* 66, 67–68 (Stephen Ackroyd & Steve Fleetwood eds., 2000).

126. See BHASKAR, *supra* note 124, at 34–36.

127. Searle defines the Background as a set of non-intentional or pre-intentional capacities that enable intentional states of function, including our dispositions to certain kinds of behavior. See JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 129, 132 (1995). Any intentional state only functions against the Background, including, but not limited to our disposition to certain kinds of behavior. See *id.* at 136.

128. *Id.* at 141. He explains:

Instead of saying, the person behaves the way he does because he is following the rules of the institutions, we should say, first, (the causal level), the person behaves the way he does, because he has a structure that disposes him to behave that way; and second (the functional level), he has come to be disposed to behave that way because that's the way that conforms to the rules of the institution.

*Id.* at 144.

129. See *id.* at 90 ("It is tempting to think that such institutional structures as property and the state itself are maintained by the armed police and military power of the state, and that acceptance will be compelled when necessary. But in the United States, and in several other democratic societies, it is the other way around. The armed might of the state depends on the acceptance of systems of constitutive rules, much more than conversely.")

130. See *id.* at 36. But Searle stresses that they rely on collective intentionality, which is not reducible to what he calls "I intentionality"—individual intentionality. *Id.* at 24–25.

and the role of social construction in contributing to shaping social reality, similarly to CMI.<sup>131</sup>

The following Section includes certain points of clarification about what is and what is not being proposed here by suggesting that international law scholars adopt CMI.

### *C. Constructivist Methodological Individualism for International Law*

The international law version of CMI mirrors the three-pronged approach outlined above. This approach entails, first, the methodological commitment to considering all norms, structures and development of international law as ultimately explicable through actions of individual people; in other words, presuming that the everyday practice of international law, as I have defined it, is ultimately done by individual people. It is of particular importance to stress that this commitment refers not only to practice by political leaders or elite actors, but also, potentially, to practice by any ordinary, private individual. At the same time, second, this approach recognizes that individuals are in fact influenced and shaped to a great extent by their social context, which includes international norms and institutions. CMI for international law therefore holds a simultaneous methodological commitment to considering the influence of international norms and institutions on individuals and individuals' actions. Third, CMI for international law entails a commitment to considering the reciprocal interaction between individuals and international law as jointly constructing the social reality in which the international legal system operates.

As I have shown in Part I, individuals' engagement with international law has been underappreciated in international law scholarship. I have argued that this oversight results from an entrenched, and sometimes unstipulated methodological statism in the literature. Furthermore, when individuals are studied there appears to be an additional bias prevalent in the literature toward studying the practice of government officials and elite actors. Only a handful of scholars have directed their attention to individuals outside those few recognized influential spheres. In Watkins' terms, the outcome is that we are left with only "halfway" theories: theories that do not get to the "rock bottom" of how international law works, but stop midair at the level of states, or, at most, elite non-state actors. Contrary to Watkins, I do not claim such theories are false, only that they produce a partial and incomplete description of the international legal system. CMI for international law therefore proposes to complete the picture by centering attention on individuals' contributions to the practice of international law. This does not suggest an opposition to also studying the contribution of other non-state

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131. Searle explains that he does not prove that external realism is true, only that our use of public language presupposes it. If one takes herself to be communicating with others, she necessarily commits herself to external realism. *See id.* at 194.

actors to the practice of international law (or of states). It merely seeks to ensure that research also accounts for the ordinary, individual person and her engagement with international law.

Another reason to single out individuals' practice of international law, which I wish only to flag here (but whose development is entirely outside the scope of this article), is that law is by definition a human business. I submit that this is the case with any kind of law, including international law. Briefly, the argument is that by presenting law for the self-application of people,<sup>132</sup> a legal system operates on the assumption that the subject is a responsible agent who is capable of locating the law, understanding it, identifying the factual circumstances in which it ought to be applied, and orienting her behavior accordingly.<sup>133</sup> Legality therefore entails a certain regard for the person on the part of the system: recognition of her as a free, autonomous, and responsible agent. This regard reflects some degree of respect of the person's human dignity.<sup>134</sup> It follows that studying law, and particularly its effectiveness in guiding behavior, requires that we take stock of the way it interacts with humans. International law is no exception.

This inherently human orientation of law carries implications with respect to international legal doctrine. If one accepts that law, by definition, speaks to people, one would therefore be prompted to consider international law norms as directed to an audience comprised not only of states, but also of people. In this context, even though international norms generally identify states as the actors whose conduct is regulated, when we break down state action, it is always individual people within state administrations who receive international law's message and act on it—or choose not to, as I discuss at greater length in Section III.C below. Furthermore, individuals outside the state administration often also pick up on the message and act in various ways to get the state (or, more specifically, state officials) to comply (or not) with international law's guidance. This is evident, among others, in the public mobilization regarding Israel's refugee deportation program described in Section III.D below. Moreover, some international law norms do not identify any particular agent whose action is specifically required. They merely set a goal, a standard that should be met, without speaking to who should realize it or how it should be realized. Unless explicitly mandated, it arguably matters not what or who within the state has brought about compliance. Here, the Paris Agreement coalition example in Section III.B. below illustrates that actors other than the state may actually bring about the realization of an international law standard, even if the obligation to achieve this standard is not formally incumbent on them.

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132. See Jeremy Waldron, *Self-Application*, PUB. L. & LEG. THEORY RES. PAP. SER. No. 16-46, <https://perma.cc/6CRS-365B>.

133. See Gerald J. Postema, *Implicit Law*, 13 L. & PHIL. 361, 363–71 (1994).

134. See, e.g., FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72–76 (1972); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 24 (1969).



In addition to exposing the literature's downplaying of ordinary people's contribution, CMI for international law challenges the architectural imagery that places the international and domestic spheres at two separate floors of the legal edifice which could (and should) be studied separately. I submit, rather, that we would do well by replacing this edifice with a different image which does not divide today's world into these two spheres. I propose an alternative image: that of a spider web, on which people in a global society are represented as nodes, communicating with those near and far through threads infused with both domestic and international law, thereby constantly reweaving the web around them.<sup>135</sup>

#### D. *Disambiguation and Clarifications*

A few points of clarification are in order. First, it might be helpful to reiterate that what I propose to study is the reciprocal causal links between individuals and what I have referred to as their social context, which I claim includes international law. Put differently, I propose to focus on the ways in which individual action generates change in society and social structures (international law included), and the ways in which the latter also generate change in individuals' action and perceptions.

However, CMI says nothing about the intentions of individuals as they participate in the practice of international law. Rather, I assume that they may operate on a range of diverse, probably often conflicting motives. In addition, one of the strengths of CMI for international law, as I see it, is in revealing the price paid by choosing to regard states as unitary entities operating on the basis of corporate interests, values or ideologies.<sup>136</sup> CMI chooses to regard state action as a result of ongoing domestic struggles between participating sub-state and transnational actors. Moreover, it is invested in revealing the two-way interaction not only between individuals and states, but also between individuals and international law. This perspective reveals that the social function of an international institution or norm may actually not be the reason it came into existence or continues to operate. Its function and effects ought to be considered alongside the complex political economy behind its establishment and ongoing existence which include not only the motives of states, but also those of individuals operating within them and across borders.<sup>137</sup>

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135. See, e.g., Hayek, *supra* note 79, at 284 ("The individuals are merely the foci in the network of relationships and it is the various attitudes of the individuals towards each other (or their similar or different attitudes towards physical objects) which form the recurrent, recognisable and familiar elements of the structure."); Bruno Latour, *Networks, Societies, Spheres: Reflections of an Actor-Network Theorist*, 5 INT'L J. COMM. 796, 805 (2011). I am especially grateful to this piece for introducing me to the work of the artist Tomas Saraceno, 'Galaxies Forming along Filaments' that was presented at the Venice Biennale in 2009. This work provides an excellent visualization of what I am here trying to put into words. See *id.* at 801; *Galaxies Forming Along Filaments*, TOMAS SACARENO, <https://perma.cc/X9YZ-JQ4Q> (2009).

136. See Lake, *supra* note 15, at 42–46.

137. See *supra* note 86.

By committing to describe and understand the everyday practice of international law through the practice of individuals, I do not rule out taking stock of the actions of groups, organizations or businesses. Obviously, people often organize and work to generate change together. Furthermore, a researcher will likely rarely be able to locate the evidence necessary to describe the actions and motivations of all individuals involved in the practice of international law in any specific context. Nevertheless, I argue that it is important to strive to think, conceptually, about how international law is practiced down to the level of the individual. Correspondingly, empirically, a researcher should strive to disaggregate social collectivities to the extent practically possible. Where accounting for individual actors is impossible, turning to groups and organizations is a helpful alternative in providing a more complex narrative than relying strictly on state actors.

It should also be clarified that I do not assume that any development of international law is necessarily good or necessarily serves the welfare of the social whole—be it defined as a society of states or a global community of individuals. The proposal here is merely to pay attention to, and describe processes that—good or bad—are ongoing, and that, I argue, have been underappreciated by academic scholarship on international law.

The following Part discusses and illustrates in more detail what CMI means for international law research: how it is applied and what the payoffs of applying it are.

### III. THE EVERYDAY LIFE OF INTERNATIONAL LAW

Individuals engage with international law and take part in the complex and intricate processes that embody its everyday life: its making, implementation or breach, as well as its interpretation and development. This is the observation that grounds this article's proposal to adopt constructivist methodological individualism in the study of international law. Without presuming to be comprehensive or exhaustive, this Part suggests what adopting this perspective entails and does so by analyzing several empirical examples which showcase some of the ways by which individuals contribute to the everyday practice of international law. The purpose is to shine a light on processes which influence international law and its effectiveness and which cannot be fully appreciated without adopting CMI.

#### A. *Making International Law*

The contribution of individuals, particularly global civil society activists, to the initiation, drafting, and adoption of multilateral conventions on a variety of topics from international criminal law through international environmental law to international law pertaining to nuclear disarmament has

been widely discussed in international law literature.<sup>138</sup> This engagement of individuals through advocacy, lobbying, shaming and praising, capacity building, media campaigns and more,<sup>139</sup> is perhaps the most academically recognized and celebrated aspect of the practice of international law by non-state actors, and there is little to be added to the work already done. I therefore only wish to acknowledge this body of literature and leave this important aspect of individual practice of international law to one side.

A more complex issue has to do with individuals' contributions to the development and crystallization of customary international law. The Statute of the International Court of Justice ("ICJ") defines customary international law as (1) general practice (2) accepted as law.<sup>140</sup> The first element is commonly understood to refer to state practice.<sup>141</sup> The second element, more often referred to as states' *opinio juris*, qualifies the relevant state practice as that which is accompanied by a perception of the conduct as legally required.<sup>142</sup>

This is an extremely important topic, but highly complex, especially given the accepted domination of high-level state officials with respect to the generation of the *opinio juris* element,<sup>143</sup> whereas I am particularly inter-

138. See, e.g., BARBARA K. WOODWARD, *GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE* (2010); Kal Raustiala, *The Role of NGOs in International Treaty-Making*, in *OXFORD GUIDE ON TREATIES* (2011), <https://perma.cc/B7ML-9EUY>. On the landmines ban treaty, see Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 *INT'L ORG.* 613 (1998). But see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 *EUR. J. INT'L L.* 91 (2000). On environmental treaties, see MICHELE MERRILL BETSILL & ELISABETH CORELL, *NGO DIPLOMACY* (2008). On the Rome Statute of the International Criminal Court, see MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT?: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 *AM. J. INT'L L.* 22 (1999). On the effort to ban nuclear weapons, see Tilman Ruff, *Negotiating the UN Treaty on the Prohibition of Nuclear Weapons and the Role of ICAN*, 30 *GLOB. CHANGE PEACE & SEC.* 233 (2018); The Norwegian Nobel Committee, *The Nobel Peace Prize for 2017* (Oct. 6, 2017), <https://perma.cc/3D9W-DLRL> (declaring the award of the 2017 Nobel Peace Prize to the International Campaign to Abolish Nuclear Weapons ("ICAN"), for its involvement in the drafting of the 2017 U.N. Treaty on the Prohibition of Nuclear Weapons).

139. This includes even the shaming of the individual delegates of recalcitrant governments into alignment with a tobacco control convention. See H.M. Mamudu & S.A. Glantz, *Civil Society and the Negotiation of the Framework Convention on Tobacco Control*, 4 *GLOB. PUB. HEALTH* 150 (2009).

140. See Statute of the International Court of Justice, annexed to the U.N. Charter, art. 38(1)(b).

141. See Michael Wood & Omri Sender, *State Practice*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2017). These authors explain this to result from the fact that states are the primary subjects of international law. Note, however, the doctrinal issue of who is a subject of international law is a different kind of discussion from the methodological and theoretical discussion presented in this article. For a different approach to subjecthood, see Portmann's suggested definition of an international legal person: "personality is acquired in international law whenever an international norm is addressed at a particular entity." ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 3 (2010). This can be contrasted with the different ideal-type conceptions Portmann identifies as prevalent in international legal argument (namely, in doctrinal debate and international practice): "the states-only conception," the "recognition conception," the "individualistic conception," the "formal conception," and the "actor conception," *id.* at 13–14.

142. See *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 *I.C.J. Rep.* 3, ¶ 77 (Feb. 20).

143. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, Judgment, 1986 *I.C.J. Rep.* 14, ¶¶ 206–09 (June 27); *Int'l L. Comm'n, Identification of Customary International Law: Text of the Draft*

ested in considering the practice of more low-level officials or of non-official individuals.<sup>144</sup> Tentatively, I believe that practice by the latter will be more easily traceable in its contribution to the generation of the ‘practice’ element of custom, and in a more indirect way, to the generation of *opinio juris*. But this is a topic that I reserve for future work on account of its breadth and complexity.<sup>145</sup>

The main part of this discussion is therefore dedicated to the later stages of international law practice: implementing international legal norms, breaking them, and interpreting or developing them. A Section is dedicated to each of these stages, illustrating how individuals contribute to shaping the realities of international law.

### B. Implementation

The Paris Agreement on climate change was adopted by the decision of 195 states in December 2015.<sup>146</sup> The United States signed the Agreement on the day it opened for signatures and it formally entered into force for the United States on November 4, 2016, only 4 days prior to the election of Donald Trump as President.<sup>147</sup>

Under the Agreement, each party adopts “Nationally Determined Contributions” (NDCs), which set a specific, voluntarily-committed goal of reducing greenhouse gas emissions, and all states undertake to work toward achieving their respective goals.<sup>148</sup> Article 4 stipulates that “[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives” of their NDCs.<sup>149</sup>

In line with President Trump’s earlier declarations,<sup>150</sup> in August 2017 the U.S. Ambassador to the United Nations Nikki Haley sent a letter to the U.N. Secretary-General António Guterres, stating that the United States “intends to exercise its right to withdraw from the Agreement.” However, she did go on to qualify this language by adding that the United States will

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Conclusions Provisionally Adopted by the Drafting Committee, U.N. Doc. A/CN.4/L.872 ¶ 10.2 (May 30, 2016) (citing, as evidence of states’ *opinio juris*, the following types of documents: “public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference”).

144. See, e.g., Maiko Meguro, *Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity*, in NON-STATE ACTORS AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW (Iain Scobbie & Sufyan Droubi eds.) (forthcoming), <https://perma.cc/RC8T-QMYJ>.

145. For a thoughtful and interesting account, see *id.*

146. See Paris Agreement of the United Nations Framework Convention on Climate Change, Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

147. *Paris Agreement - Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (2019), <https://perma.cc/SWR5-S2CK>.

148. Paris Agreement, *supra* note 146, art. 4.2

149. *Id.* art. 4.

150. *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017), <https://perma.cc/CG8B-ASPJ>.

submit the withdrawal notification when it is eligible to do so “[u]nless the United States identifies suitable terms for reengagement.”<sup>151</sup>

Haley could not just declare the United States’ exit from the Agreement because Article 28 allows for withdrawal only after three years have passed from the date of the Agreement’s entry into force for the relevant party.<sup>152</sup> Withdrawal then occurs one year after the written withdrawal notice is deposited with the U.N. Secretary-General.<sup>153</sup> This means that the United States cannot deposit a notice of withdrawal before November 3, 2019, and cannot withdraw before November 3, 2020. It also means that the United States continues to be bound by the terms of the Agreement until such time.

What do these obligations entail? Recall, the NDCs are voluntarily committed. Further, the Paris Agreement obligation on states is not to meet the NDCs, but only to “pursue measures . . . with the aim” of meeting them.<sup>154</sup> Nevertheless, the general principles of *pacta sunt servanda* and good faith suggest that the United States is obligated to at least perform these perfunctory efforts in good faith as long as the Agreement is in force.<sup>155</sup> Failing to do so may plausibly be claimed to breach its obligations. At the same time, one may plausibly suggest that if the United States were to meet its NDCs even without pursuing any measures, that would nonetheless constitute meeting its obligations under the Paris Agreement since reducing emissions is the ultimate object and purpose of the Agreement.<sup>156</sup>

Responding to these developments, a coalition of non-state, sub-federal actors has mobilized to step up and meet the United States’ NDCs in its stead. This coalition is comprised of state governors, mayors, companies, universities, faith groups, and tribal communities who have pledged to work to reduce the United States’ greenhouse gas emissions to the extent committed by the United States.<sup>157</sup> A website associated with the coalition lists thousands of member organizations and groups and their climate action commitments.<sup>158</sup> These include global brands like the family-owned Mars Inc. and the publicly-owned Microsoft Corporation. But they also include members of local and religious communities, like the Blue Lake Rancheria tribal community, located in Humboldt County, California with a population of 82 members;<sup>159</sup> small businesses like the Classic Boat Shop, founded by Jean Beaulieu and located in the fishing village of Bernard, Maine;<sup>160</sup> and

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151. Karl Mathiesen, *Trump Letter to UN on Leaving Paris Climate Accord — In Full*, CLIMATE CHANGE NEWS (July 8, 2017), <https://perma.cc/SDW9-SB9L>.

152. See Paris Agreement, *supra* note 146, art. 28.

153. See *id.*

154. *Id.* art. 4.

155. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 26.

156. See *id.* art. 31(1).

157. See *We Are Still In Declaration*, WE ARE STILL IN, <https://perma.cc/R62X-CABM>.

158. See *Who’s In*, WE ARE STILL IN, <https://perma.cc/JH89-HX39>.

159. *My Tribal Area*, U.S. CENSUS BUREAU, <https://perma.cc/JX6E-W6ES>.

160. See *About Classic Boat Shop*, CLASSIC BOAT SHOP, <https://perma.cc/9NWW-3LNK>.

climate-driven enterprises such as “Climate Dads,” founded by Jason Sandman, a father concerned for his toddler’s future.<sup>161</sup>

One might be disposed to dismiss this movement as merely a symbolic gesture, but this in fact is a very impressive collection of actors. As they emphasize, if the members of this coalition combined were a country, they would be the third-largest economy in the world and responsible for the fourth highest emission output under the U.N. Framework Convention on Climate Change. They include states and cities representing more than half of the United States’ economy and over 1700 businesses, which are collectively valued at approximately \$25 trillion, and over 500 universities.<sup>162</sup>

Representatives of this coalition have actively engaged the other state parties to the Paris Agreement, showing up at the Conference of the Parties meeting (“COP23”) at Bonn, Germany in November 2017. There, they set up a grand pavilion, the U.S. Climate Action Center, and hosted events aiming to showcase that Americans—at the sub-national level—are still fighting climate change in spite of the line coming from Washington.<sup>163</sup>

This action is not happening in a vacuum. The decision adopting the Paris Agreement explicitly envisions a role for non-state actors in pursuing climate change action. The decision, “[w]elcomes the efforts of all non-Party stakeholders . . . including those of civil society, the private sector, financial institutions, cities and other subnational authorities.”<sup>164</sup> It also refers elsewhere to “local communities and indigenous peoples”<sup>165</sup> and invites such stakeholders to support emission reductions and other efforts.<sup>166</sup> The decision also sets up an online “Non-State Actor Zone for Climate Action” platform (“NAZCA”).<sup>167</sup>

Members of the coalition have signed the We Are Still In declaration.<sup>168</sup> This declaration is framed, interestingly, as an “open letter to the international community and the parties to the Paris agreement from U.S. state, local and business leaders.” The declaration includes a commitment to “support climate change action to meet the Paris Agreement,” a denouncement of the Trump administration’s position, as well as a statement to the world that “the actors that will provide the leadership necessary to meet our Paris

161. See Jason Sandman, *From Urgency to Agency: Youth Leadership in the Age of Climate Awareness*, CLIMATE DADS (Aug. 15, 2018), <https://perma.cc/PS8R-Q95P>.

162. See Kristin Irgusky, et al., Bloomberg Philanthropies, *America’s Pledge: Phase 1 Report*, 29 (2017), <https://perma.cc/QG6A-8PLF>; see generally WE ARE STILL IN, *supra* note 158.

163. See, e.g., Alister Doyle, *Anti-Trump U.S. Coalition Tells U.N. Climate Talks: “We’re Still In,”* REUTERS (Nov. 9, 2017), <https://perma.cc/D8D7-68LZ>; Mythili Sampathkumar, *American Cities and Companies Have Declared They’re Still In the Paris Agreement Despite Trump*, INDEPENDENT (Nov. 10, 2017), <https://perma.cc/77ZH-VGYV>; Shawn McCarthy, *Unofficial U.S. Delegation Prepares to Defy Trump at Bonn Climate Summit*, THE GLOBE AND MAIL (Nov. 5, 2017), <https://perma.cc/WEL4-5HH7>.

164. Conference of the Parties, *Adoption of the Paris Agreement*, 21st Sess. U.N. Doc. FCCC/CP/2015/L.9/Rev.1, ¶ 134 (Dec. 12, 2015).

165. *Id.* at ¶ 136.

166. See *id.* at ¶ 135.

167. *Id.* at ¶ 118.

168. WE ARE STILL IN, *supra* note 157.

commitment are found in city halls, state capitals, colleges and universities, investors and businesses.”<sup>169</sup>

As this coalition shows, individual actors take part in implementing international law. By committing to work to get the United States to meet its NDCs, they act collectively to ensure the implementation of its international obligation. Note that the coalition includes not just state leaders or influential elites, but also members of local and religious communities and small business owners.<sup>170</sup> Large multinational corporations like Mars or Microsoft can certainly make singularly large climate contributions by, for instance, readjusting their supply chains to minimize their emission outputs. However, the combined efforts of thousands of small businesses and local communities can likely also make a difference.

In fact, climate change is probably the issue-area on which CMI is most intuitively compelling: think of the role of each of us in upholding local or national recycling schemes, in using our purchase power to sustain and promote environment-friendly agricultural products, or our willingness to conserve electricity or water. Such efforts rely on the cooperation of ordinary people and are bound to fail absent such cooperation.

How is telling this story from a CMI perspective different from recent literature about public mobilization by Simmons or Brunnée and Toope?<sup>171</sup> First, the perspective proposed by CMI aims to identify and explore the different individual coalition members. Note, for instance, that this coalition brings together rather strange bed fellows. Even if we accept that all members of the coalition are genuinely concerned about climate change’s consequences for humanity at large—a concern I have no reason to doubt—one might nonetheless presume that some have additional motivations for supporting the cause, and that they diverge significantly in their additional motivations. It is likely that leaders of multinational corporations such as Mars and Microsoft are also acting out of concern for the sustainability of their supply and production chains, the public relations dividends of embracing climate change efforts, and other issues relating to their bottom line. Similarly, a diversity of motives may be presumed for members of tribal communities, members of religious communities, and university heads, which may include concern for community sustenance, the continued practice of religious or moral ideals, and educational values, among others. Therefore, if we want to understand this mobilization, it would be misguided to view all actors as cut from the same cloth. While their impact is obviously more noticeable in the aggregate, their action—and the realiza-

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169. *Id.*

170. On the role of subnational governments in climate change, see generally Hari M. Osofsky, *Multiscalar Governance and Climate Change*, 25 MD. J. INT’L L. 64 (2010). For a discussion of the role of cities in international law, generally, and environmental law particularly, see Yishai Blank, *The City and the World*, COLUM. J. TRANSNAT’L L. 875, 905–06 (2006).

171. See *supra* notes 58–63, and accompanying text.

tion of international law standards that it aims to achieve—is explicable on an individual basis. CMI’s contribution is thus to underscore that, in order to understand what makes international law’s implementation possible in this story, we must weigh the interests, values, and motivations of the individual actors, rather than only those of the coalition.

Moreover, none of these motivations drive the United States under President Trump, considered as a unitary entity, and none explain its reluctance to cooperate with climate change mitigation efforts. In this story, CMI allows us to describe the practice of international law in the United States irrespective of the state actor. Only by shifting focus from the state to the individual actor are we able to explain the traction that the Paris Agreement has gained in the United States and the possibility of the United States’ meeting its NDCs.

Furthermore, Simmons’ theory emphasizes the avenues that international treaties open up for domestic actors to act locally vis-à-vis their government by demanding that it complies with its international obligations.<sup>172</sup> However, told through a CMI perspective, the coalition’s story is different. This story is not about individuals shaping state action; it is about individuals working to realize an international standard or rule that they have the capacity to realize, irrespective of the state. They are mobilizing not in order to set the state into motion, but in order to replace it at the helm in order to achieve their goal. This is also evident in the direct engagement of the coalition with other states party to the Paris Agreement, and the COP as an international institution. It is further underscored by the We Are Still In declaration addressing not only state parties or the COP, but also “the international community,” suggesting a wish that their voice is heard by other individuals and communities, across borders and throughout the world.<sup>173</sup>

As the coalition shows, people’s actions cannot simply be presumed to be aggregately reflected in states’ actions. Domestic systems house robust disagreement and see profound power struggles on political issues. People cannot simply be assumed to be fully represented by their states internationally, as the positions and actions of some stakeholders always stand in contradiction with the formal line advanced by a state. People may even sidestep their state to engage other state and non-state actors or international institutions directly. Further, in various ways, people may also compel state action or act in a state’s stead.

Tellingly, and this will be further illustrated in the next Section, we see that international law can, and increasingly does, guide directly the action of people and communities. To borrow a famous metaphor from Meir Dan-Cohen,<sup>174</sup> international law does not maintain “acoustic separation” by

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172. See SIMMONS, *supra* note 46, at 12–14.

173. WE ARE STILL IN, *supra* note 157.

174. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–34 (1984).



speaking to states and leaving it to states to, at will, convey the message to their citizens. Instead, international law speaks directly to people, and sometimes succeeds in generating responsive action. The members of the coalition have responded to international law's call. If they deliver on their pledge to cut emissions, the United States may well find itself in compliance with its NDCs despite the Trump Administration's resistance.

### C. Challenging and Violating

One could think of individual people's capacity to challenge or violate international law in at least three ways: first, as agents acting on behalf of states; second, as agents acting independently of their states but impacting the fulfillment of the states' obligations under international law; or, third, as independent actors whose actions, rights, and obligations are directly regulated by international law and who may therefore act in a manner inconsistent with these obligations. I argue that in all of these scenarios, individual people's actions may cause a violation of international law or challenge its concepts, standards, and norms. In this sense, too, individuals take part in the practice of international law.

The law on state responsibility is helpful in elucidating the first way in which people may cause a breach of international norms: when acting on behalf of a state.<sup>175</sup> A state is considered to have committed an internationally wrongful act when two conditions are realized: (1) a conduct is attributable to a state under international law;<sup>176</sup> and (2) that conduct constitutes a breach of an international obligation of that state.<sup>177</sup> Thus, the law on state responsibility creates a legal construct that converts the conduct of individuals that meets certain criteria into the conduct of a state.

An act or omission is attributable to a state on one of several bases:<sup>178</sup> if it is the act of a *de-jure* or *de-facto* organ of the state;<sup>179</sup> if it is carried out "on

175. See generally G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

176. In contrast to domestic law where different organizations may be granted distinct powers and independent legal personalities, attribution entails that, once conduct is attributed to the state, international law will treat it as the conduct of the state as a single, unified legal person. See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 83 (2002); see also Articles on State Responsibility, *supra* note 175, at art. 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.")

177. See Articles on State Responsibility, *supra* note 175, art. 2; see also Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 56 (May 24).

178. Note that attribution does not require intent or knowledge regarding the possibility of breach of an international rule by the actor or by the relevant state officials. Depending on the content of the specific international legal obligation, and on the circumstances, mere inadvertent conduct may suffice. In other words, there is no fault or *mens rea* requirement. See CRAWFORD, *supra* note 176, at 82; JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 61 (2013).

179. See Articles on State Responsibility, *supra* note 175, arts. 4–7. A *de-jure* organ is "any person or entity which has that status in accordance with the internal law of the State," *id.* art. 4.2, but conduct is also attributable to the state where a person or entity "is empowered by the law of that State to exercise elements of the governmental authority . . . provided the person or entity is acting in that capacity in the

the instructions of, or under the direction or control of, that State in carrying out the conduct”;<sup>180</sup> if a person is “exercising elements of governmental authority” when official authorities should exercise them and do not do so;<sup>181</sup> or if the state has adopted the act as its own.<sup>182</sup> The conduct may be carried out by a person or a group.<sup>183</sup>

As James Crawford explains, the state responsibility doctrine takes a narrow view with respect to the international legal implications of actions by individuals and groups, referring only to those actions that fall into the criteria for attribution.<sup>184</sup> It limits its scope only to the first of the pathways through which individuals may breach international norms mentioned above: acting on behalf of states. He defends this choice in the following manner:

In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority.<sup>185</sup>

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particular instance.” *Id.*, art. 5. Crawford clarifies that such empowerment is not restricted to legislated grants of authority, but may include practice so empowering an entity to exercise public power. *See* CRAWFORD, *supra* note 178, at 100. This is the case even if the act is carried out *ultra vires*, *see* Articles on State Responsibility, *supra* note 175, art. 7.

180. Articles on State Responsibility, *supra* note 175, art. 8. In this context, one cannot avoid recalling the famous clash between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia with respect to the interpretation of Art. 8. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 399–407 (Feb. 26); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 137 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

181. Articles on State Responsibility, *supra* note 175, art. 9. Thus, the actions of individuals who are not state agents may nevertheless give rise to state responsibility for breach of its obligation when they comprise an act that calls for state intervention to counteract it, without which the state could be found to breach its international obligation. In this context, Art. 14(3) stipulates that the state’s obligation to prevent a given event extends even after it has been realized and as long as it continues. *See, e.g.*, Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgment, 1980 I.C.J. Rep. 3 (May 24), ¶¶ 67–68; Articles on State Responsibility, *supra* note 175, art. 14(3). Furthermore, as Arts. 29 & 30(a) clarify, the state whose responsibility has been engaged is under a continued duty of performance of its obligation and a duty of ceasing the breach. *See* Articles on State Responsibility, *supra* note 175, arts. 29, 30(a). In addition, the responsible state may also not rely on the provisions of its internal law as justification for failure to comply with its obligations under Part II of the Articles, including the duty to cease the breach. *See id.* art. 32.

182. *See* Articles on State Responsibility, *supra* note 175, art. 11; Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Rep. 3, ¶ 74.

183. *See* CRAWFORD, *supra* note 176, at 82.

184. *See id.* at 91.

185. *Id.*

Despite the goal of limiting responsibility, the law on state responsibility does recognize multiple attribution grounds. Furthermore, under the law of state responsibility, it does not make a difference whether a state obligates individuals whose actions are attributable to it to follow international law, or not. Individuals are therefore in principle capable of breaching international law obligations incumbent on their state, irrespective of the guidance they receive from the state. Specifically, the wrongfulness of breaches of international obligations by individuals who are organs of states cannot be precluded by the fact that they acted *ultra vires*,<sup>186</sup> or that their act is prohibited by domestic law.<sup>187</sup> “What matters is the exercise of *state authority*, not its propriety,” as Crawford explains.<sup>188</sup> Furthermore, a person’s interests or motivations for action may diverge from those of the state. This would not bar the attribution of international responsibility of these actions to the state if the relevant criteria were met. There is one exception: the state would not be held responsible when the individual acts in her private capacity. A person would be considered as acting *ultra vires*, rather than privately, however, when she appears to be acting under the cloak of authority, for instance, when wearing uniform or purporting to carry out official functions.<sup>189</sup>

The principle of holding a state accountable for attributable individual actions, even if conducted *ultra vires*, is also evident in other substantive provisions of international law. Consider, for example, the international prohibition against torture. Article 1 to the Convention Against Torture defines torture as an “act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>190</sup> Thus, by definition, a public official committing torture implicates her state in a violation of the international legal prohibition on torture. This is irrespective of whether torture is condoned or condemned by domestic law.<sup>191</sup> Note that this definition is particularly

186. See Articles on State Responsibility, *supra* note 175, art. 7.

187. Art. 3 to the Articles on State Responsibility determines that an act’s lawfulness under a state’s domestic law does not affect the determination of whether it is internationally wrongful. See *id.* art. 3. This rule is often referenced as a ground to denying states the possibility of relying on domestic law in order to claim the legitimacy or necessity of their internationally wrongful act or omission. See, e.g., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries: Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, II, Part Two Y.B. INT’L L. COMM., 36 (2001). Arguably, the rule can also be read to prevent states from renouncing their responsibility for individual conduct by citing a domestic law prohibiting that conduct.

188. CRAWFORD, *supra* note 178, at 136.

189. See generally *id.* at 136–40; CRAWFORD, *supra* note 176, art. 7, ¶ 8.

190. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, art. 1, 1465 U.N.T.S. 85.

191. As the Inter-American Court for Human Rights stipulated in the seminal Velasquez Rodriguez decision:

Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the

broad in that it allows individuals to breach the international legal prohibition on torture in a manner attributable to the state when they act merely “at the instigation of” a public official, meaning the “incitement, inducement or solicitation” by an official, or even acting merely with her “consent or acquiescence.”<sup>192</sup> State liability for torture is further underscored by the derivative obligation on a state to prevent, investigate and punish instances of torture, which may also serve as a standalone ground for attributing the conduct to the state.<sup>193</sup>

Consider likewise acts of genocide, war crimes or crimes against humanity that are carried out by soldiers, or directed by low-, or mid-level commanders. Such actions may incur state responsibility, in addition to the potential international criminal liability of the individual actors, which I discuss separately below.<sup>194</sup>

Acts of sub-national municipalities or governments may also give rise to international responsibility of their state. The *LaGrand* and *Avena* cases heard by the ICJ are the obvious examples.<sup>195</sup> In both cases, federal sub-units’ actions led to a breach of the United States’ international obligations, in *Avena*, even in defiance of the President’s pronounced commitment to uphold them.

In the *LaGrand* case, the ICJ issued a preliminary measure instructing the United States to delay the execution of Walter LaGrand, a German national, just hours prior to his planned execution on March 3, 1999.<sup>196</sup> Sought by Germany, this measure was based on the failure of authorities in Arizona to discharge the United States’ obligation under the 1961 Vienna Convention on Consular Relations<sup>197</sup> to notify foreign nationals upon their arrest of their

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acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

*Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 169-70 (July 29, 1988).

192. MANFRED NOWAK, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 78–79 (2008).

193. See *Velasquez Rodriguez*, No. 4, ¶ 172 (“An illegal act which violates human rights and which is initially not directly imputable to a State [for example, because it is the act of a private person or because the person responsible has not been identified] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”).

194. See, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UNGA Res. 260, Dec. 9, 1948, art. 1; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. and Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 166 (Feb. 26) (“It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law”); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, arts. 6-8.

195. For a detailed discussion of the cases, see Alberto R. Gonzales & Amy L. Moore, *No Right at All: Putting Consular Notification in Its Rightful Place after Medellin*, 66 FLA. L. REV. 685, 694–97 (2014).

196. See *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27), ¶ 479; *Federal Republic of Germany v. United States*, 526 U.S. 111, 111–12 (1999).

197. See Vienna Convention on Consular Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

right to consular assistance. Germany immediately sought enforcement of the ICJ measure with the U.S. Supreme Court, which denied relief, citing Germany's tardiness in seeking it as well as jurisdictional limitations.<sup>198</sup> LaGrand was executed in Arizona as planned.<sup>199</sup> The ICJ later found the United States to have breached its international legal obligations twice: first, by not notifying LaGrand of his right to consular assistance, and second, by failing to uphold the provisional measure.<sup>200</sup>

In the 2004 *Avena* case, the ICJ ruled that José Ernesto Medellín Rojas, among other Mexican nationals convicted of crimes in the United States, was entitled to a review and reconsideration of his conviction and sentence by Texas courts, as a result of the authorities' failure to notify him of his right to consular assistance under the Vienna Convention.<sup>201</sup> President George W. Bush subsequently issued a memorandum determining that the United States "will discharge its international obligations" emanating from the ruling.<sup>202</sup> However, in its March 2008 *Medellín v. Texas* decision, the U.S. Supreme Court held that the ICJ ruling in *Avena* does not have an automatically binding domestic effect in the United States,<sup>203</sup> and maintains such status despite the President's memorandum. In a direct challenge to the President's position and the ICJ ruling, Texas authorities executed Medellín on August 5, 2008 without review or reconsideration.<sup>204</sup>

The second way in which individuals are capable of breaching norms of international law is through non-officials' influence on state practice. Here, consider the mirror example of the We Are Still In coalition case discussed in Section B of this Part. Imagine that the United States remains fully committed to its NDCs under the Paris Agreement, but that, despite genuine and significant regulatory and enforcement efforts, it is unsuccessful in mobilizing its industry and population to work toward the emission reduction goal. A broad civil movement has gained ground in opposition to the government's climate change efforts and has effectively blocked them. Such scenario would entail that individuals, factory owners and communities, have, through civil disobedience, litigation, public protest or otherwise, caused the failure of the United States to meet its NDCs, despite the government's formal position. Note that public non-cooperation with climate change action may be motivated not only by ideological opposition, but also by finan-

198. See *Germany*, 526 U.S. at 112.

199. See *LaGrand*, 2001 I.C.J. Rep. 466, ¶¶ 32–34.

200. See *id.* at ¶ 128(3)–(5).

201. See *Avena and other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12 (Mar. 31), ¶ 153(9).

202. George W. Bush, *Memorandum for the Attorney General: Compliance with the Decision of the International Court of Justice in Avena*, WHITE HOUSE (Feb. 28, 2005), <https://perma.cc/NCV9-9LZS>; see *Medellín v. Texas*, 552 U.S. 491, 525 (2008).

203. See *Medellín*, 552 U.S. at 507–09.

204. See Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST (Aug. 6, 2008), <https://perma.cc/FC57-HEGK>. Medellín's last minute appeal was dismissed by the Supreme Court, *Medellín v. Texas*, 554 U.S. 759, 760 (2008).

cial or practical inability to undertake the necessary reform. In this manner, too, non-official individuals can bring about the failure of states to meet their international obligations.<sup>205</sup> Granted, the obligation under the Paris Agreement is to “pursue measures” to mitigate climate change and not to meet the NDCs. Nevertheless, a complete failure to make progress may arguably cast doubt on the adequacy of the measures pursued and consequently, on the state’s compliance with its obligations.<sup>206</sup>

The third manner in which individuals may breach international legal norms is by failing to comply with obligations imposed directly on them by international law. I have already mentioned the rules of international humanitarian law and international criminal law which forbid people to engage in genocide, war crimes or crimes against humanity.<sup>207</sup> The Law of the Sea is an additional case in point. Articles 99–109 of the 1982 U.N. Convention on the Law of the Sea,<sup>208</sup> include states’ undertakings to “take effective measures to prevent and punish the transport of slaves,” “cooperate . . . in the repression of piracy,” “cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances,” and “cooperate in the suppression of unauthorized broadcasting from the high seas.”<sup>209</sup> These provisions do not explicitly criminalize the referenced activities. Nevertheless, such criminalization is clearly codified in them.<sup>210</sup>

In this context, it is helpful to summon again Dan-Cohen, and stress that legal prohibition of individual actions does not necessarily occur by way of a language directly prohibiting certain conduct, but in fact is often done by indirect language, for instance by determining the punishment to be levied on the conduct in question.<sup>211</sup> The same may be the case when an act is criminalized, but the details as to the criteria for its establishment or the specifics required for its enforcement are left to secondary regulation. A construction in which states legislate an obligation on individual conduct by way of an international treaty, or agree to legislate it domestically, appears in other areas of international law as well. These include the prohibition on individuals to engage in bribery of foreign officials;<sup>212</sup> whaling,<sup>213</sup> and

205. Although, as made clear above, the NDCs are not actually legally binding. What the United States is legally committed to do is to work toward the goal to which it committed. Nonetheless, making no progress or little progress toward the goal may plausibly be claimed to represent a failure to work toward the goals.

206. See Vienna Convention on the Law of Treaties, *supra* note 156, art. 26.

207. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 194, art. 1; Rome Statute of the International Criminal Court, *supra* note 194, arts. 6–8.

208. These articles are formally part of the chapter of the Convention which deals with the law of the high seas, but they are also adopted into the Exclusive Economic Zone chapter, United Nations Convention on the Law of the Sea art. 58(2), opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397.

209. *Id.* arts. 99, 100, 108, 109.

210. See J. Ashley Roach, *Countering Piracy off Somalia*, 104 AM. J. INT’L L. 397, 402–03 (2010).

211. See Dan-Cohen, *supra* note 174, at 630–31.

212. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, art. 2.

human trafficking.<sup>214</sup> In all such cases, where direct international obligations apply to individuals, individuals may breach international law.

#### D. Interpretation and Development

Individuals debate the meaning and application of international law norms, negotiate their interpretation, and contribute to their development. Such engagement with international law was evident in the heated public debate in Israel in the winter of 2018 on the legitimacy of deporting asylum seekers and refugees to allegedly “safe third countries.”

Israel has signed and ratified the 1951 Convention Relating to the Status of Refugees as well as its 1967 Protocol,<sup>215</sup> but it has never promulgated the legislation necessary to give domestic legal effect to their provisions.<sup>216</sup> Nevertheless, the core customary principle of *non-refoulement* which forbids the return of a person to a place where her life or liberty are at risk, has been pronounced by the Supreme Court as domestically binding, also forming part of the constitutional value of human dignity.<sup>217</sup>

Starting in 2006, Israel has seen a significant increase in the numbers of undocumented individuals crossing by foot into the country through its long, unfenced Egyptian border. The numbers of entrants peaked in 2011, then the trend reversed with a dramatic decline, probably due to the erection of a fence on most of the border by 2012.<sup>218</sup> The numbers have remained steadily low since.<sup>219</sup>

The overwhelming majority of those entering Israel in this manner—estimated at a total of approximately 65,000<sup>220</sup>—did not originally come

213. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361, art. 9.

214. See Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319, art. 5.

215. See Convention Relating to the Status of Refugees, July 29, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 13, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. For ratification status, see United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/CONF.2/108 (July 28, 1951). While the Convention’s protection is limited only to persons who have become refugees as a result of events occurring before January 1, 1951, in Europe or elsewhere, see Refugee Convention, art. 1, the Protocol extends this protection to persons who have become refugees as a result of events that occurred after that date and removes the geographic limitation, Refugee Protocol, pmbL., art. 1.

216. See HCJ 7146/12 Adam v. The Knesset, ¶ 7 (J. Arbel) (2013) (Isr.).

217. President Aharon Barak, who penned the decision, clarifies specifically that the prohibition also extends to removal to a (third) country where there is reason to believe that this country would expel the person to a place where his life or liberty would be in danger, see *El Tai v. Minister of Interior*, 493 PD 843, 9 (1995) (Isr.). The 1971 decision in HCJ 17/71 Mrar v. Minister of Defense 28(1) PD 141 (1971) (Isr.), already holds in more general terms that authorities must do everything within their power to spare deportees of life-endangerment.

218. See HCJ 7146/12 Adam, ¶ 99 (J. Arbel); Numbers are derived from Population and Immigration Authority, *Aliens in Israel Statistics: Summary of 2014* (2015) [hereinafter *Alien Statistics 2014*].

219. See Population and Immigration Authority, *Aliens in Israel Statistics: Summary of 2017* (2018); Population and Immigration Authority, *Aliens in Israel Statistics: Summary of 2016* (2017).

220. See *Alien Statistics 2014*, *supra* note 218.

from Egypt, but rather from other African countries that do not share a border with Israel, predominantly from Eritrea and Sudan.<sup>221</sup> Thus, they did not simply cross a joint border between their country and Israel, but rather made their way through Egypt to Israel.<sup>222</sup> The Law for Prevention of Infiltration criminalizes unauthorized crossing of the border into Israel,<sup>223</sup> designating such offenders as “infiltrators,” a term that carries highly pejorative baggage.<sup>224</sup>

Successive governments have adopted measures aimed at deterring and curbing “infiltration,” including a pushback policy;<sup>225</sup> a prohibition on the employment of undocumented individuals;<sup>226</sup> the detention of “infiltrators” in the Holot reception center (run by the Israeli Prison Authority; effectively a detention facility);<sup>227</sup> requiring employers to deduct twenty percent of “infiltrators’” pay which would only be returned upon their departure from Israel;<sup>228</sup> passing legislation that would enable their indefinite incarceration

221. 33,999 Eritrean nationals and 8,772 Sudanese nationals resided in Israel at the time of the reports’ writing. Of the total of 46,437 undocumented individuals estimated to reside in Israel, they therefore made up 73% and 19%, respectively, and 92% cumulatively. Nationals of other African countries made up additional 7% of the total. *See id.*

222. Some of these, primarily Sudanese nationals, have previously resided and even sought asylum, and some have even received asylum in Egypt. And yet, a police crackdown on Dec. 30, 2005 on a sit-in led by Sudanese asylum seekers at Mustafa Mahmoud Park in Cairo resulted in the death of twenty-seven Sudanese nationals and the arrest of hundreds of others. Subsequent to these events, Sudanese nationals increasingly started to leave Cairo for Israel. On the Mustafa Mahmoud incident, see *A Tragedy of Failures and False Expectations: Report on the Events Surrounding the Three-Months Sit-In and Forced Removal of Sudanese Refugees in Cairo, September–December 2005*, AM. U. CAIRO (2006), <https://perma.cc/T29L-PG4V>.

223. *See* Reuven (Ruvi) Ziegler, *No Asylum for “Infiltrators”: The Legal Predicament of Eritrean and Sudanese Nationals in Israel*, 29 IMMIGR. ASYLUM & NAT’LITY. L. 172, 176 (2015).

224. Since the term “infiltrators” has been anchored in legislation, I do refer to it but I wish to highlight its problematic nature. *See* J. Uzi Vogelmann’s criticism of the choice of term “infiltrator” in HCJ 7146/12 Adam v. The Knesset, ¶ 12 (2013) (Isr.)

225. According to the Israeli policy effective between 2007 and 2011, the Israel Defense Forces returned “infiltrators” who crossed into Israel from Egypt back into Egyptian territory or delivered them to Egyptian authorities. *See* HCJ 7302/07 Hotline for Migrant Workers v. Minister of Defense (2011).

226. However, the Supreme Court gave formal effect to the government’s undertaking not to enforce such prohibition with respect to those asylum seekers whose asylum request had not yet been decided. *See* HCJ 6312/10 Kav LaOved v. The Government (2011).

227. In these three successive decisions, the HCJ struck down different aspects of the government program to detain “infiltrators” in a formally-open detention facility in the Israeli desert until such time as they could be deported or up to a maximum of three years. In *Adam*, the Court held that holding a person for the purpose of deterring others from “infiltrating” into Israel is unconstitutional, and further that detention for a period of three years is disproportionate. *See* HCJ 7146/12 Adam. In *Eitan*, detention for the period of one year was also found to be excessive and unconstitutional, as well as the requirement that people report to center authorities three times a day. *See* HCJ 7385/13 Eitan v. The Government of Israel (2014). The Court ordered the closure of the facility within 90 days. In *Desseta*, the Court allowed for the three-months detention of “infiltrators” but reiterated its ruling that extension of detention beyond 12 months is unconstitutional. *See* HCJ 8665/14 Desseta v. The State of Israel (2015). The Holot Detention Facility was finally shut down in March 2018. *See* Yarden Zur, *Last Asylum Seekers Released From Holot Detention Center as Mass Deportation Campaign Moves Ahead*, HAARETZ (Mar. 14, 2018), <https://perma.cc/DK4B-T3AW>.

228. *See* Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel Act (Legislative Amendments and Temporary Orders), art. 4(8) (2014).



unless they consent to their deportation from Israel;<sup>229</sup> and finally, seeking to arrive at secret “safe third country” agreements which would allow for the deportation of Sudanese or Eritrean nationals to such countries, even without their consent.<sup>230</sup>

The identity of the third countries was not officially disclosed but was quickly leaked.<sup>231</sup> The agreements with Rwanda and Uganda were claimed to allow for the deportation from Israel of asylum seekers, refugees, and those whose refugee status application had been denied.<sup>232</sup> It should be said that the need for these agreements arose from the government’s principled acceptance of its obligation not to return Eritrean and Sudanese nationals back to their home countries, where many are likely to face risk to life or liberty—if only for having entered Israel in the first place (in the case of Sudan), or for having avoided forced conscription (in the case of Eritrea).<sup>233</sup> Grudgingly, but mostly consistently, Israel has granted temporary group protection to these populations despite its simultaneous refusal to acknowledge fleeing forced conscription in Eritrea as a ground for refugee status, a position widely accepted elsewhere in the world.<sup>234</sup>

The third country agreements with Rwanda and Uganda were upheld by the Supreme Court in its August 2017 *Tsagatta* ruling. The Court upheld the government’s claims that such international contracting can, under certain conditions, be legitimate, even with respect to coerced deportation.<sup>235</sup> Nevertheless, reviewing the confidential agreements *ex parte*, the Court interpreted the specific agreements with Rwanda and Uganda as requiring the deportees’ consent.<sup>236</sup> Furthermore, the Court held that threatening prospected deportees with indefinite incarceration should they refuse to be deported does not give rise to valid consent or to legitimate deportation.<sup>237</sup>

According to media publications, following the *Tsagatta* ruling, the Israeli government sought and obtained in October 2017 the amendment of the agreement with Rwanda to explicitly allow for non-consensual deportation.<sup>238</sup> Soon afterwards, two new regulatory procedures were published, regulating the forced deportation of Eritrean and Sudanese refugees and asylum seekers, including those whose asylum request is pending, set to begin on

229. See Entry into Israel Act, art. 13f(b)(1) (1952) (allowing for the indefinite detention of a person who is present in Israel unlawfully due to “lack of full cooperation” on his or her part with his or her deportation from Israel).

230. APA 8101/15 *Tsagatta v. Minister of Interior* (2017).

231. See Administrative Petition, AP 54836-04-15 *Doe v. Minister of Interior* (Submitted Apr. 20, 2015), ¶ 64.

232. See Population and Immigration Authority, 10.9.0005 *Deportation to Third Countries Procedure* (1st ed.), art. 3 (Jan. 1, 2018).

233. See Ziegler, *supra* note 223, at 177, 181.

234. For a good overview of the status of Eritrean and Sudanese asylum seekers in Israel, see *id.*

235. See APA 8101/15 *Tsagatta v. Minister of Interior* ¶¶ 39, 115 (2017).

236. See *id.* at ¶ 117.

237. *Id.* at ¶ 126.

238. See Ilan Lior & Barak Ravid, *Israel Can Now Deport African Asylum Seekers Without Their Consent*, HAARETZ, (Oct. 25, 2017), <https://perma.cc/9G27-F6FB>.

April 1, 2018.<sup>239</sup> The procedures also allowed for incarceration of those who refuse to consent to their deportation.<sup>240</sup>

These developments ignited a public debate in Israel inspired by the idea of *non-refoulement* and revolving around the responsibility of Israel as the deporting country to the safety of those whom it deports. Broad public mobilization was led by civil society organizations, both grass-root refugee organizations and Israeli organizations providing services to the refugee community, but spanned many other grass-root ad hoc initiatives in various sectors of the Israeli public. Several action platforms can be identified, including the use of publicly-circulated petitions or calls; fact-finding and media publications; seeking to generate international pressure on Israel from U.N. bodies and international NGOs; public protests, litigation and more. The following paragraphs elaborate on each of these platforms. Of course, mobilization was not restricted to those opposed to the deportation.<sup>241</sup> Nevertheless, in the following pages I focus almost exclusively on the opposition campaign, preferring a thick, detailed description of one strand of the public debate over a hasty description of both, within the confines of this already long article.

First, an explosion of petitions, signed by holocaust survivors, diplomats, El-Al airline pilots, doctors, psychologists, social workers, musicians, architects, school principals and teachers, academics, CEOs and tech entrepreneurs, journalists, actors and cinematographers,<sup>242</sup> and other groups, including a letter signed by 800 American Jewish clergymen<sup>243</sup> joined in public outcry against the deportation. Prospected deportees staged hunger strikes<sup>244</sup> and created art installations,<sup>245</sup> and musicians released videos dedicated to the protest.<sup>246</sup>

239. See Entry into Israel Law, 5712-1952, art. 13f(b)(1) (Isr.); Population and Immigration Authority, Deportation to Third Countries Procedure, ¶ 5.3 (No. 10.9.0005, 1st ed. 2018) (Isr.); Population and Immigration Authority, Deportation to Third Countries from Holot Detention Facility ¶ 4.9 (No. 10.9.0005, 2nd ed. 2018) (Isr.).

240. See Entry into Israel Law, *supra* note 239, art. 13f(b)(1); Population and Immigration Authority, Deportation to Third Countries Procedure, *supra* note 239, ¶ 5.3; Population and Immigration Authority, Deportation to Third Countries from Holot Detention Facility, *supra* note 239 ¶ 4.9.

241. For instance, the Front to Free South Tel Aviv staged a counter demonstration calling for the deportation of infiltrators, see Itay Blumenthal, *Clasbes at a South Tel Aviv Demonstration against the Deportation of Foreign Nationals*, YNET (Jan. 1, 2018), <https://perma.cc/6BA3-5BXF>.

242. See *Doctors, Pilots and Rabbis: Opposition Grows to Israel's Plan to Deport Asylum Seekers*, HAARETZ (Jan. 24, 2018), <https://perma.cc/7T5X-ER59>; Max Schindler, *Israeli CEOs, Tech Entrepreneurs Speak Out Against African Deportations*, JERUSALEM POST (Feb. 2, 2018), <https://perma.cc/3257-J46B>; Staff, *Former Diplomats Join Outcry Against Deportation of African Migrants*, TIMES OF ISRAEL (Jan. 28, 2018), <https://perma.cc/CGQ6-89Z4>.

243. See *Former Diplomats*, *supra* note 242.

244. See Ilan Lior, *Hundreds of Asylum Seekers Go on Hunger Strike as Israel Begins Jailing Those Refusing Deportation*, HAARETZ (Feb. 21, 2018), <https://perma.cc/CG3Y-P9M3>.

245. See Itay Blumenthal, *Against the Backdrop of Asylum Seeker Deportation: Confrontations in the Herzliya Gymnasium*, YNET, (Aug. 3, 2018), <https://perma.cc/2S42-GTUC>.

246. See Nechi Nech & Barry Sacharoff Singing Against Deportation of Refugees, MAKO (Feb. 15, 2018), <https://perma.cc/78CS-BRVF>.

The various documents called on the government to refrain from sending people back to the “hell from which they fled,”<sup>247</sup> and argued that the deportation “will add the State of Israel to the cycle of harm done to the refugees” and amounts to “sentencing them to continued harm.”<sup>248</sup> They referenced Israel’s identity as a state of law and asylum seekers’ rights under international conventions that it had signed<sup>249</sup> and invoked the Jewish history of statelessness and persecution, quoting biblical texts.<sup>250</sup> Hundreds of people vowed to hide refugees in their homes to circumvent deportation.<sup>251</sup>

Israeli Members of the Knesset from the opposition, activists and journalists went on fact-finding missions to Rwanda or interviewed past deportees and revealed that they have not been granted the rights that were promised.<sup>252</sup> In fact, many were coerced into leaving Rwanda, embarking on dangerous journeys to Uganda and beyond, and ending up either on dangerous sea voyages to Europe or worse, being repatriated to their countries of origin.<sup>253</sup> Similar concerns were raised by the office of the U.N. High Commissioner for Refugees after interviewing 80 deportees from Israel to Sub-Saharan African countries who ended up in Rome.<sup>254</sup>

Street protests were staged both in Israel<sup>255</sup> and in front of Rwandan, Ugandan and Israeli embassies throughout the world, from Toronto to New York, Paris to Beijing. These transnational coordinated efforts were facilitated through Facebook groups whose membership included Israeli emigrants or students studying abroad as well as other partners of the cause.<sup>256</sup>

Despite the Israeli government’s insistence that the agreement with Rwanda was indeed amended, in early 2018 Rwandan and Ugandan officials publicly denied the existence of any agreement with Israel which facilitates coerced deportation. “The Government of Rwanda wishes to inform that it has never signed any secret deal with Israel regarding the relocation of African migrants,”<sup>257</sup> the Government Spokesperson said. The Rwandan Foreign

247. Ilan Lior, *Hundreds of Israeli Academics Urge Netanyahu Not to Deport African Asylum Seekers: “We Have a Historic Duty,”* HAARETZ (Jan. 20, 2018), <https://perma.cc/Z3L3-XEAY>; Diplomats, Social Workers Petition Against Mass Deportation, YNET, (Jan. 29, 2018), <https://perma.cc/ZK2C-6URA>.

248. *Doctors, Pilots, supra* note 242.

249. *See id.*

250. *See* Lior, *supra* note 247; *Diplomats, Social Workers, supra* note 247.

251. *See Doctors, Pilots, supra* note 242.

252. *See* Oren Ziv, *Sent to Rwanda by Israel: ‘We Have No Food or Work. Don’t Come Here’,* +972 MAGAZINE (2018), <https://perma.cc/9MWY-EQB6>.

253. *See id.*

254. *See* United Nations High Commissioner for Refugees, *UNHCR Appeals to Israel over Forced Relocations Policy* (Jan. 9, 2018), <https://perma.cc/BR7R-8Y56>.

255. *See* Lee Yaron, *25,000 Protest in Tel Aviv Against Israel’s Asylum Seeker Deportation Plan*, HAARETZ, (Mar. 24, 2018), <https://perma.cc/36YD-W2VF>; Ilan Lior, *20,000 Israelis Protest Deportation of African Asylum Seekers*, HAARETZ, (Feb. 24, 2018), <https://perma.cc/ANC8-J26J>.

256. *See* Shachar Peled, *‘We Can’t Let This Happen’: Protests Erupt Worldwide Against Israel’s Deportation of Asylum Seekers*, HAARETZ (Feb. 8, 2018), <https://perma.cc/K74Y-SJ8D>.

257. Republic of Rwanda, *Statement from the Government Spokesperson Regarding the Relocation of African Migrants from Israel* (Jan. 23, 2018), <https://perma.cc/6EGP-GP9L>.

Minister, Olivier Nduhungerehe, further tweeted that “#Rwanda has no deal whatsoever with #Israel to host any African migrant from that country.”<sup>258</sup>

A legal memorandum publicly addressed to the Attorney General was signed by 25 Israeli international law experts, citing the procedures’ breach of general principles of international law as well as human rights law and refugee law norms.<sup>259</sup> It stressed that the Rwandan denial of the agreement led to the deportees’ inability to rely on it to vindicate their rights in the Rwandan justice system. They were therefore *de-facto* forced into dangerous conditions as a result of deportation, which renders such deportation in violation of *non-refoulement*.<sup>260</sup> This memo’s arguments were supported by similarly critical public statements by U.N. experts<sup>261</sup> and North American and European international refugee law experts.<sup>262</sup> Global NGOs also joined their voice in protest against the deportation<sup>263</sup> as well as against the threat of incarceration for those who do not consent to be deported, citing, particularly, Israel’s unfair asylum system.<sup>264</sup>

Israeli human rights activists also filed petitions with the High Court of Justice against the new procedures, highlighting the new evidence on Rwandan denial of the agreement.<sup>265</sup> On March 15, 2018, two weeks before the official inception of deportation under the new procedures, the Court granted a temporary injunction restraining the government from carrying out deportation under their framework.<sup>266</sup>

On April 2, 2018 Israeli Prime Minister Benjamin Netanyahu called a press conference where he recognized that the third country option is no longer viable. He announced a deal reached with the U.N. according to which 16,250 Eritrean and Sudanese nationals would be resettled in Western countries, and an equal number would receive temporary residence permits in Israel, thereby largely resolving the issue with respect to the majority of the asylum seeker community still in Israel.<sup>267</sup> Several hours

258. Shoshana Kranish, *Rwanda Denies Existence of Deal to Accept African Migrants from Israel*, JERUSALEM POST (Jan. 23, 2018), <https://perma.cc/NC9R-JAKN>.

259. See Kevin Jon Heller, *Letter to the Israeli AG About the Deportation of African Asylum Seekers*, OPINIO JURIS (Feb. 6, 2018), <https://perma.cc/VT8Y-GCV7>. Full disclosure: I am one of the letter’s signatories.

260. See *id.*

261. See United Nations High Commissioner for Refugees, *Israel: UN Experts Urge Immediate Halt of Plans to Deport Eritrean and Sudanese Nationals* (Mar. 1, 2018), <https://perma.cc/5DGJ-K338>.

262. See JTA, *Dozens of Refugee Law Experts Object to Israeli Deportation Plan*, TIMES OF ISRAEL (Apr. 11, 2018), <https://perma.cc/24WH-VPAH>.

263. See Amnesty International, *Israel: Deportation of African Asylum-seekers is a Cruel and Misguided Abandonment of Responsibility* (Mar. 26, 2018), <https://perma.cc/9BGQ-PUQX>.

264. See Human Rights Watch, *Israel: Don’t Lock Up Asylum Seekers* (Jan. 22, 2018), <https://perma.cc/H3ZN-TUBP>.

265. See HCJ 2445/18 Hotline for Refugees and Migrants v. Prime Minister (2018) (Isr.).

266. See HCJ 679/18 Kook-Avivi v. Prime Minister (Interim decision, Mar. 15, 2018) (Isr.) (interim decision).

267. See Lee Yaron & Noa Landau, *Israel Reaches Deal With UN to Deport Asylum Seekers to West, Not Africa*, HAARETZ (Apr. 2, 2018), <https://perma.cc/XMM9-BCHA>.

later, however, Netanyahu renounced the U.N. deal, yielding to pushback from his rightwing base on social media.<sup>268</sup> The government nonetheless notified the Court, on April 24, 2018, that “involuntary deportation to a third country is not presently a valid option.”<sup>269</sup> Media reports have since suggested that despite renegeing on the deal, Israel has reengaged the U.N. about a new deal to resettle at least some of the refugees elsewhere.<sup>270</sup> At the time of writing, this engagement, too, is reported to have failed.<sup>271</sup>

The story of this public mobilization is therefore not brought here in celebration of people’s success to achieve a certain result or to thwart the government’s deportation plan. It is not yet clear whether the plan will eventually be realized. Rather, this story is brought to highlight a process through which people engaged in a public deliberation about the appropriate interpretation of an international norm, whether or not it is applicable to the situation at hand, what exactly it entails, and whether or not it ought to be followed. Furthermore, since the interpretation of international norms is sensitive to the manner in which they are practiced and understood over time,<sup>272</sup> this mobilization also contributes to the development of international law.

Through this broad public mobilization, individual people—including officials and non-officials, civil society activists and ordinary citizens, Israelis and refugees—acting independently or through organizations and groups, rallied to take a stand on the acceptable limits of “safe third country” agreements and on the appropriate interpretation of Israel’s obligations in accordance with the *non-refoulement* principle. As already noted, this debate also included, of course, voices supporting the deportation and rejecting Israel’s responsibility for the fate of deportees.

Through their pronouncements and their actions, participants in the campaign against the deportation held the Israeli government responsible for the safety of the individuals it hands off to other countries and eschewed attempts by government spokespeople to shrug it off. They interpreted such responsibility substantively, rather than merely procedurally: the government’s claims that it obtained the third countries’ assurances of protecting the rights of deportees were appraised against evidence that such assurances

268. See Noa Landau & Lee Yaron, *Netanyahu Nixes Asylum Seeker Deal After Right-wing Pushback: ‘We Will Remove the Infiltrators,’* HAARETZ (Apr. 3, 2018), <https://perma.cc/H3CD-VJM2>.

269. Respondents’ Update Notice, HCJ 2445/18 *Hotline* (April 24, 2018) (Hebrew; translation is mine).

270. See *Israel Reportedly Seeks to Renegotiate Refugee Deal With UN*, HAARETZ (May 2, 2018), <https://perma.cc/SQ7Q-SHV8>.

271. See Lee Yaron, *Israel Considers Deporting Asylum Seekers to Eritrea and Sudan*, HAARETZ, (July 24, 2018), <https://perma.cc/D5WJ-RRQQ>.

272. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(3)(b) (determining that “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account in the interpretation of a treaty).

were either not granted or that they were not being upheld.<sup>273</sup> They condemned Rwanda and Uganda for agreeing to receive coerced deportees.<sup>274</sup> Pressure was placed on these countries, too, to not cooperate in the involuntary deportation of asylum seekers and refugees.<sup>275</sup> Rwanda was shamed as the stories of persons formerly deported to it came into light, revealing that travel documents were systematically taken away; that despite promises, they were not allowed to work; that they were pressured into leaving on dangerous smuggling routes to Uganda and onwards, and more.<sup>276</sup>

This clear voice also rang in the halls of the Supreme Court, helping to awaken the judges to belatedly recognize the inadequacy of the agreements in relation to Israel's *non-refoulement* obligations. The shift is particularly evident in the judges' explicit concern, voiced in a hearing in March 2018 regarding the implications of the agreement's secrecy in light of the evidence from past deportees.<sup>277</sup>

Through this collective engagement between August 2017 and April 2018, the contours of Israel's *non-refoulement* obligations were redrawn, both legally and practically. Although many organizations took part in the public campaign, many individuals who were in no way centrally directed or organized also took part in these efforts with many voicing their motivation as resting on emotions of personal responsibility, empathy, shame or anger, but also on a principled commitment to the rule of law which requires that Israel respects its obligations under international law as they understand them.<sup>278</sup>

## CONCLUSION

Adopting constructivist methodological individualism in the research of international law requires us to strive to explain international law developments at the level of individual action. It entails studying both individuals' contributions to developing international law, and international law's influence on individual action. It entails, further, studying not only those high-level officials we are accustomed to equate with states—presidents, prime ministers, foreign ministers, even judges—but also specifically tracing the engagement with international law of non-officials, down to the person in the street.

As Part III has demonstrated, CMI's chief contribution is in shedding light on processes of international legal development hitherto gone unnoticed, or at least, undertheorized. These are processes which, since they do

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273. See appellants' claims in APA 8101/15 Tsagatta v. Minister of Interior (Aug. 28, 2017).

274. See *supra* note 256 and accompanying text.

275. See *id.*

276. See *supra* notes 252–254 and accompanying text.

277. See HCJ 679/18 Kook-Avivi v. Prime Minister (hearing on Mar. 12, 2018) (Isr.).

278. See *supra* notes 242–251, 255–256, 259 and accompanying text.

not engage formal state or elite actors, or since they do not culminate in a result that is easily classifiable as compliant or non-compliant with an international obligation, fly under the radar of international law scholarship. CMI is therefore helpful in exposing what is, in effect, the everyday life of international law.

CMI also offers several additional contributions. First, it underscores the agential capacity of individuals, including with respect to international law. CMI rejects portrayals of individuals as passive receptors of norms, and rather depicts them as proactive practitioners, taking part not only in international law's making but also in its everyday implementation, interpretation, development, or breach. This outlook poses a challenge to international law scholarship and questions its ability to offer satisfactory assessments of the law's effectiveness when focusing on states as exclusive lead actors.

Second, CMI commits us to a simultaneously top-down and bottom-up reading of international law. It views international law as an ongoing project, continuously evolving and constantly negotiated by a multitude of stakeholders. Such an outlook also has implications for theory and doctrine, and may lead to fresh insights about the origins, meaning and effects of international norms and institutions.

Third, CMI suggests that theorists of international law should not be content with limiting themselves to IR-style methodological statism. While statism may be helpful in accommodating certain IR research goals, it is incompatible for theorizing many of the complex processes through which international legal development is achieved. Studying the international legal system, I argue, requires taking individual people's practice into account, not only state practice.

Finally, as demonstrated by the examples discussed in Part III, constructivist methodological individualism helps reveal that every individual can engage with international law and drive processes of change both in her country and internationally. This is the case even when such processes are not formally embraced by states' political leadership.

On the day of the release of the U.S. Supreme Court ruling in *Obergefell*,<sup>279</sup> legalizing same-sex marriage, President Barack Obama gave a brief but heartfelt address. He described the ruling as "a consequence of the countless small acts of courage of millions of people across decades." "What an extraordinary achievement," he concluded, "but what a vindication of the belief that ordinary people can do extraordinary things."<sup>280</sup> It is exactly this recognition of the aggregate force of small-scale, unplanned, uncoordinated but eventually highly significant individual actions that constructivist methodological individualism seeks to embed into the study of international law.

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279. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

280. *Transcript: Obama's Remarks on Supreme Court Ruling on Same-sex Marriage*, WASH. POST, (June 26, 2015), <https://perma.cc/7RSM-7M5D>.

