In a realistic and descriptive sense, customary human rights law is a complex and dynamic legal process profoundly interconnected with international law more generally and, like the latter, with regional and domestic legal processes throughout the globe. There are no single sources or evidences of human rights law; no single set of participants; and no single arenas or institutional arrangements for the creation, invocation, application, change or termination of such law. Like all human law, it is full of human choice and rich in individual and group participation.

One might challenge this reality, for it can have significant consequences concerning awareness of human rights norms, realistic meaning or content, remedies, and possible sanction strategies. The reality of human rights law might function in ways opposed to favored myths, limiting preferences or biases, and individual psychic needs. Realism more generally (as well as certain basic human rights) is especially opposed to a rigid state-oriented positivism and its favored, even dangerous, consequences. Indeed, Realist orientations to human rights might be threatening to those with a pretense of power, to those who prefer some unobtainable stability (or perhaps merely their own specially favored value positions), and to domestic governmental elites (and those eager to serve them) who are anxious to argue that they should control both the content and application of law.

Yet, it is precisely the reality of human rights law that the scholarly observer, the more than sporadically effective practitioner, and the relatively objective decisionmaker should try to identify, clarify, invoke and apply. For example, if scholars project merely their personal needs and insecurities onto perceived processes of customary law, they will miss other needs, interests, objectives, expectations, and forms of participation and interaffection. They might be blind to normative detail evident in actual patterns of expectation, to the actual strength of customary norms, to opportunities for refinement and change of normative content, to the realities of comprehensive and complex sanction processes, and to opportunities for more effective
sanction strategies. Similarly, practitioners might be less than effective and decisionmakers less than objective if the reality of human rights law is partly hidden by false myth, bias, or muddled thinking. From a realistic perspective, then, what are the primary components of customary human rights law? How are these related to the complex and dynamic legal process termed customary human rights law, to human and institutional participants, to values claimed or shared, and to conforming and nonconforming behavior? And what are some of the inhibiting myths or historic errors proffered by those with a less than realistic orientation?

Despite jurisprudential differences, nearly all agree that customary human rights law has two primary components which must generally be conjoined: (1) patterns of practice or behavior, and (2) patterns of legal expectation, "acceptance" as human rights law, or *opinio juris*. Although some prefer to stress the importance of one element or the other, both are necessary for the formation, shaping and continued validity of customary human rights norms. Indeed, they are somewhat familiar and necessary components of treaty-based human rights law, especially concerning an authoritative and realistic meaning of treaty-based rights.


2 See id. at 61-68, and references cited. *Opinio* may well be the more significant element and driving force of human rights law, but both patterns are needed. See id. at 60 n.4, 61, 63-64 n.12, 64 & n.13.

It would seem strange then to argue that human obligations derive from practice, even stable patterns of practice, and not also *opinio*. Stranger still would be a jurisprudential insistence that past practice as such is necessarily determinative of future practice or that it is far more important than human demands and expectations either as a reliable predictor of future practice or in shaping future attitudes and behavior.\(^4\) A realistic inquiry should demonstrate that both are relevant and influential, that they are often interconnected even as they clash or create tensions and interstimulating patterns.\(^5\) If anything, *opinio* would seem to be more significant in shaping attitudes and behavior, but they are ultimately intertwined and are parts of the whole. The very effort to identify past patterns of practice alone and then to turn this into a "normative" projection for the future,\(^6\) is, at best, an effort at self-deception or the deception of others. It confuses supposedly isolated practice and the "normative," perhaps even confusing choice about what was with both the "is" and "ought" of human rights law.\(^7\)

To pretend that relevant patterns of human "practice" are more "real," "solid," or "hard" than empirically demonstrable patterns of human expectation is equally bizarre.\(^8\) The existence of each set of patterns at any given social moment is a fact, as is their existence, change or nonexistence through time. The discovery and description of each requires human perception and choice, and conclusions about one set of relevant patterns are

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\(^4\) For viewpoints approaching this extreme, see, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82, 88-89, 107 (1989). Curiously, their theory stresses the *opinio* or consensual aspects of "general principles" of domestic law without requiring as serious an inquiry into patterns of practice as they would with respect to customary law. See *id.* at 102, 104-05, 107. Clearly, however, patterns of *opinio* and practice should both be relevant with respect to the identification and clarification of general principles of law. Without generally conforming behavior, such "principles" are at best demands and/or expectations and are not principles of "law". It is also interesting that Philip Alston had already written that there is "a large and growing body of evidence" that much of the Universal Declaration is customary law. See Philip Alston, *The Universal Declaration at 35: Western and Passe or Alive and Universal*, 31 REVIEW 60, 69 (Int'l Comm'n Jurists ed., 1982), *quoted in* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 324 (1995-96).

\(^5\) See generally Paust, *supra* note 1, at 61-68, 72-77.

\(^6\) See, e.g., Simma & Alston, *supra* note 4, at 89.


\(^8\) See, e.g., Simma & Alston, *supra* note 4, at 88-89.
not inherently more "objective" or "empirically" derivable than conclusions about the other. To "thingify" practice and to pretend that it is always "carefully" (a word necessarily implying human volition) hammered out in actual interactions, but that opinio juris never is, is unreal in at least two respects: (1) in assuming that patterns of practice are always carefully hammered out, and (2) in assuming that patterns of human demand and expectation are necessarily less influenced by processes of interaction and are always somehow magically less "careful." Each is real and each can be "solid" or "soft," intense or weak, and widely or narrowly shared or extant.

The main point is that each set of patterns should be measured as objectively as possible for a comprehensive and realistic awareness of customary human rights law. If there is a core of settled meaning, measure it. If around this core there are other possible meanings at or toward the edge which allow room for experimentation and growth within the contours of a human rights norm, identify and clarify these. If new opinio or practice has torn the core apart, measure this also. Instead of imagined tensions between conceptions of opinio and practice, measure real tensions and interconnections with respect to actual patterns of opinio and practice. It is no criticism of customary human rights law that some papered aspiration is not widely expected to be legally relevant or required or that general patterns of practice are not conforming (although surely the particular aspiration cannot rightly be identified as a customary norm). Further, it is understandable that a customary human right is subject to birth, growth, other change, and death, depending upon patterns of expectation and behavior that are recognizably generally conjoined in the ongoing social process. A human right, literally, is what we make of it.

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9 See also Paust, supra note 7, at 12-18, 31, 38-41.
11 See, e.g., Simma & Alston, supra note 4, at 89.
13 See also Paust, supra note 12, at 242-50.
14 See, e.g., Paust, supra note 1, at 64-67.
Despite occasional rhetorical flourish, universality of behavior and unanimity are not required. Patterns of human practice need only be general, not uniform, and patterns of opinio juris need only be generally shared.\textsuperscript{15} Thus, a particular nation-state might disagree whether a particular human right is customary and its governmental elites might even violate such a norm, but it would still be bound if the norm is supported by patterns of generally shared legal expectation and generally conforming behavior extant in the community.\textsuperscript{16} If the patterns of violation become too widespread, however, one of the primary bases of customary law can be lost. Similarly, if it is no longer generally expected that a norm is legally appropriate or required, the other base of customary law can be lost. When either base is no longer generally extant, there can be no conjoining of general patterns of legal expectation and behavior and, for such a social moment at least, a prior customary law will no longer be operative.

For these reasons, both practice and opinio should be measured as comprehensively as possible and with reference to relative stability or change. With respect to opinio juris, it is suggested that the researcher identify not merely how widespread a particular pattern of expectation is or has been, but also how intensely held or demanded a particular norm is or has been within the community.\textsuperscript{17} Awareness of the degree and intensity of general acceptance provides a more realistic approach to the identification and clarification of normative content and should aid those who must apply customary human rights law in making informed and rational choices. It would also be useful to know how long such patterns of expectation have existed, although a prior stability evident through time is no guarantee of continued acceptance in the future and time is not otherwise a determinative factor.\textsuperscript{18} It is possible, of course, to have a relatively recently widespread and intensely held expectation that a human right is legally appropriate or required and that such a pattern of opinio juris could form one of the components of a new rule of customary international law, one that will even be more stable in the future.

\textsuperscript{15} Id. at 63-64, and references cited. Cf. In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (preferring that norms be “universal” or “universally condemned”). Universality of expectation or unanimity are not required, although the norm will be “universal” in obligation.

\textsuperscript{16} Paust, supra note 1, at 64-68 & nn.14-15, 76-77 & nn.30-31; LILICH, supra note 12, at 89, 127.

\textsuperscript{17} See Paust, supra note 1, at 63-64 & n.12, 73, 75-76.

\textsuperscript{18} Id. at 64 n.13.
One of the recent myths concerning opinio and customary law more generally is that a "dissenter" is sometimes not bound by customary international law, as if customary law sometimes, but not always, requires the consent of each actor or participant that such law can reach. In another article, I have demonstrated why this recent claim and certain of its permeations are shared only by a minority and are illogical, false, and threatening to the nature of customary international law. These observations pertain especially in connection with customary human rights and related prohibitions of genocide and human rights in times of armed conflict under humanitarian law.

In view of these recent claims, it is worth emphasizing that not only the prohibitions of genocide, but also the rights and prohibitions contained in treaties such as the 1949 Geneva Conventions (many of which are viewed as customary), as well as human rights treaties as such, are recognizably of a higher status than ordinary international laws. As affirmed by the International Court of Justice in 1970, certain obligations under international law "are the concern of all States...[and i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection." They are, the Court declared, obligatio erga omnes (obligations owing by and to all); and they include prohibitions of genocide and the deprivation of "basic rights of the human person." To this list, especially in view of common Article 1 of the Geneva Conventions (which requires all signatories "to respect and to ensure respect for the Convention[s] in all circumstances" and in view of the universally obligatory criminal sanction...

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19 See id. at 64-65 n.14.
20 Id. at 65-67 n.14, 76-77.
23 Id.
provisions (now part of customary international law), one can safely add war crimes covered by Geneva law. Also significant with respect to the higher status and erga omnes nature of several such treaties is the fact that neither termination nor suspension of performance for material breach is available regarding "provisions relating to the protection of the human person contained in treaties of a humanitarian character," such as the Geneva Conventions and Protocols. If rights and obligations contained in such treaties are also customary, they retain the obligatio erga omnes character recognized by the International Court concerning "basic rights of the human person."

The prohibition of genocide is also a well-recognized example of a peremptory norm jus cogens. Violations of fundamental human rights in times of armed conflict or relative peace are also recognizably included.

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25 Vienna Convention, supra note 3, art. 60(5), 1155 U.N.T.S. at 346. See also Geneva Civilian Convention, supra note 21, arts. 1, 3, 27, 33, 148, 6 U.S.T. at 3518, 3536, 3538, 3618. With respect to genocide, Judge Elihu Lauterpacht has added: "The duty to 'prevent' genocide is a duty that rests upon all parties and is a duty owed by each party to every other." Case Concerning Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. at para. 86 (Further Requests for the Indication of Provisional Measures of Sept. 13) (separate opinion of Judge Lauterpacht) [hereinafter I.C.J. Second Request].

26 See, e.g., I.C.J. Second Request, supra note 25, at para. 100; RESTATEMENT, supra note 3, § 702(a), cmts. d, n; 1 OPPENHEIM'S INTERNATIONAL LAW, supra note 3, at 7-8, § 2; Jordan J. Paust, Congress and Genocide: They're Not Going to Get Away With It, 11 MICH. J. INT'L L. 90, 92-94 n.3 (1989) (survey of textwriters included in other supporting evidence); van Boven, supra note 21, at 15-16.

27 See, e.g., In re Estate of Marcos, 978 F.2d 493, 500 (9th Cir. 1992), quoting Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715, 717 (9th Cir. 1992), quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); RESTATEMENT, supra note 3, § 702, cmt. n & n.1. See also MYRES S. MCDouGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 274, 317-18, 341 (quoting JOHANN BLUNTSCHL, MODERN LAW OF NATIONS OF CIVILIZED STATES (1867))

For example, the customary *jus cogens* prohibitions recognized by the *Restatement* include: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights. More recently, the U.N. Commission of Experts investigating international crimes in the former Yugoslavia has reported that applicability of fundamental human rights norms and the prohibition of genocide in that context is further assured by "their character as peremptory norms of international law." More generally, the *erga omnes* nature of customary human rights is thought to be an added dimension assuring more clearly the universal nature of the obligations involved. An additional assurance exists when particular human rights are not merely *erga omnes* but also *jus cogens*, since these

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28 *RESTATEMENT*, *supra* note 3, §702 (a)-(g) and cmts. d, n; van Boven, *supra* note 21, at 16 (general list), 26 & n.37 (democracy). In his remarks during the Colloquium, Professor Louis Henkin noted that the list was "modest" and not exclusive, and that among the norms he would add today would be those concerning individual autonomy and democracy. In terms of actual judicial use of human right precepts in the United States over the last two hundred years, the Restatement's list of what arguably are customary rights appears modest indeed. See *infra* note 47; Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 596-610 (1989) (documenting state and federal judicial use of numerous categories of customary human rights that were also related to constitutional and statutory norms in over 1,000 cases during a period of more than 200 years). Concerning other categories of human rights claimed in U.S. history, see, e.g., *id.* at 546-70, and references cited. See also Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 F.S.U. J. TRANS. L. & POL. 1, 16, *passim* (1993); Simma & Alston, *supra* note 4, at 93 (addressing the *RESTATEMENT*, Schachter, Lillich and Meron); but see *id.* at 94-95.

Recently, the Human Rights Committee, under the 1966 Covenant on Civil and Political Rights, identified a list of customary human rights mirrored in the covenant. See *United Nations International Covenant on Civil and Political Rights Committee: General Comment Adopted Under Article 40 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant*, General Comment No. 24(52), para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in 34 I.L.M. 839 (1995).

norms are not merely universal but are also peremptory.\textsuperscript{30} Indeed, one extra feature of customary \textit{jus cogens} is the requirement that there exist a general pattern of expectation that such norms are peremptory.\textsuperscript{31} Clearly, such patterns can and should be measured and, like customary law more generally, they can be modified.\textsuperscript{32} In a real sense, \textit{jus cogens} norms represent a shared hope, demand, and expectation that certain values prevail over others. They are the product of a process of choice in which we can all participate.

The reality of individual participation is another important feature of customary human rights law that is too often ignored or viewed less than comprehensively. Imperfect forms of focus, if not limiting biases and preferences, can lead to other false and inhibiting myths—myths that even tend to serve and fit comfortably within a rigid state-oriented positivism that is actually seriously opposed to several basic human rights and to the precept of self-determination.\textsuperscript{33} Part of this reality was rightly stressed at Nuremberg when the International Military Tribunal rejected defense claims “that international law is concerned [merely] with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible. . . .”\textsuperscript{34} While necessarily stressing duties and criminal sanctions as opposed to rights, the Tribunal recognized: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.”\textsuperscript{35} Rejecting the false myth that international law is

\textsuperscript{30} See, e.g., Paust, \textit{supra} note 27, at 81-84.

\textsuperscript{31} \textit{Id.} at 83-84 & n.21.

\textsuperscript{32} See \textit{id.} at 82-85.


\textsuperscript{35} \textit{Id.} at 220. Clearly, there have been some state actor perpetrators (e.g., as in the case of some war crimes). Clearly also, some perpetrators of international crime are private actors. See, e.g., United States v. Arjona, 120 U.S. 479 (1887) (counterfeiting of foreign currency); United States v. The Cargo of the Brig Malek Adhel, 43 U.S. (2 How.) 210, 232, 235 (1844) (piracy); United States v. Morris, 39 U.S. (14 Pet.) 464 (1840) (slave trade); United States v.
merely state-to-state, the Tribunal also provided a recognition profoundly relevant to the reality of human rights: "Crimes against international law are committed by men, not by abstract entities. . ." The same can be said of violations of human rights law, although certainly many violators are official elites who also claim to represent abstract entities. Further, as in the case of international crime, most violations occur in the territory of a state, although such actions are essentially of international concern. Clearly also, most of the victims are individuals, and most of these are private individuals. It is not difficult to understand, then, that patterns of practice involving violations of international criminal law and human rights more generally are not merely patterns involving interactions among States or state actors.

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


Additionally, offenses against human rights recognized in particular treaties often reach private perpetrators (as well as private victims). See, e.g., Jordan J. Paust, Aggression Against Authority: The Crime of Oppression, Politicide And Other Crimes Against Human Rights, 18 CASE W. RES. J. INT'L L. 283, 291-92 & nn.55-61; see also infra note 58.

patterns of *opinio juris* measurable at various moments. Participation in the shaping of attitudes is a social fact, whether or not such participation is actually recognized by each individual or is as effective as it might otherwise be (e.g., even if apathetic “inaction” is the form of participation for some, a form that simply allows others a more significant role). Actors may also have a more significant role in any given social context because of relatively higher respect, power, enlightenment, skill, wealth, and so forth; but such relative outcomes (or “value positions” at any given moment) are tied to the dynamics of the social process in which all participate, however directly or indirectly or seemingly integrated, dominated or alienated. The same can be said of state actors. Indeed, the same recognitions apply to participation in the creation of patterns of human practice or behavior, the other element of customary law.

Since each nation-state, indeed each human being, is a participant in both the attitudinal and behavioral aspects of dynamic customary human rights law, each may initiate a change in such law, or, with others, reaffirm its validity. Indeed, such a law at least, born of what people think and do, is constantly reviewed and “re-enacted” in the social process, changed, or terminated. The decisions of governmental elites are especially subject to a constant “process of review” in which all can participate. As Myres McDougal, Harold Lasswell, and Michael Reisman remarked:

> Most of us are performing ... these ... roles without being fully aware of the scope and consequences of our acts. Because of this, our participation is often considerably less effective than it might be. Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawnlike political impotence, of being locked out of effective decisions, is an equally unwarranted orientation. The limits of the individual’s role ... [are] as much a function of his passive acquiescence and ignorance of the potentialities of his participation as of the structures of the complex human organizations of the contemporary world.  


Moreover, it is the reality of participation in processes of expectation and practice which allows one to recognize that individuals are not merely objects of customary international law, but are also participants in the creation, shaping and termination of such law; that patterns of "domestic" practice are relevant, not merely practice state-to-state or at the international level; and that the related pretense of British positivism at the start of the twentieth century, widely opposed but adopting several false myths, was perhaps substantially as unreal then as it would be now despite the many more formal institutional arrangements for individual and group participation at the international level and recognition today of a growing interaction and interdependence of individuals, groups, and public and private institutions in all social, economic, and political sectors. Need one stress, customary human rights law is neither made purely by actions, and/or the opinio, of "States," nor merely by national governmental actors within a federated system. Similarly, the international legal process is not simplistically a purely horizontal system or radically decentralized.

A related myth that human rights law did not begin until after the

39 See, e.g., Paust, supra note 1, at 59-72; infra notes 42, 47-48.
40 See, e.g., Paust, supra note 1, at 67-72, and references cited; Simma & Alston, supra note 4, at 92 (addressing Schachter's recognition); see also MCDOUGHAL ET AL., supra note 27, at 367, passim; supra note 37. But see Simma & Alston, supra note 4, at 99-100 (assuming that "customary international law can only be triggered, and continue working, in situations in which States interact" and that state-to-state interaction is "essential").
41 See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW §§ 288-292, at 362-69 (2d ed. 1912). Some assume that British positivism reflected a "traditional" view (see, e.g., LILLICH, supra note 12, at 31-32, 64, 88, 90; but see id. at 35), but such was radically opposed to 18th and early 19th century Western—and American—views and was also seriously opposed even at the start of the 20th century (infra note 42). Further, it was widely known that "nations" are different than States and were also capable of creating treaty-based international law. See, e.g., Paust, supra note 1, at 60 n.4.
44 But see Weisburd I, supra note 43.
atrocities of World War II\textsuperscript{45} involves confusion of the rarity of direct individual remedies at the international level with a perceived lack of rights.\textsuperscript{46} History demonstrates that such a perception is too simplistic. Actual patterns of \textit{opinio juris} and practice concerning human rights are far more complex and provide evidence of a rich history of individual rights and remedies, although further research of human rights in Europe, Latin America and other areas prior to the twentieth century is still needed. Traditional international law demonstrates that remedies at the international level were primarily state-controlled; but within the overall process, domestic courts and other remedial processes were expected to and did play a role with respect to individual claims and sanctions.\textsuperscript{47} This is especially evident in a detailed documentation of the history of the use of human rights in the United States.\textsuperscript{48} Further, at the international level, human rights claims of individuals and groups were often pressed indirectly by States by various


\textsuperscript{46} See Paust, supra note 28, at 632 & n.539. See also id. at 648-49 & nn.601-02.

\textsuperscript{47} See, e.g., Lillich, supra note 12, at 35, 44 (Schachter); Paust, supra note 28, at 546-611, 615 n.479 \textit{passim}. With respect to early use of human rights precepts and claims in Europe, Latin American, and other areas outside the United States, see McDougal et al., supra note 27, at 3-6 \textit{passim}; Paust, supra note 28, at 547-48, 554-55, 556 n.74, 561 n.111, 567-70, 647-49 nn.601-02; Burns H. Weston, \textit{Human Rights}, \textit{Encyclopedia Britannica}, extract reprinted in \textit{International Law Anthology}, supra note 27, at 21-24. See also Thomas Buergenthal, \textit{International Human Rights in a Nutshell} I, 5 (1988); Louis B. Sohn, \textit{Keynote Address: Proposals for the Future}, 20 Ga. J. Int'L & Comp. L. 413, 414, 420 (1990) (line of cases and precepts from 1910 to 1990). Especially in the Americas and Europe, generally shared and growing demands and expectations concerning human rights were also transposed into domestic constitutions, statutes, regulations, and judicial decisions for more effective protection in the arenas where most human rights deprivations still occur. Transnational and international influences were complex and dynamic; and such interstimulation is still ongoing, especially as modern human rights instruments are themselves transposed into domestic laws or produce indirect effects. See also Lillich, supra note 28, at 1.

\textsuperscript{48} Paust, supra note 28, at 546-611 \textit{passim}.
means and in various formal and informal sanction processes.\textsuperscript{49}

This last point is relevant in defeating another myth, that the process of sanctions for violations of human rights is in some sense singular, operates merely state-to-state, and is functional only through formal institutional arrangements that look much like domestic police, courts, and jails. Another simplistic and imposed notion is that sanctions operate only through coercion,\textsuperscript{50} a notion often related to a less than comprehensive awareness of processes and strategies of coercion as well as actual processes of authority. In contrast, the seminal study by Myres McDougal, Harold Lasswell, and Lung-chu Chen\textsuperscript{51} provides a comprehensive framework for inquiry into various sanction processes and strategies of a diplomatic, ideologic, economic, and "military" nature.\textsuperscript{52} The "process of review" noted above can also be conceived as part of a comprehensive process of sanctions whereby official elite actions are "reviewed" and responded to by our actions and inactions.\textsuperscript{53}

Knowing this, one can recognize various forms of individual and group participation in both public and predominantly private sanctions; and one might devise more effective strategies of a political, economic of "military" nature implicating perhaps resources or processes concerning respect, enlightenment, wealth, well-being, and power.\textsuperscript{54} Private institutions, groups, and individuals have been involved in various forms of sanction strategy concerning human rights for at least the last two hundred years.\textsuperscript{55} They have used diplomatic, ideologic, economic, and/or "military" strategies to promote one or many sanction objectives such as prevention, deterrence, restoration, rehabilitation, reconstruction, and correction.\textsuperscript{56} For example, the

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\textsuperscript{49} See, e.g., LILLICH, supra note 12, at 1-3, 35; Paust, supra note 28, at 566, 570, 615 n.479; 648-49 nn.601-02.

\textsuperscript{50} See, e.g., Weisburd I, supra note 43.

\textsuperscript{51} Supra note 27.

\textsuperscript{52} Id. at 219-47, 551-60 passim.

\textsuperscript{53} See, e.g., Jordan J. Paust, Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction, 12 STAN. J. INT'L STUD. 79, 82-83 passim (1977).

\textsuperscript{54} See id. at 83-87, 94-114; supra note 52.

\textsuperscript{55} See, e.g., McDougal ET AL., supra note 27, at 173-79, 192 passim; Paust, supra note 28, at 546-611, 648-49 n.602.

\textsuperscript{56} See, e.g., MYRES S. MCDouGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 309-32 (1961); supra note 55. Prevention, as a sanction objective, is an effort to prevent occurrence of impermissible conduct. Deterrence, like prevention, seeks to prevent occurrence of impermissible conduct, but "is concerned with a threat or challenge . . . that has emerged and been clearly posed and imminently promised."
current roles played by many human rights groups are notorious. Beyond diplomacy, education, use of the media, networking, other efforts to clarify and disseminate information, lobbying, advising, drafting, testifying or witnessing, investigating, invoking, and what Professor Henkin referred to as "mobilizing shame," private human rights groups have been and might be involved in economic and "military" strategies to promote various sanction objectives. More generally, like all participants in sanction processes, they aid in the shaping of attitudes and behavior concerning human rights and help even to condition the unlawful exercise of power. The power of public protest and the sanction of public opinion, for example, can be particularly significant for prevention, deterrence, restoration, and reconstruction.

A slightly different myth is that human rights duties flow merely to the State or those acting as official elites. In another study, it is shown that private duties of individuals or groups can and do exist under human rights law, that nearly all human rights instruments today provide express or implied recognition of private duties, and that inquiry should shift from whether there are private duties to what sorts of duty correspond to what sorts of right in what context, how competing rights should be accommodated, and how these ultimately affect public responsibility.8

Finally, with respect to evidences of customary human rights, the reality of individual and group participation as well as the role of actual patterns of human expectation and behavior demonstrate that numerous evidences are

Deterrence "envisages the influencing of the decision that the potential violator will make by affecting his expectations of how the sanctioner will behave and respond." Restoration involves "the application of responding coercion for the purpose of compelling the violator to reduce" or stop the unlawfully initiated conduct. Rehabilitation involves the "reparation of the destruction of values" suffered because of the unlawfully initiated conduct. Reconstruction designates the "long-term purpose of avoiding the recurrence of prohibited coercion by modifying or reorganizing or eliminating particular structures and processes . . . within the violator state (area). . . ." Correction is a sanction strategy directed against particular persons in order to subject such persons to corrective deprivations; e.g., as with a criminal penalty.

57 See generally CHEN, supra note 37, at 65-75; LILlich, supra note 12, at 65-6, 69, 192-93, 344-57, 371, 900-01, 912; McDougal et al., supra note 27, at 145, 173-76, 226-27, 255, 259-61, 264-65, 269, 282-86, 313; Paust, supra note 1, at 73 n.23.

58 See Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 Harv. Hum. RTS. J. 51 (1992). See also McDougal et al., supra note 27, at xviii (reminding more generally that "there is a human rights dimension to every interaction in the shaping and sharing of values, and this dimension includes in varying constellations effects upon the outcomes of all values."). 96, 807-10, 583, 587, 592-93; supra notes 35, 45.
relevant and should be investigated.\textsuperscript{59} One notorious and well-accepted role concerning the identification and clarification of customary law is that engaged in by private textwriters,\textsuperscript{60} including the testimony or affidavits of textwriters.\textsuperscript{61} Similarly, private conferences, codes, and reports can be used to identify and clarify customary norms.\textsuperscript{62} With respect to general practice, it is also important to note that "inaction" or compliance because of a choice to not violate a norm may often be more relevant than the nonconforming practice of a few violators of the norm, and yet such a practice may be difficult to measure.\textsuperscript{63}

As recognized in another study, knowing what behavioral patterns should be measured and what should not be unduly emphasized, however, can also have important consequences with respect to research and choice about the formation, change and termination of customary law.\textsuperscript{64} Too often textwriters argue that the death of a norm, even a treaty norm, has occurred because of the actions of a few States.\textsuperscript{65} Instead, what should be investigated are the patterns of expectation more generally extant concerning human rights (including those even of such law violators), and the actions and inactions of all participants. It is also too simplistic to argue that law violations which, in a relatively less formally organized community, have not been subject to effective sanctions have, therefore, necessarily led to the demise of a customary norm. It would be ludicrous to argue, for example, that when a law-violating official elite of a State knows that its actions are prohibited by customary human rights law, when others generally expect that such conduct is and remains illegal, and when violations are scarce, the customary norm is obviated by a failure effectively to ensure sanctions against such an elite. Even in a relatively formally organized community the lack of effective sanctions against several law violators (e.g., several of those who commit murder) does not necessarily lead one to the conclusion that a norm (e.g., the prohibition of murder) has thereby been obviated (although widespread patterns of murder can break down the prohibition).

\textsuperscript{59} See, e.g., Paust, supra note 1, at 68-75, and references cited.

\textsuperscript{60} See, e.g., id. at 68-70 & n.17; Sohn, supra note 45.


\textsuperscript{62} Paust, supra note 1, at 72-73 nn.22-23.

\textsuperscript{63} Id. at 76-77 & n.31.

\textsuperscript{64} Id. at 77.

\textsuperscript{65} See also id. at 67-68 n.15, 76-77 & n.31.
Suppose, for example, that genocidal violations of human rights law are occurring in four countries with either the conspiratorial or complicitous involvement of three other States. Assume also that most private and official perpetrators know or should know that such acts are illegal under customary international law and that, once caught, they could even suffer criminal sanctions. Additionally, the general populations in such countries are split as to whether or not such conduct should be supported, but a majority supports genocide in only three of the seven countries, and in all but two the majority expects that genocide is unlawful. Further, the official elites in these countries are divided as to whether or not such acts should be lawful in the future, but a majority of officials from two States openly and formally presses two sorts of claim: (1) that their actions are recognized exceptions, and (2) that there should be such exceptions in the future. The United Nations General Assembly has formally condemned genocide and singled out actions in one such country. Similarly, the U.N. Security Council has issued resolutions condemning such acts in the same country, imposing economic sanctions, and calling for an end to such acts and the complicitous, if not conspiratorial, acts of two outside States. To date, genocide continues in each of the four countries.

Given widespread and intensely held expectations among humankind (even in some of the countries where violations occur) that genocidal violations of human rights are unlawful under customary international law and the patterns of general practice within and outside the United Nations (including patterns of public and private compliance with the prohibition of genocide), it would be, to say the least, unreal to conclude that the unabated actions of a few violators has led to the demise of a customary norm prohibiting genocide or that the violators have somehow opted out or can lawfully avoid the reach of such law and various future sanctions. The actions of perpetrators and complicitors from seven States certainly cannot be controlling patterns of

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66 See also id. at 67-68 n.15.

practice, nor do they mirror general and controlling patterns of *opinio juris* in a community of some one hundred and eighty States unless they happen to represent the majority of humankind.

Even if there were no "coercive" efforts made by States or official state elites at the United Nations or elsewhere to oppose such genocidal acts and official elite actions were cynical, hypocritical, and even functionally complicitous in part, the facts of general practice in compliance and widespread *opinio juris* would remain and the customary norm would retain its validity. Additionally, the fact that such violators and their supporters are (along with all other actors in the international legal process) law creators does not simplistically compel the conclusion that those who participate in the creation of law are not bound by law currently extant.  

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Human rights are too important to be left with the State. Realistic inquiry into the complex nature, sources, and evidences of customary human rights law demonstrates that they are not and that they are meant to be real rights of real human beings. Private individual, group, and institutional participation in processes of expectation and behavior is a social, political, and legally-relevant fact, as well as participation by public regional and international institutions. Awareness of these forms of participation can help one to avoid fallacious myth and to guide realistic inquiry not merely concerning identification and clarification of human rights, duties, competencies and responsibilities, but also with respect to violations of human rights law and various sanction processes, strategies, and possibilities.

Finally, although genocidal violations of human rights have been rampant and largely unabated in Bosnia-Herzegovina, it would be ludicrous to argue that such conduct has now become permissible. Indeed, how many will view "Schindler's List" and leave the theater thinking that genocide in Europe, now or in 1944 in the former Yugoslavia, is or was then permissible under international law? And how many are or will be violators? Few, and we pray, very few.

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68 See supra note 65.