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# Enhancing global constitutionalism: The need for the recognition of civil society's right to participation in the international law-making process

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# Contents

# Summary

In an era of globalization, where decision-making transcends national boundaries, it is crucial to recognize the importance of individual participation in shaping the international legal sphere. This recognition becomes even more critical in the 21st century, as we are faced with the need to respond to global challenges and emergencies that demand the collaboration of diverse actors. The inclusiveness of individuals and civil society -especially marginalized and vulnerable populations- is essential in addressing these issues effectively.

However, the right to participation, enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR), has often been limited to the domestic level, overlooking its potential impact in the international sphere. This is largely due to the traditional conception of international law, which has conceived individuals as mere objects rather than active participants. As a result, the full recognition and development of the right to participation at the international level, particularly in the international law-making process has been neglected.

In my thesis, I aim to shed light on the significance of granting individuals the right to participation in the international law-making process. By advocating for the recognition and development of this right, we can foster a more inclusive and democratic global governance system. Through an in-depth analysis of relevant international instruments, treaty interpretations, and emerging practices, I seek to challenge the prevailing notion of exclusive state-centric decision-making and emphasize the role of individuals and civil society actors in shaping the international order.

Through doctrinal-legal research employing a mixed methodology, I firmly advocate for the urgent recognition of the right to participation in the international law-making process within the framework of global constitutionalism. From a global constitutional perspective, the international legal order should shift towards an individual-oriented system that reflects the recognition of democratic values at transnational levels. This will contribute to ensuring the legitimacy of decision-making on the international stage.

In my argument, I emphasize the evolution of the right to participation enshrined in Article 25 (a) of the ICCPR, especially in light of the General Comment No. 25 issued by the Human Rights Committee. This evolution signifies a significant positive development for the global constitutionalism agenda, as it empowers individuals on the international stage.

This investigation is divided into four main sections. Firstly, the need to recognize the right to participation in the international law-making process within the framework of global constitutionalism is analyzed. This includes an exploration of global constitutionalism as a theory and its justifications.

Secondly, I focus on how International Human Rights Law (IHRL) challenges the subject-object dichotomy, highlighting the evolution of the right to participation in Article 25 (a) of the ICCPR. It also examines the interpretation of this right based on the Vienna Convention on the Law of Treaties (VCLT) and the Statute of the International Court of Justice (ICJ Statute). Thirdly, I delve into civil society participation in the law-making process of IHRL, with case studies on the Convention on the Rights of the Child (CRC) and the Convention on the Rights of People with Disabilities (CRPD), as well as the role of non-governmental organizations (NGOs) accredited in the Economic and Social Council (ECOSOC). Lastly, I analyze the challenges and scope of the right to participation, offering recommendations for enhancing its recognition in the international law-making process.

To address the challenges faced by civil society, I conclude that it is crucial to fully recognize the right to participation in the international law-making process. One approach is to begin by acknowledging this right through a new general comment from the Human Rights Committee, emphasizing that civil society's involvement should be a legal requirement rather than subject to state consent. This comment should also outline minimum requirements for modalities and mechanisms that ensure effective participation. Essential aspects of meaningful civil society participation include open invitations, access to information, the opportunity to make written and oral statements, and justifications for any denials of participation. Both international bodies and state delegations have a responsibility to genuinely consider the inputs offered by civil society actors. To address unequal participation, it is important to implement measures such as voluntary funds and initiatives that promote the involvement of vulnerable populations. Technology and online platforms can facilitate regional participation and enhance the inclusion of civil society voices.

Recognizing the right to participation holds particular significance within the framework of global constitutionalism, as it empowers individuals and aligns with the core principle of the protection of rights and constituent power.

# Preface

I started my professional career as a Multilateral Policy Official at the Ministry of Foreign Affairs in Honduras, my home country. Back then, I witnessed Honduras's participation challenges and scarce visibility in international forums. Initially, I regarded this as the absence of a foreign policy by the high state officials. Though, as I learned more about multilateral policy, I realized this was a symptom of a more complex problem – the structural inequality in global governance. I became aware that in the establishment and implementation of an integrated global policy, countries from the Global South were mainly subjects being talked about, but not actual participants.

Later on, I had hands-on experience in-country offices of the Organization of American States (OAS) and the United Nations (UN). Both agencies came into existence by social demand and at the Government's request for technical cooperation, however these international bodies faced different challenges when engaging with national institutions and civil society actors, especially with vulnerable populations. Mainly, due to the social perception of the 'disconnectedness' of these bodies from the national context.

My professional experience until now, has led me not only to open new perspectives on the need for a more cohesive international community but to start building a vision of a more equalitarian international law, which genuinely enables cultural diversity. Through these experiences, I have come to recognize that inequality within the international sphere exists on two fronts. Firstly, there is a prevalent dominance of the global north over the global south. Secondly, there is a significant lack of participation by vulnerable populations in the international sphere.

As a result, I began contemplating ways to contribute to the pluralism and legitimacy of the international legal sphere. I realized that one of the core issues was the state-centric perspective on which international law had been built. To include vulnerable populations in the international sphere, it was necessary to shift toward an individual-centered perspective. Thus, I believe that IHRL can contribute to the pluralism and social legitimacy of the international legal sphere by fully recognizing and developing the right to participation in the international law-making process.

During the course of this investigation, one of the primary challenges I encountered was the lack of formal documentation regarding the participation of civil society in the international sphere. It became evident that crucial information such as the identities of participating civil society actors, their modes of participation, and the impact of their involvement was not consistently recorded by international bodies. Instead, it was often scholars and NGOs who took the initiative to compile this information. To analyze the unequal participation of civil society at the international level, I decided to

classify the NGOs accredited by the ECOSOC, by country. Although ECOSOC provides a search tool, it lacks information or reports on NGOs categorized by region. The lack of formal documentation on the participation of civil society is also a reason for advocating for the full recognition of the right to participation in the international law-making process, as it will not only enhance our understanding of inequality but also shed light on the challenges faced by civil society actors.

Finally, I would like to express my gratitude to my parents for always urging me to question and explore new possibilities. To my sisters and brother-in-law for their unwavering support and encouragement. To Felipe for bringing light to my journey here in Sweden. To the Swedish Institute for the SI Scholarship for Global Professionals, for allowing me to accomplish this academic goal. And, to my supervisor, Jessica Almqvist, whose guidance and stimulating discussions have been essential for completing this thesis.

# Abbreviations

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| Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities | Ad Hoc Committee |
| Convention on the Rights of the Child | CRC |
| Convention on the Rights of People with Disabilities | CRPD |
| People with disabilities organizations | PDOs |
| Economic and Social Council | ECOSOC |
| International Human Rights Law | IHRL |
| International Court of Justice | ICJ |
| International Criminal Court | ICC |
| International Covenant on Economic, Social, and Cultural Rights | ICESCR |
| International Covenant on Civil and Political Rights | ICCPR |
| Non-governmental Organizations | NGOs |
| NGO Ad Hoc Group on the Drafting of the CRC | NGO Ad Hoc Group |
| Office of the United Nations High Commissioner for Human Rights | OHCHR |
| Open-ended Working Group | OEWG |
| Save the Children International Union | SCIU |
| Universal Declaration of Human Rights | UDHR |
| United Nations | UN |
| United Nations Children's Fund | UNICEF |
| Vienna Convention on the Law of Treaties | VCLT |

# 1 Introduction

Global constitutionalism is a theory that advocates for the application of constitutionalist principles in the international legal sphere. Two of these principles are constituent power and the protection of rights. The principle of constituent power asserts that people serve as a crucial legitimizing element. This is particularly important if we consider that one of the challenges posed by globalization is that decision-making processes are no longer confined to national territories. Constitutions are no longer capable of regulating governance comprehensively since some of the typical governmental functions are transferred to supranational level, therefore, individual participation becomes crucial in legitimizing international treaties. Also, the principle of the protection of rights entails recognizing that individuals possess inherent rights that should be respected by states and other actors in the international sphere.

Global constitutionalism is studied within the field of global governance from a legal/normative perspetive. Global governance has been presented as a collective way of solving problems and addressing threats that are too complex for any nation to handle independently. While this approach can be effective, it is essential to prioritize democratic values in the decision-making process. A key element of this democratic value is the active participation of individuals in the international sphere. Consequently, under global constitutionalism, the primary actors are individuals, promoting a shift from a sovereignty-centered system to an individual-oriented system.

IHRL has made a significant contribution to promoting individual participation in the international sphere. The Office of the United Nations High Commissioner for Human Rights (OHCHR) asserts that the participation of individuals and civil society groups at the supranational level fosters a connection between national and international levels. One of the most meaningful contributions of IHRL in empowering individuals in the international sphere is General Comment No. 25 issued by the Human Rights Committee. On it, it is assert that Article 25 (a) of the ICCPR protects the right of all individuals to participate in public affairs, including the formulation and implementation of policies at all levels, be it local, regional, national, or international.

Even though General Comment No. 25 was issued in 1996, as of 2023 the right to participate in public affairs at an international level hasn't been fully recognized and developed under IHRL. I consider that one reason for the underdevelopment of the right to participation at an international level, especially in the international law-making process is due to the dichotomy of 'subjects' and 'objects' in international law. Although this doctrine has been significantly challenged since the late 1990s and early 2000s, still there are challenges ahead. This is mainly because 'subjects' have been considered bearers of rights and obligations under international law. IHRL is built upon

the fundamental principle of state responsibility, where states have traditionally been viewed as the primary duty bearers of human rights. In this sense, I claim that in light of Article 25 (a) ICCPR and General Comment No. 25 the dichotomy of 'subjects' and 'objects' is unhelpful and that the status of 'participants' used by Rosalyn Higgins is more appropriate.

The right to participation has a close relationship with the right of freedom of association since it can be exercised individually or in association -e.g., NGOs. Therefore, I consider that is more appropriate to refer to a civil society´s participation at an international level, as it has been used by the OHCHR to encourage individual participation in the UN decision-making, especially in the UN human rights system.

The participation of individuals at the international level has mainly been considered through NGOs, which have been regarded as the iceberg of international civil society. For instance, since the creation of the UN charter through Article 71 the participation of NGOs within the UN structure was envisioned through the ECOSOC. This participation was not designed as an individual's right to participation but rather as an opportunity for governments to utilize these groups specialized knowledge and skills, through consultation processes. However, despite its inclusion since the adoption of the UN Charter according to the data of the ECOSOC, as of 2023 there exists a significant disparity between the involvement of NGOs from the global north and those from the global south.

IHRL has been one of the areas of international law where there has been increased participation of individuals in the law-making process. Two examples are the CRC and the CRPD. However, the extent of civil society involvement in these cases has been subject to state consent, imposing limitations on their participation. Typically, civil society participation has been solely conceived through NGOs, resulting in potential inequalities between the Global South and the Global North, while marginalized and vulnerable populations may have been excluded from these processes.

Thus, I consider it necessary to fully recognize and develop the right to participation in the international law-making process. I argue that there has been an evolution in the right to participation established in Article 25 (a) of the ICCPR in light of General Comment No. 25 issued by the Human Rights Committee. This is a positive evolution for the global constitutionalism agenda since it empowers individuals at the international level.

To support my claim this investigation is divided into four main sections. Firstly (Chapter 2) is an analysis of the need for recognizing the right to participation in the international law-making process within the framework of global constitutionalism. In this sense, I present a historical and conceptual framework of global constitutionalism as a theory that advocates for the application of constitutional principles at the international level. Furthermore, this chapter provides a comprehensive overview of the various justifications underlying the theory of global constitutionalism, with a particular emphasis

on the analysis of globalization and its implications for the establishment of a cosmopolitan democracy, as proposed by David Held. However, special attention is given to the concept of subaltern cosmopolitanism, highlighting its significance in addressing the voices and concerns of marginalized and disadvantaged populations within the global constitutional framework. Finally, this chapter explores in the notions of individuals and NGOs under global constitutionalism and the concept of civil society under IHRL.

Secondly (Chapter 3), a study of how IHRL has challenged the subject-object dichotomy is presented. To set the stage this chapter starts by discussing the debate of 'subjects' and 'objects' under general international law and how this debate has been delved under IHRL. Likewise, this chapter presents the evolution of the right to participation established in Article 25 (a) of the ICCPR in light of General Comment No. 25 issued by the Human Rights Committee. I claim that this evolution gives the legal base for the full recognition and development of the right to participation in the international law-making process. This claim is supported through an analysis of this provision in light of the general rules of interpretation of the VCLT and the sources of law stated in Article 38 (1) of the ICJ Statute. The latter provision is not only helpful in analyzing the evolution of Art. 25 (a) but also it guide us in determining what should be included in the conception of law-making process.

Thirdly (Chapter 4) I focus on the participation of civil society in the law-making process of IHRL. For it, I use two notable case studies: the CRC and the CRPD. These conventions are selected as examples due to their inclusive drafting processes, which involved significant participation from civil society actors. By examining these case studies, this chapter sheds light on how civil society has participated in the drafting-process of treaties and the challenges faced by civil society. Furthermore, an analysis is conducted on the participation of NGOs accredited in the ECOSOC, particularly given their significant involvement in the drafting process of the CRC and since the participation of NGOs through ECOSOC has been recognized since the adoption of the UN Charter. This examination sheds light on how general international law has conceived the participation of individuals through NGOs within the UN structure. Despite the limited efforts made thus far to assess their tangible impact on UN activities, it is possible to track the geographic distribution of NGOs accredited in ECOSOC through the list of NGOs in consultative status with ECOSOC. The ECOSOC website offers a search function that enables users to filter NGOs by country and consultative status. By utilizing this search feature, I present a chart (Annex 1) and a breakdown of the number of NGOs registered in ECOSOC by country. This analysis aims to determine whether there has been equitable participation between the global north and the global south.

Finally (Chapter 5), this thesis conducts an analysis of the challenges surrounding the right to participation in the international law-making process and explores what the scope of this right should be. The primary objective of this chapter is to identify the key obstacles that hinder meaningful

participation and to provide recommendations for enhancing the recognition of the right to participation in the international law-making process. By examining these challenges and proposing specific measures, this chapter aims to contribute to the development and strengthening of the right to participation in the international arena.

## 1.1 Objective and research questions

The main aim of this thesis is to contribute to the global constitutionalism agenda by exploring the empowerment of individuals in the international law-making process within the framework of IHRL through Article 25 (a) of the ICCPR and General Comment No. 25 of the Human Rights Committee. For it, my main research question is:

> R.1. How has IHRL contributed to the global constitutionalism agenda by empowering individuals in the international law-making process?

To answer this question and achieve the main aim of my thesis, I have established three specific objectives, each with its own research question. My first specific objective is to determine the evolution of Article 25(a) of the ICCPR in light of the general rules of interpretation of the VCLT and the sources of law stated in the ICJ Statute. In this regard, my research question is:

> R.2. How can the right to participation in the international law-making process be fully recognized and developed?

My second specific objective is to analyze the participation of civil society in IHRL, specifically in the drafting process of the CRC and CPD. These treaties are used as case studies since they have been regarded as the most participate drafting process in IHRL. For it, my research question is:

> R.3 How has civil society participated in the international law-making process in IHRL and what are the challenges they face?

Finally, my third specific objective is to propose a practical measure to promote the full recognition of the right to participation and its development in the international law-making process. For this last objective my research question is:

> R.4 What does the right to participation in the international law-making process should entail?

## 1.2 Methodology

This investigation is conducted through doctrinal-legal research, using a descriptive, explanatory, evaluative and recommendatory methodology to comprehensively analyze the right to participate in the law-making process of IHRL. Specifically, the study will focus on Article 25(a) of the ICCPR and its interpretation by the Human Rights Committee through General Comment No. 25.

In order to explore the empowerment of individuals in the international law-making process of IHRL within the framework of global constitutionalism, I use a descriptive methodology based on legal-historical, legal doctrine, and non-binding legal sources interpretation. This approach will describe the historical and conceptual framework of global constitutionalism, the concept of civil society under IHRL, the debate surrounding the transformation of the dichotomy of 'subjects' and 'objects' in international law and IHRL. Additionally, using a legal doctrine and systematic interpretation I analyze Article 25(a) of the ICCPR and its interpretation by the Human Rights Committee through General Comment No. 25 in light of Article 31 of the VCLT and the sources of law stated in Article 38 (1) of the ICJ Statute.

An explanatory methodology will be used to analyze the participation of civil society in IHRL, specifically in the drafting process of the CRC and CRPD. This will be done in order to identify the problems and challenges faced by civil society when participating in the international law-making process. This will help us understand why there is a need to fully recognize and develop this right under IHRL.

Finally, an evaluative and recommendatory methodology will be used in order to evaluate the challenges faced by civil society in the international law-making process, due to the lack of recognition of their right to participation. Likewise, in light of the challenges faced I formulate recommendations on what this right should entail.

## 1.3 Justification

The 21st century is characterized by the urgent need to address global challenges that demand the collective involvement of diverse stakeholders. In response to these pressing global emergencies, global constitutionalism has emerged as a potential framework. This approach emphasizes two fundamental principles applicable in the international legal sphere: constituent power and the protection of rights. The principle of constituent power asserts that the constituent power of the people serves as a crucial legitimizing element in state constitutions. In the context of global constitutionalism, it recognizes that international treaties can have an impact

on domestic constitutions, potentially leading to a 'constituent usurpation'[1]. Additionally, the principle of the protection of rights acknowledges that individuals inherently possess rights that should be upheld by both states and other actors in the international arena. Global constitutionalism advocates for a shift from a sovereignty-centered system to an individual-oriented system, where individuals are regarded as the primary actors. Consequently, a key objective of global constitutionalism is to empower individuals at the international level.

However, international law has been built under the traditional conception that 'the right of entering into international engagements is an attribute of State sovereignty'.[2] Consequently, the international law-making process has traditionally been perceived as the exclusive domain of states, relegating the participation of civil society to the states consent without recognizing any inherent right for these groups to engage in it. Thus, it has been argued that while there has been a growing role for civil society in the international law-making process, a right to access and participation is premature. Although some NGOs have been granted limited participation rights, these instances are exceptions and subject to the will of states, which retain ultimate decision-making authority.[3]

IHRL has made a significant contribution to promoting individual participation in the international sphere. A prime example is that the Human Rights Committee's General Comment No. 25 asserts that Article 25 (a) of the International Covenant on Civil and Political Rights (ICCPR) protects the right of all individuals to participate in public affairs, including the formulation and implementation of policies at all levels, be it local, regional, national, or international. This is why I consider it important to analyze how has IHRL contributed to the global constitutionalism agenda by empowering individuals in the international law-making process. Recognizing the significance of IHRL's contribution, is essential in advocation for the full recognition and development of the right to participation in the international law-making process. By doing so, we can foster a more democratic global governance system that embraces the active involvement of individuals.

[1] Peter Niesen, 'Constituent power in global constitutionalism' in Anthony F. Lang, Jr. & Antje Wiener (eds), Handbook on Global Constitutionalism. (Edward Elgar Publishing Limited, 2017) 222

[2] *United Kingdom and ors v Germany Case SS 'Wimbledon' [1923]* PCIJ Series A no 1.

[3] Nabuel Maisley, 'The International Right of Rights? Article 25 (a) of the ICCPR as a Human Right to Take part in International Law Making'. (The European Journal of International Law 2017) 92

# 2 Expanding global constitutionalism: The need for recognizing the right to participation in the international law-making process

Global Constitutionalism is studied within the field of global governance from a legal/normative perspective. It has been regarded as an intersection between politics and law. Global constitutionalism is a strand of thought that advocates for the application of constitutionalist principles in the international legal sphere. There is a consensus among scholars that the four constitutional principles on which global constitutionalism focuses are: the rule of law, separation of powers, constituent power, and the protection of rights.

One of the justifications for global constitutionalism is to tackle the challenges posed by globalization. This is because decision-making processes are no longer confined to national territories, and governance is exercised beyond the limits of the state's constitution. As a result, state constitutions are no longer comprehensive, as some of the typical governmental functions are transferred to supranational levels. In global constitutionalism, inclusiveness is essential since it conceives individuals as the primary members of the global constitutional community. Therefore, global constitutionalism advocates for the recognition of the right to participation at the international level, mainly in the international law-making process.

In this chapter I present a historical and conceptual framework of global constitutionalism; the need of recognizing the right to participation in a globalized context; individuals and NGOs as members of the international community according to global constitutionalism; and the concept of civil society in IHRL. The aim of this chapter is to analyze the importance of the right to participation as a key element of global constitutionalism and the role of IHRL in promoting democratic global governance. In this sense, I highlight the contributions of IHRL in advancing global constitutionalism by recognizing the importance of individuals' and NGOs' engagement in the international sphere through the right to participation.

## 2.1 A historical and conceptual framework of global constitutionalism

Classical Greek and Roman political thinkers laid the foundation for a theory of global constitutionalism.[4] The Stoics had a cosmopolitan vision as they considered the cosmos as a single community of citizens, subject to the law of nature.[5] In his personal writings collected in *Meditations*, Marcus Aurelius states that all humans are members of a political community governed by common law. He conceived the world as a manner of state in which the law applies equally to everyone.[6]

Modern historical antecedents of global constitutionalism trace back to the Enlightenment. During this period, the clearest globalist expressions are the works of Immanuel Kant.[7] In his essay *Perpetual Peace*, Kant presents his idea of a peaceful global order. Kant advocates for a 'federation of peoples' in which each nation enters along with into a constitution where their rights could be secure.[8]

In the nineteenth century, the strong preference for treaties and international conventions not only gave birth to modern international law but also contributed to the idea of a global society.[9] Later, the notions of global order re-emerge with the end of the cold war. Consequently, global constitutionalism emerged with the hope of a 'new world order', but also as an opportunity to provide unity and coherence to international law.

Christine Schwöbel simplifies global constitutionalism by breaking it down into 'global' and 'constitutionalism' stating that "the word 'global' refers to the assumption of universality of the concept. In the very broadest sense, the word 'constitutionalism' pertains to a certain social, political, cultural, economic, and legal system of ideas. The suffix 'ism' denotes a belief in or a practice of the system of ideas."[10] By this broad definition, global constitutionalism may be understood as a universal social, political, cultural, economic, and legal system. Anne Peters, one of the best-known scholars on the subject, defines global constitutionalism as: "an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the

[4] Jill Harries, 'Global Constitutionalism: the ancient world', in Anthony F. Lang, Jr. & Antje Wiener (eds), *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited, 2017) 23
[5] Jill Harries, (2017) p. 23
[6] Marcus Aurelius, 'Meditations'. Penguin Classics, (2006) p. 4.4.
[7] Chris Thornhill, 'The enlightenment and global constitutionalism', in Anthony F. Lang, Jr. & Antje Wiener (eds), *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited, 2017) 65
[8] Immanuel Kant. 'Perpetual peace, A philosophical essay', 1795. Available here.
[9] Martine Julia Van Ittersum. 'Global constitutionalism in the early modern period: the role of empires, treaties and natural law' in Anthony F. Lang, Jr. & Antje Wiener (eds), *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited, 2017) 47
[10] Christine E. J. Schwobel, (2011) 2

effectiveness and the fairness of the international legal order."[11] In other words, global constitutionalism advocates for the application of constitutionalist principles in the international sphere.

There is a consensus among scholars that the four constitutional principles on which global constitutionalism focuses are: (1) rule of law, (2) separation of powers, (3) constituent power, and (4) the protection of rights. Global constitutionalism is perceived as a way to normatively evaluate the changes happening in the international legal and political order by valorizing constitutionalism as a means by which rights can be protected and responsibilities distributed in the global order.[12]

Global constitutionalism in contemporary discourse has been justified on the grounds of the global emergencies common to all humankind; the fragmentation of international law; and globalization. In this sense, global constitutionalism has been presented as response to the global emergencies that currently threaten humanity, such as global warming; the nuclear threat; the growth of inequalities and misery; the dissemination of despotic regimes which systematically violate human rights; the growing development of transnational organized crime; and human mobility through massive migration movements. In addition, the COVID-19 pandemic made evident the fragility of the human race and common destiny.[13]

Regarding the fragmentation of international law, it has been said that there is a lack of unity and coherence due to the creation of self-sustained legal regimes, with the potential for conflict between norms and actors.[14] Likewise, the need for global constitutionalism has also been highlight in light of globalization. It has been argued that the phenomenon of globalization has increased global interdependence and that it puts the state and state constitutions under strain. Therefore, the state constitutions are no longer capable of regulating governance comprehensively, and as a result, they can no longer be considered total constitutions.[15]

In the international legal sphere, there are different visions and approaches to global constitutionalism. For example Jean d' Aspremont identifies three dimensions of what he denominates the multifacetedness of constitutionalist

[11] Anne Peters, 'The Merits of Global Constitutionalism' (Indiana Journal of Global Legal Studies 2009) 397.
[12] Anthony Lang Jr. and Antje Wiener, 'A Constitutionalising Global Order: An Introduction', in *Handbook on Global Constitutionalism* (UK: Edward Elgar Publishing Limited, 2017) 3
[13] Luigi Ferrajoli, 'Por una constitución de la Tierra: La humanidad en la encrucijada' (Editorial Trotta S.A. 2022) [My translation]
[14] David Alejandro Mora-Carvajal, 'Global Constitutionalism: Opportunity to have a more unitary and coherent International Law' (Revista Derechos del Estado 2020) 101-120. 102
[15] Anne Peters, 'Compensatory Constitutionalism: The function and potential of fundamental international norms and structures' (Leiden Journal of International Law 2006) 579-610. 580

thinking in international law.[16] These three dimensions are: Descriptive, normative, and evaluative.[17] Christine Schwöbel reviews the different visions prevailing in the debate on global constitutionalism from a legal perspective and categorizes them into four dimensions: Social constitutionalism, institutional constitutionalism, normative constitutionalism, and analogical constitutionalism.[18]

As can be seen, global constitutionalism is a complex area of debate. Bardo Fassbender drawing on the writings of Alfred Verdross, suggests that the UN Charter can be referred to as the constitution of the international community.[19] Other authors, like Gunther Teubner, Andreas Fischer-Lescano, and Phillip Allott argue against State-centered constitutionalism and promote the notion of global constitutionalism of civil society instead.[20] Anne Peters states that the idea is not to create a global, centralized government, but to constitutionalize global (polyarchic and multi-level) governance.[21] Other authors, like Christian Tomuschat advocates for a vision of global constitutionalism based on the idea that certain fundamental norms *like jus cogens* and *erga omnes* norms constitute the foundations of a global constitution.[22]

In global constitutionalism, inclusiveness is essential, as it encourages the participation of non-state actors. The idea of the international community envisioned reflects this inclusiveness and invokes the constitutionalist democratic principle. Through this framework, the privileges of certain states

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[16]Jean D'Aspremont. 'International legal constitutionalism, legal forms and the need of villains' in Anthony F. Lang, Jr. & Antje Wiener (eds), *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited, 2017) 159

[17] The first dimension is the 'descriptive' dimension, which provides a descriptive framework of international law based on existing constitutional mechanisms such as jus cogens, erga omnes obligations and human rights. The second dimension is normative, which pursuit to reinvent and reform international law according to constitutionalist lexica and values. And finally, the third dimension is the evaluative, a combination of the aforementioned normative and descriptive frameworks with a view to identifying those areas of international legal order where action is needed from international lawyers.

[18] Social constitutionalism: views the international sphere as an order of coexistence. Is concerned about participation and accountability and considers the international community either as a global constitutional order or as a global civil society. Institutional constitutionalism: focus in where power is situated in the international sphere and seeks to institutionalize this power. Normative constitutionalism: identifies specific norms as possessing a global constitutional character, in which the legitimacy of these norms is derived from their inherent moral value for society rather than their procedural value in the allocation of power. Is divided in world law, hierarchy of norms and fundamental norms. Analogical constitutionalism: identifies constitutional principles of particular legal orders (mostly of their own national or regional legal orders) and find parallel principles in the international sphere.

[19] Bardo Fassbender, 'Written versus unwritten: two views on the form of an international constitution.' in Anthony F. Lang, Jr. & Antje Wiener (eds), *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited, 2017) 271

[20] Christine E. J. Schwobel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers 2011) 17

[21] Jan Klabbers, Anne Peters, et. al., *The Constitutionalization of International Law* (Oxford University Press 2009) 346

[22] Christine E. J. Schwobel,(2011) 17

can be exposed and challenged, providing a powerful tool for advocating for greater equality and representation in global governance.[23] The idea of an international community is presented in many of the different approaches of global constitutionalism. It is argued that there has been a shift away from a sovereignty-centered system to an individual-oriented system.[24]

Anne Peters argues that in the constitutionalized world order, individuals are the primary members of the global constitutional community and that NGOs are important members of the international community because they represent the global civil society.[25] This is why before analyzing the evolution of the right to participation in IHRL, it is important to understand the impact of globalization in nations-states governance, which transfers decision-making to a supranational level.

## 2.2 Recognizing the right to participation in a globalized context

The 21st century is being shaped by the need to respond to global issues, which can only be solved through the collaboration among different actors. This is why in recent years global constitutionalism has also been presented as a response to global emergencies. David Held, when analysing democracy and globalization states that the emergence of global problems is not a new phenomenon, as many of them have existed for decades. However, their significance has grown in recent times, due to the increased interconnectedness among people and nations produced by globalization.[26]

As mentioned before, global constitutionalism has been justified as a way to face the challenges of globalization, since it has altered the nature and prospects of a democratic political community. The traditional assumption that the national government holds effective political power has become obsolete due to the proliferation of diverse forces and agencies at national, regional, and international levels. Consequently, the concept of a political community can no longer be meaningfully contained within a single nation-state.[27] Nowadays states operate within increasingly complex global and regional systems, impacting their autonomy and sovereignty. Additionally, national boundaries have traditionally determined the inclusion and exclusion of individuals in decisions that affect their lives. However, since many socioeconomic processes and decision outcomes transcend national borders, this has severe implications not only for consent and legitimacy but for all key democratic principles. Therefore, David Held argues that the nature of a constituency, the role of representation, and the proper form and scope of

[23] Jan Klabbers, Anne Peters, et. al. (2009) 154
[24] Christine E. J. Schwobel. (2011). 15
[25] Jan Klabbers, Anne Peters, et. al. (2009) 157.
[26] David Held, 'Democracy and Globalization' (Global Governance 1997) 293
[27] ibid.

political participation are all crucial issues that must be addressed in light of the challenges posed by globalization.[28]

In this sense, the concept of a democratic order is no longer limited to a particular closed political community or nation-state, as we now inhabit a complex and interconnected world. Decision-making goes beyond national territories, due to the fact that governance is being exercised beyond the state's constitutional confines.[29] State constitutions can no longer be considered total constitutional since typical governmental functions are in part transferred to supranational levels. Therefore, it is crucial to recognize that democratic values and principles must be applied at a transnational level to effectively address global issues and ensure the well-being of individuals and communities around the world. David Held argues that these challenges open the possibility of a cosmopolitan democracy. [30]

However, globalization has been driven by neoliberalism and as promoting cultural hegemony of the Global North.[31] Likewise, the concepts of globalization and cosmopolitanism are often used to serve the interests of specific social privileged groups. However, these concepts can be useful if they are redefined to prioritize the needs of groups that have been denied their basic human dignity, such as victims of intolerance and discrimination, non-citizens, and socially excluded individuals.[32]

This idea has been presented as subaltern cosmopolitanism, which represents a form of oppositional and counter-hegemonic globalization. This alternative version of cosmopolitanism is characterized by its demand for social inclusion beyond the limits of global capitalism. It is embodied in a wide range of networks, initiatives, organizations, and movements that aim to combat economic, social, political, and cultural exclusion caused by neoliberal globalization. This notion advocates for a redefinition of cosmopolitanism and globalization that prioritizes the needs and aspirations of marginalized and excluded groups. The notion of subaltern cosmopolitanism has been considered a powerful force in creating a more just and equitable global community.[33]

In his proposal for cosmopolitan democracy, Held contends that the establishment of administrative capacity and independent political resources at both regional and global levels is vital in addition to those at the local and national levels. He argues that the objective of cosmopolitan democracy is not to reduce state power and capacity worldwide, but rather to entrench and advance democratic institutions at regional and global levels as a necessary

[28] ibid.
[29] Anne Peters (2006) 580
[30] David Held (1997) 263
[31] Boaventura de Sousa Santos. *Construyendo las Epistemologías del Sur para un pensamiento alternativo de alternativas* (Antologías del pensamiento social latinoamericano y caribeño. CLACSO 2019)
[32] ibid.
[33] ibid.

supplement to those at the nation-state level. [34] However, it is important to emphasize that this vision of cosmopolitan democracy must also prioritize the inclusion of marginalized and excluded groups to ensure their representation and participation in the decision-making processes of these democratic institutions.

Global governance is presented as a collective way of solving problems and addressing threats that are too complex for any one nation to handle independently.[35] While this approach can be effective, it is essential to prioritize democratic values in the decision-making process. Central to this democratic value is the active participation of individuals in the international sphere. Therefore, it is crucial to foster a global governance framework that upholds the principles of democracy and promotes the involvement of all relevant actors in the decision-making process, including vulnerable populations.

The role of IHRL in promoting democratic global governance is crucial. IHRL has made a significant contribution by acknowledging that the right to participate includes participation in the conduct of public affairs at all levels, including in an international context. A prime example of this contribution can be seen in the Human Rights Committee's General Comment No. 25. This document asserts that Article 25 of the ICCPR protects the right of all individuals to participate in public affairs, including the formulation and implementation of policies at all levels, be it local, regional, national, or international.[36] This recognition is a cornerstone of democratic governance, as it empowers citizens to participate in decision-making processes that affect their lives. The Human Rights Committee in General Comment No. 25 also states that an essential adjunct to the right to participate is the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs.[37]

While the Human Rights Committee has recognized -or at least acknowledged-the right to participation in public affairs at all levels, including in the international sphere, it has not fully developed the implications of this right. Consequently, it is essential to expand the interpretation of the right to participate in the international sphere to include the voices and perspectives of marginalized and excluded groups that are heard and taken into account in global decision-making processes.

By acknowledging the importance of individual participation and engagement in international and regional public affairs, IHRL has played a significant role in promoting transparency, accountability, and

[34] David Held (1997). 263
[35] Thomas G Weiss, *Thinking about Global Governance: Why People and Ideas Matter* (Routledge 2011) 147
[36] UN Human Rights Committee. 'General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)' CCPR/C/21/Rev.1/Add.7 (1996) Para. 1 & 4
[37] ibid.

responsiveness in global governance, thereby contributing to the development of a more democratic and inclusive global community.

## 2.3 Individuals and NGOs as members of the international community

One of the core objectives of global constitutionalism is to empower individuals at an international level. It has been argued that individuals should be considered as the primary international legal persons. This view is based on the idea that the 'right to have rights' is acknowledged in Article 6 of the Universal Declaration of Human Rights (UDHR) and Article 16(2) of the ICCPR.[38] Even though historically these provisions have been interpreted as applicable only at the national level, in times of globalization the guarantee would be seriously weakened if limited to the domestic level.[39]

In this context, one way to empower individuals at an international level is through the recognition of the right to participate in the international law process. Individuals under this approach can no longer be perceived as objects of international law, as this does not represent their current standing in the international legal system.[40] According to Anne Peters individuals "have in legal terms become active legal subjects and in political terms transnational citizens".[41] To empower this status it is necessary to guarantee individuals their rights to participation in the international legal process and in transnational governance.[42] Likewise, in a global community, the recognition of individuals as the primary international legal persons also entails international obligations.[43]

NGOs also play a significant role in the global constitutional community. NGOs are valued for their ability to represent the interests of special groups, enhance the knowledge base for global governance, ensure transparency, support the work of international organizations, shape global public opinion, and globalize values and preferences.[44] Their main task is their participation in international law-making and law enforcement, which on a global constitutional community should not be left to the discretion of states, but should be a legal requirement.

The increased participation of NGOs in international law is beneficial in enhancing global constitutionalism. Under current international law, the participation of NGOs is included through multilateral conventions and through their accreditation in international conferences, forums, organizations, etc. In this regard, from a constitutionalist perspective, it has

[38] Jan Klabbers, Anne Peters, et. al. (2009) 158.
[39] ibid.
[40] ibid.
[41] ibid. 160
[42] ibid.
[43] ibid. 176
[44] ibid. 220

been questioned if NGOs are entitled to participate in global governance activities without such accreditation or other admission procedure.[45] While some argue that NGOs already have a customary right to participate in inter-state institutions[46], Anne Peters contends that there is no such right, that a customary right of NGOs to participate freely in international legal process does not exist. On the contrary, it only upholds the requirement of prior accreditation or admission to conferences and committees. Nonetheless, she recognizes that a general legal principle of openness is emerging, which means that "NGOs have the right to apply for an accreditation and be duly considered."[47]

In conclusion, global constitutionalism seeks to empower individuals' and NGOs' participation in the international legal sphere, especially in the law-making process. However, there are debates about whether NGOs have the right to participate without prior accreditation or admission procedures. Despite these debates, a general legal principle of openness is emerging, which suggests that NGOs have the right to apply for accreditation and be considered for participation. Overall, the recognition of individuals and NGOs as key actors in global constitutionalism can contribute to a more inclusive, transparent, and effective international legal system. One of the branches of international law, in which individuals and NGOs play an important role is IHRL. Therefore, since IHRL acknowledges the right to participation in the international legal sphere, it is important to understand how this branch of international conceives individuals and NGOs through the concept of civil society.

## 2.4 The concept of civil society under International Human Rights Law

In the international community, both individuals and NGOs have played an important role in IHRL.[48] In particular, NGOs have made a significant contribution to the development and promotion of IHRL through their involvement in treaty drafting- e.g., the CRC-, but also in law enforcement. Individuals, on the other hand, have taken on various roles such as victims, claimants, defendants, and experts, all of which have contributed to advancing and enforcing human rights standards.[49]

The acknowledgment of the participation of individuals and NGOs in the field of IHRL has been justified by the necessity of safeguarding and promoting the fundamental rights and welfare of human beings. As a result, individuals, NGOs, and other civil society actors participate in both the development and

[45] ibid. 221
[46] ibid.
[47] ibid.
[48] Robert Mccorquodale, 'Beyond State Sovereignty: The International Legal System and Non-State Participants.' (Revista Colombiana de Derecho Internacional 2006) 103
[49] ibid. 127-131.

implementation of international norms. This can be seen as a reflection of the democratization of international relations. The fact that individuals are included as key players in the contemporary international legal order, alongside states and international organizations, is a sign of the importance of the rule of law [50] – a key principle in a global constitutional community.

In IHRL individuals and NGOs are often referred to as civil society actors. The OHCHR defines civil society as "individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights."[51]

According to Cullen & Morrow, civil society is a crucial concept in liberal political and social theory. It refers to an area of the public realm which is not the state and the market. They assert that civil society is constituted of public organizations which are not the state organizations, such as the media, educational institutions, religious bodies, and voluntary associations.[52] However, the concept of civil society given by the OHCHR also includes individuals.

The OHCHR emphasizes collaboration with civil society in developing knowledge and skills on international human rights. The goal is to encourage civil society participation in UN decision-making processes and UN advocacy on civic space.[53] The actors considered part of civil society include the following:

- Human rights defenders, including on-line activists;
- Human rights organizations (NGOs, associations, victim-support groups);
- Coalitions and networks (on e.g. women's rights, children's rights, or environmental issues, land rights, LGBTI, etc.);
- Persons with disabilities and their representative organizations;
- Community-based groups (indigenous peoples, minorities, rural communities);
- Faith-based groups (churches, religious groups);
- Unions (trade unions as well as professional associations such as journalists' associations, judges' and lawyers' and bar associations, magistrates' associations, student unions);
- Social movements (peace movements, student movements, pro-democracy movements);

[50] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers 2010) 223–224

[51] OHCHR 'A Practical Guide for Civil Society. Civil Society Space and the United Nations Human Rights System' 2014

[52] Holly Cullen & Karen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (Non-State Actors and International Law 2001) 7-40. 10

[53] OHCHR. 'Working with the United Nations Human Rights Programme: A Handbook for Civil Society' (2008).

- Professionals contributing directly to the enjoyment of human rights (e.g. humanitarian workers, lawyers, doctors and medical workers);
- Relatives and associations of victims of human rights violations; and
- Public institutions that carry out activities aimed at promoting human rights (schools, universities, research bodies).[54]

It is noteworthy that the OHCHR guide for civil society published in 2008 did not include online activists when referring to human rights defenders, but these new non-state actors were included in the updated version released in 2014. The reason for this update can be attributed to the explanation presented by Nina Hall. This author argues that the internet has enabled novel non-state actors to leverage digital technologies to affect political decision-making, which she refers to as digital advocacy organizations. These actors actively advocate for certain aspects of the rules-based multilateral order and have shaped the opinion on important international issues, such as the protection of refugee rights.[55] The emergence of new technologies has given rise to new civil society actors, expanding the scope of non-state actors in this area.

The participation of civil society in the law-making process of IHRL is crucial in strengthening its legitimacy for a global constitutional community. Civil society organizations often represent marginalized and vulnerable communities that are otherwise excluded from international decision-making, promoting inclusiveness and diversity in the international sphere. Civil society's participation in the treaty process increases the transparency and accountability of states for their negotiating positions, leading to greater accountability within a community.[56]

In summary, IHRL has made significant contributions in challenging the dominant doctrine that regards the international legal system as one system created by and for states. The participation of civil society actors in IHRL has democratized international law, paving the way for a more inclusive and equitable constitutional global community. However, the recognition of their participation is limited, mainly because of the dominant doctrine in international law that conceives the states as the main subjects of international law. Therefore, in the next chapter I will analyze to what extent IHRL has challenged the traditional subject-object dichotomy.

[54] OHCHR (2014)
[55] Nina Hall, *Transnational Advocacy in the Digital Era: Think Global, Act Local* (Oxford Academics, 2022)
[56] Mccorquodale (2006) 137

# 3 Challenging the traditional subject-object dichotomy in International Human Rights Law

The traditional dichotomy of ‘subject’ and ‘object’ has long been regarded as the dominant legal doctrine in international law. This view holds that states are the exclusive ‘subjects’ of international law, while individuals are mere ‘objects’ of the international legal system. However, this view has been increasingly challenged since the latter half of the 20th century, with scholars arguing that individuals and other non-state actors should also be recognized as ‘subjects’ of international law or as alternative position ‘participants’. Global constitutionalism also challenges the traditional dichotomy of ‘subject’ and ‘object’ in international law. It recognizes the importance of individuals in the international legal system and argues that individuals should be considered as the primary international legal persons rather than mere ‘objects’ of international law.

This chapter will extensively explore how IHRL has challenged the traditional dichotomy of ‘subjects’ and ‘objects’. The central argument presented in this chapter is that the right to participation should be fully recognized and developed in the international legal sphere. To support this argument, I will draw on Nahuel Maisley's interpretation of Article 25 of the ICCPR -the right to participation- in light of the general rules of interpretation outlined in Article 31 of the VCLT. Furthermore, I will underscore this contention by emphasizing that the right to participation is entrenched in the formal sources of law, as enumerated in Article 38(1) of the ICJ Statute.

To do so, I will begin by examining the evolution of international law's dichotomy between ‘subjects’ and ‘objects’. This will set the stage for a discussion on the conception of individuals as holders of rights under IHRL and their obligations. Likewise, I will analyze in depth the right to participation in order to justify why this right should be fully recognized and developed in the conduct of public affairs in the international sphere. This chapter provide a comprehensive overview of the dichotomy of ‘subjects’ and ‘objects’ in international law and its conception in IHRL and shed light on how the dominant legal doctrine has been faced in this area of international law. The main aim is to determine the evolution of Article 25 (a) in light of the general rules of interpretation of the VCLT and the sources of law stated in the ICJ Statute.

## 3.1 The transformation of the dominant legal doctrine of 'subjects' and 'objects' in International Law

During the 1990s and early 2000s, there was a growing discussion about the potential transformation of the dichotomy between 'subjects' and 'objects' in international law. The positivist school of thought in international law traditionally embraced the idea that there are only 'subjects' and 'objects' within a legal framework, with states being designated as 'subjects' within the international legal system[57]. This responds to the dominant legal doctrine that conceives that the international legal system is solely for, and by, states. Therefore, the debate of non-state actors in international law had been framed through the dichotomy of 'subjects' and 'objects'.

The positivist view considers that 'subjects' are bearers of rights and obligations under international law, elements that are solely possessed by states. According to Robert McCorquodale, this view has perpetuated the notion that only 'subjects' of international law can be involved in the law-making process[58]. McCorquodale further contends that this dominant legal doctrine reinforces the idea of sovereign states as the only legitimate legal authorities, thereby obscuring the reality of international legal participation.[59] Thus, within this doctrine, sovereignty has also been regarded as the power of each state to participate in the law-making process of international law.

However, since the second half of the 20th century and particularly the 1990s several scholars started endorsing the idea of individuals as subjects of international law. Whilst some maintain that the subjectivity of individuals has been recognized only in specific circumstances, others argue that the rejection of individuals as subjects of international law lacks any substance. James Crawford states that it is not a universal principle that individuals cannot be considered subjects of international law[60]. Andrew Clapham examines the role of individuals in international law and raises the question of what rights and obligations its appearance entails in general international law.[61] In his analysis of individuals as rights holders in international law, he asserts that they possess rights that are born from the obligations of states to respect important values- e.g., the right not to become a victim of war crimes, but they lack remedies under general international law.[62] Also, he contends that individuals are bearers of obligations under international criminal law,

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[57] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford Scholarly Authorities on International Law (OSAIL) 1995) 49
[58] Robert McCorquodale, 'Beyond State Sovereignty: The International Legal System and Non-State Participants.' (Revista Colombiana de Derecho Internacional. 2006) 103
[59] ibid.
[60] James Crawford, *Brownlie's Principles of Public International Law.* (Oxford University Press, 9th Edition. 2019) 105
[61] Andrew Clapham. 'The Role of the Individual in International Law' (European Journal of International Law. 2010) 26
[62] ibid. 27

through the Rome Statute that conceives the International Criminal Court (ICC) with jurisdiction over individuals.[63]

It is undeniable that the dominant legal doctrine has undergone a certain degree of alteration or transformation, specifically through the recognition of individuals as right holders, but individuals still lack remedies under general international law. This was the conclusion of the ICJ in the *LaGrand case* that stated that Article 36, paragraph 1 of the Vienna Convention on Consular Relations, creates individual rights, which, may be invoked at the ICJ by the national State of the detained person.[64] Likewise, in relation to the recognition of individuals as bearers of obligations under general international law, the general rule according to the International Law Commission's Articles on State Responsibility is that a state is responsible for the acts of a private actor if that actor is acting in a governmental capacity, or under its direction and control, or where it adopts a person's actions as its own.[65]

Many authors recognize that international law has undergone significant transformation, and some even go so far as to assert that it has been completely overcome. One such author is Antonio Cançado, who proposes a new *International Law for Humankind* that acknowledges individuals as legitimate subjects of this legal framework. Cançado contends that the exclusion of individuals as subjects of international law has been overcome, and the new approach acknowledges their rights and obligations as actors on the global stage. This perspective implies a departure from the traditional state-centric view of international law.[66] However, it should be noted that this view is not universally shared among scholars.

The traditional issues that the dichotomy of 'subjects' and 'objects' presented -by not recognizing non-state actors as subjects and not representing the reality of the international sphere- also prompted other postures. Rossalyn Higgins argues that international law is a decision-making process and that it is not helpful to rely on the dichotomy model. Thus, she claims that international law is a dynamic and non-static process with a variety of participants, individuals being one of them along with NGOs.[67]

Building on the work of Higgins, McCorquodale contends that the dichotomy model privileges and reifies the voices of states.[68] Therefore, he advocates for the recognition of the participation of non-state actors -including civil society- in three different stages of the law-making process of international law:

(1) Creation of the law: Non-state actors often draft and negotiate the terms of ratified treaties. This author argues that the law-making process is affected directly by non-state actors. However, while

[63] ibid.
[64] *La Grand Case (FRG v US)*. [2001] International Court of Justice (ICJ). Para. 77
[65] UNGA, International Law Commission, Articles on State Responsibility Resolution A/RES/56/83 (12 December 2001) Article 8
[66] Antônio Augusto Cançado Trindade (2010)
[67] Rosalyn Higgins (1995) 49
[68] McCorquodale (2006) 123

acknowledging that treaty ratification is solely the responsibility of states, he acknowledges instances where non-state actors, such as transnational corporations may request a state to ratify a treaty that exempts them from that state's national laws and instead applies international economic law.[69]

(2) Creation of customary law: The involvement of non-state actors is important in the state's decision-making and modification of its practices and beliefs.[70] In his dissenting opinion in *the Arrest Warrant case*, Judge Van Den Wyngaert stated that the opinion of civil society "cannot be completely discounted in the formation of customary international law today".[71]

(3) The enforcement of law: Non-state actors can act as fact-finding bodies, lobbyists, and advocates in violations of international law.[72]

The fact that individuals and NGOs have increasingly participated in the international arena cannot be ignored, indicating that states are not the sole actors of international law. Thus, international law has a variety of participants, including non-state actors, and their level of participation depends on the particular area of the international legal system.[73] In this sense, the actors of the international community will change depending on the nature of the issue involved.[74]

IHRL has been regarded as one of the areas of international law where there is more participation of individuals and NGOs. After analyzing the debate that emerged mainly in the 1990s and early 2000s, the following section will examine the dichotomy between 'subject' and 'object' in IHRL. The focus will be on the concept of 'subjects' as both right holders and bearers of obligations.

## 3.2 The dichotomy of 'subjects' and 'objects' in International Human Rights Law

The dichotomy of 'subjects' and 'objects' of international law, conceives 'subjects' as holders of rights and bearers of obligations. Even though individuals have been recognized as rights holders under general international law it has been argued that they lack the remedies to uphold them. This is not the case in IHRL, where individuals have rights that can be claimed in an international sphere - regional human rights courts. However, IHRL has been

[69] ibid.
[70] ibid. 140
[71] *Arrest Warrant Case (Democratic Republic of the Congo v Belgium) Dissenting Opinion, Judge Chris Van Den Wyngaert* [2002] International Court of Justice (ICJ). No. 121. Para. 27.
[72] McCorquodale (2006) 145
[73] ibid. 125
[74] ibid. 126

created to place the sole legal obligations on states, which has the monopoly of responsibility.

IHRL is built upon the fundamental principle of state responsibility, with states bearing the primary duty to uphold human rights as outlined in human rights treaties and customary international law. Whilst states have traditionally been viewed as the primary duty-bearers of human rights, in order to analyse the dichotomy of 'subjects' and 'objects' under this area of international law, it is important to examine whether non-state actors also have obligations under IHRL.

The classical tripartite description of a state's human rights duties of respect, protect, and fulfill human rights, oblige the state -particularly the duty to protect- to exercise due diligence and adopt appropriate measures to prevent and penalize any actions by a private actor that impede the human rights of others.[75] The Human Rights Committee in General Comment 31 states that: "There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[76]

In this sense, the actions by non-state actors for which a state may be found to be in breach of IHRL do not arise because the actions of non-state actors are being attributed to the state. Rather, from the state's obligation to exercise due diligence to protect the human rights of all persons under its jurisdiction. Therefore, even where a state or a state official is not directly responsible for the actual violation of IHRL, the state can still be held responsible for a lack of response to, or prevent, the violation of human rights by a non-state actor.[77]

Major universal and regional human rights agreements require states to implement laws or other measures to 'ensure' the rights in the human rights treaty, whether immediately or progressively.[78] E.g., the CRC which in Article 2(2) establishes that: "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

The state's obligation and responsibility to protect human rights against acts of non-state actors have also been recognized by the regional courts of human

[75] Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds). *International Human Rights Law (*Oxfrod University press. 3rd Edition 2018) 115
[76] UN Human Rights Committee. General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 13 327 (2004) Para. 8
[77] Robert McCorquodale, 'Non-State Actors and International Human Rights Law' in Joseph Sarah and McBeth Adam, *International Human Rights Law* (Edward Elgar 2009). 8
[78] ibid.

rights.[79] The legal foundation for these decisions adopted by these courts is based on the conception that the state has an international obligation to take measures domestically to ensure compliance with its human rights obligations by all persons within the state's jurisdiction.[80] For instance, the Inter-American Court of Human Rights in the case *Velasquez-Rodríguez v. Honduras* stated that: "[A]n 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."[81]

The concept of individuals possessing rights and states bearing duties is based on the belief that the state is responsible for safeguarding the well-being of its citizens.[82] However, the globalization process and privatization of state activities, have increased the demands for the recognition of non-state actors human rights obligations. Some argue that the silence in relation to the obligations of non-state actors causes a great number of human rights violations to get excluded from the direct protection of IHRL. Manisuli Ssenyonjo states that the main argument opposing the direct imposition of human rights obligations on non-state actors asserts that it could result in states shifting their responsibility onto these actors, reducing their accountability and obligations.[83]

However, the UDHR acknowledges that actors beyond the state bear certain duties and responsibilities. In its preamble, the UDHR stipulates that "every individual and every organ of society… shall strive … to promote respect for these rights and freedoms…". Similarly, Article 29 mandates that: "Everyone has duties to the community in which alone the free and full development of his personality is possible." As a result, even when the UDRH is not a binding instrument it has been inferred that human rights duties extend beyond the state to include non-state actors. The UDHR acknowledges that these actors bear certain responsibilities, and its preamble urges every individual and societal entity to promote respect for human rights.[84]

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[79] The European Court of Human Rights in the case Osman v. UK established that states have duties to do all that can reasonably be expected to prevent human rights abuses by private actors. Likewise, the African Commission on Human and Peoples' Rights in the case SERAC v. Nigeria found that Nigeria had failed to protect indigenous peoples in Ogoniland from harmful actions by an oil consortuim, which breached the peoples' rights to health, property, housing, food, and freedom from forced deprivation of wealth and resources.

[80] McCorquodale (2009).

[81] *Case Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights (Ser. C) No. 4. 1988. Para. 172

[82] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' ( Human Rights Quarterly 1999) 56. 59

[83] Manisuli Ssenyonjo, 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (The International Journal of Human Rights 2008). 726

[84] ibid. 736

In this sense, it is widely accepted that non-state actors are obliged to respect human rights. Importantly, the Guiding Principles on Business and Human Rights states that the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. This responsibility requires a business to avoid causing or contributing to adverse human rights impacts through their own activities, address such impacts when they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services.[85]

In binding treaties, both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the ICCPR acknowledge in their respective preambles that individuals have obligations toward one another and to their communities. In relation to the right to health, the Committee on Economic, Social, and Cultural Rights declared in General Comment No. 14 that although only states are signatories to the Covenant and responsible for upholding it, every member of society, including individuals, healthcare providers, families, local communities, intergovernmental and non-governmental organizations, civil society groups, and private businesses, bears obligations to ensure the right to health. States parties should create a conducive atmosphere that enables these actors to fulfill their responsibilities.[86]

States have a responsibility to create an environment that facilitates the discharge of human rights responsibilities by non-state actors. Failure to do so may result in violations of human rights by state parties, as a result of permitting or failing to take appropriate measures to prevent harm caused by non-state actors.[87] To ensure compliance with human rights responsibilities, accessible, transparent, and effective monitoring and accountability mechanisms are necessary to regulate the conduct of non-state actors such as transnational corporations. Likewise, non-state actors must not undermine state efforts to comply with human rights obligations, and there is a dire need for them to comply with their human rights responsibilities.[88]

The UN Human Rights Councils mechanisms for Syria and Libya documented human rights violations by non-state actors during armed conflicts. However, OHCHR has yet to take a formal position on the ability of non-state actors to commit human rights violations during such conflicts.[89]

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[85] OHCHR.'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework'. 2011

[86] Committe on Economic, Social and Cultural Rights. General comment No 14: The right to the highest attainable. E/C.12/2000/4. 2000. Para. 42

[87] Manisuli Ssenyonjo, (2008) 726

[88] ibid.

[89] Yousuf Syed Khan and Charles Majinge, 'Advancing the Rule of Law and Human Rights Protection through United Nations Mandated Mechanisms: The Cases of the Syrian Arab Republic and the State of Libya' (Max Planck Yearbook of United Nations Law Online. 2021) 359

In conclusion, under IHRL the primary duty of non-state actors is limited to the respecting of human rights. The state has the virtual monopoly of responsibility under IHRL and can be held responsible for failing to prevent or respond to human rights violations by non-state actors. It is the state's obligation to exercise due diligence and adopt appropriate measures to protect human rights. While non-state actors, particularly individuals, have been recognized as right-holders, their recognition as 'subjects' of IHRL is still limited. It has been suggested that classifying individuals as 'subjects' may not be helpful[90], and thus, the conception of non-state actors, and particularly civil society participation under IHRL requires further analysis.

## 3.3 The right to participation in the international law-making process and its contribution to challenging the dominant legal doctrine

Antonio Cançado Trindade when presenting his idea of *International Law for Humankind* asserts that the constant contact of the individual with the international order is confirmed by the considerable evolution in the last decades of IHRL.[91] He believes that IHRL is established to protect human beings regardless of their nationality, political status, or circumstances, and emphasizes the legal rights of individuals as subjects of both domestic and international law.

In his concurring vote in the *Advisory Opinion on the Legal Status and Human Rights of the Child*, Judge Cançado Trindade, asserts that the conception of 'subjects' of the dominant legal doctrine, not only demands -in order to be recognized- individuals to have rights and obligations but also to participate in the process of creating its norms and complying with them.[92] He argues that the dominant legal doctrine that denies fully recognition of individuals as subjects of international law, is unsustainable and that it appears contaminated by an ominous ideological dogmatism, that alienates individuals from the international legal order. Therefore, Cançado Trindade claims that individuals are subjects of international law, which means that they are also participants.[93] According to his posture, there is no clear differentiation between subjects and participants. On the contrary, this posture conceives that the recognition of individuals as subjects in international law, and particularly in IHRL, implies their participation in it.

[90] James Crawford (2019). 111
[91] Cançado Trindade (2010). 221
[92] *Voto concurrente del Juez Cançado Trindade a la OC-17/2002, sobre 'Condición Jurídica y Derechos Humanos del niño'* Corte Interamericana de Derechos Humanos. Serie A No. 17. 2002. Para. 26, 27
[93] ibid.

However, the concept of ‘participants’ was introduced as a substitute or alternative for the prevailing dichotomy of ‘subjects’ and ‘objects’. As stated before the field of IHRL has adopted a restricted notion of ‘subject’ due to the state's monopoly on responsibility. Consequently, many have argued that relying on this dichotomy is unproductive, as it estranges individuals from IHRL.

IHRL has made a significant impact on the prevailing legal doctrine that views the international legal arena as a system created by and for states. One of the biggest contributions can be seen in the Human Rights Committee's General Comment No. 25. This document asserts that Article 25 of the ICCPR protects the right of all individuals to participate in public affairs, including the formulation and implementation of policies at all levels, be it local, regional, national, or international.[94] From a constitutionalist perspective the inclusion of the international level in the right to participation is beneficial since the empowerment of individuals in the international sphere is a key aspect of global constitutionalism.

In its General Comment the Human Rights Committee conceives different forms in which a citizen can engage in the conduct of public affairs and exercise their right to participate, such as: (1) when they exercise power as members of legislative bodies or by holding executive office; (2) when they choose or change their constitution or decide public issues through a referendum or other electoral process; (3) when taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government; (4) by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves; and, (5) as voters or as candidates for election.

While the right to participation in public affairs is recognized at all levels in General Comment No. 25, its exercise in the international sphere is not yet developed in order to understand what it entails. Despite its superficial recognition by the Human Rights Committee's General Comment on the issue, this document does not provide specific guidelines for the implementation of this right at the international level. Unlike in national contexts, popular assemblies do not play a role in shaping decision-making processes at the international level. However, individuals are still able to engage in the decision-making process through discussion, debate, and the exchange of ideas at international level. While progress has been made towards recognizing the importance of individual participation in shaping international affairs, further steps are necessary to fully recognize this fundamental right.

According to the OHCHR the decision-making at the regional and international levels has a significant effect on the realization of human rights,

[94] UN Human Rights Committee. General Comment 25 (1996).

on national legislation, policies, and practices. Thus, it asserts that it is necessary that such decisions are made in a transparent and accountable manner, with the participation of those who will be affected by those decisions.[95] The OHCHR asserts that the participation of individuals and civil society groups at the supranational level significantly benefits local and national concerns to the international community. This fosters a connection between national and international levels.

At present, there is no universally agreed-upon standard for how the right to participation should be exercised at the international level. According to the OHCHR, the forms and modalities of participation may vary depending on the specific format and rules of the international forum in question, as well as the nature and phase of the process.[96] The OHCHR further notes that a variety of approaches can be employed to ensure effective participation, such as granting observer, consultative, or participatory status, establishing advisory committees that are open to relevant stakeholders, holding forums and dialogues, webcasting events, and inviting general comments. By utilizing such methods, the international community can enhance individual participation in decision-making processes and ensure that diverse perspectives are taken into account.

However, the OHCHR considers that for the right holder to participate effectively at the international level access to relevant information is critical. This includes "documents, drafts for comments, and websites relevant to the decision-making process, the possibility to circulate written statements and to speak at meetings, without prejudice to the ability of international forums to prioritize their business and apply their rules of procedure."[97] Likewise, the OHCHR states that any criteria for assessing the appropriateness of materials must be made public and any objection process should be transparent and allow sufficient time for the affected civil society organization to respond.

The OHCHR's interpretation of participation aligns closely with the views of Rossalyn Higgins regarding participants in international law. The OHCHR uses the same concept of international law as a decision-making process that is espoused by Higgins. Likewise, when referring to individuals and civil society groups these organisms don't refer to them as subjects, but as right holders, and their involvement in the law-making at the international and regional level is born from their right to participation. Also, the OHCHR interpretation empower individuals and therefore it is beneficial in the academic agenda of global constitutionalism. However, it also runs short of establishing what this right should entail.

Despite the importance of the right to participate in public affairs at the international level, it has not yet been fully recognized and developed in a

[95] Office of the United Nations High Commissioner for Human Rights (OHCHR). 'Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs' 18
[96] ibid. 18
[97] ibid.

formal manner. This is mainly due to the limited development of this right in General Comment No. 25. As a result, some international scholars still question whether this General Comment has indeed recognized the right to participation in the international sphere, mainly because it is undeniable that within the domestic context, this right involves electoral and non-electoral elements.

### 3.3.1 Article 25(a) of the ICCPR in light of the Vienna Convention on the Law of Treaties

Article 25 (a) of the ICCPR recognizes the right to participation, which as mentioned before until now, has only been fully developed at a domestic level, although there are some efforts in recognizing this right at an international level. Nahuel Maisley, in contrast to the prevailing view among scholars that this article is limited to domestic law-making, contends that it grants global citizens a role in shaping international law. [98] He argues that Article 25 (a) grants civil society groups the right to participate in international law-making in accordance with the VCLT rules of treaty interpretation. [99]

According to the VCLT, the interpretation of a treaty must accord with its 'ordinary meaning'[100] and according its evolution over time.[101] The term 'public affairs' in Article 25(a) is a generic term that has evolved beyond its original domestic context due to the increasing globalization of decision-making.[102] This term should be understood as encompassing not only decisions made within a state, but also those made in non-national settings. [103] In a globalized world, governance and decision-making expands beyond the national confines, therefore 'public affairs' should be interpreted not only in a domestic level, especially international law-making, since it has a crucial role to play in shaping global norms and standards.

Likewise, according to Article 31 (1) of the VCLT, the treaties should be analyzed 'in their context'. In the case of Article 25 of the ICCPR part of this context is the Human Rights Committee General Comment No. 25, which confirms that the right to participate in public affairs includes the rights to freedom of expression, assembly, and association that are applicable in the international sphere. Another relevant element in terms of context is the

[98]Nahuel Maisley. 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (European Journal of International Law. 2017) 91
[99] ibid 95.
[100] UNGA, Vienna Convention on the Law of Treaties. Article 31 (a)
[101] *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)* International Court of Justice. 13 July 2009. Para 70. The ICJ when analyzing the notion 'comercio' stated that " even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty."
[102] Nabuel Maisley (2017) p. 96
[103] ibid p. 97.

wording of Article 25(a) itself, which contains no geographical limitation and thus may be applied internationally.[104]

Article 31(3)(b) of the VCLT states as a rule of interpretation the subsequent practice in the application of the treaty. In this case, global civil society has been increasingly granted access to different processes of international law-making.[105] Even though the participation of civil society still depends on the discretion of the states, IHRL has contributed in the promotion of individuals participation in the international sphere. Maisley argues that the expansion and consolidation of civil society participation came about when human rights were codified in international treaties, such as the ICCPR. Thus, this subsequent practice supports the interpretation of Article 25(a) as granting a right to participate in international law-making for civil society groups. [106]

Finally, Article 31(3)(c) regarding "relevant rules of international law applicable in the relations between the parties" can be understood as the various human rights treaties that grant civil society members a degree of participation in international law-making within their specific sphere of authority.[107] Likewise, under general international law, many multilateral treaties include the participation of NGOs through cooperation or consultation.[108] Maisley even asserts that state practice is beginning to recognize a customary right to participation. [109]

In accordance with the VCLT's, treaties should be interpreted 'in good faith' and in alignment with their 'object and purpose'. This calls for an interpreter to choose the best possible reading from among the text's presented readings and its interpretive practices. The preamble to the ICCPR explicitly acknowledges that the covenant's rights are not derived from states' consent but from the inherent dignity of the human person. [110]The ICCPR's object and purpose, therefore, is not to create but to define these rights, establish standards by which to measure them, and bind those states ratifying the Covenant to a framework of legal obligations. As such, Maisley asserts that the ICCPR's object and purpose is to protect the equal freedom of all individuals, a goal that aligns with most political theories.[111] Thus, interpreting the right to participate globally is more aligned with securing the equal freedom of individuals worldwide. Firstly, participation can enhance the guarantee of the equal freedom of individuals, leading to a more efficient international order conducive to fulfilling other human rights. Secondly, the right to participate can be considered a direct consequence of the equal freedom of all individuals, and civil society's participation in international law-making can be relevant for the sociological legitimacy of rules.[112]

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[104] ibid 97, 98.
[105] Ibid. 99
[106] ibid 99,100.
[107] Ibid 101
[108] Jan Klabers, Anne Peters, et.al. (2011) 202
[109]ibid
[110]Ibid. 103
[111]ibid
[112] ibid. 104,105.

In conclusion, in light of the general rules of interpretation of the VCLT, Article 25 (a) of the ICCPR regarding the right to participation should be recognized at an international level. The meaning of this right should be contextualized in our present times. This means in a globalized world, where public affairs are no longer only exercised at a national level, but also internationally. Article 25 (a) does not limit its exercise to the national level. Likewise, the preamble of the ICCPR explicitly acknowledges that the covenant rights are not derived from state consent, but from the inherent dignity of the human person. It is clear that the right to participation as stated in Article 25 (a) of the ICCPR should be fully recognized at an international level. To reinforce the reason why the right to participation should also be recognized in an international sphere I will now analyze this right in light of the sources of law stated in Article 38 (1) of the Statute of the ICJ.

### 3.3.2 The right to participation in the international law-making process: Justification through Article 38 (1) of the ICJ Statute

Christine Chinkin states that the sources of law helps identify what constitutes law and how decision-makers determine which instruments, practices, or policies are legally binding obligations, rather than moral, political, or other social commitments.[113] This definition is helpful as it guides us in determining what should be included in the law-making process. Chinkin notes that the state-centric nature of international law and the pre-eminent role of states in law-making is evident in Article 38(1) of the Statute of the ICJ.[114] As a result, it fails to reflect the complexity and diversity of contemporary IHRL, where civil society participates in the law-making process and draws on material far beyond the formal sources listed in Article 38(1) ICJ Statute.

However, I consider that by also taking into account the sources of law established in Article 38 (1) of the Statute of the ICJ, civil society groups should be granted the right to participation in the international law-making process.

The ICJ Statute recognizes international conventions as the first source of international law, including IHRL. Therefore, treaty law is the most significant source of IHRL. Article 1(3) of the UN Charter provides in a general and indeterminate language the first guarantee of human rights and fundamental freedoms by establishing it as one of the purposes of the UN.[115]

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[113] Christine Chinkin. 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*. (Oxford University Press 2018)

[114] ibid. 64

[115] According to this article one of the purposes of the UN is 'to achieve international cooperation in … promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

The follow-up of the UN Charter is the UDHR, which along with the ICCPR and the ICESCR is referred to as the International Bill of Rights. [116] In this sense, the right to participation is recognized in one of the instruments that constitute the 'International Bill of Rights', such as the ICCPR.

The role of UN treaty bodies is critical in the development of IHRL, and their activities span across various sources. However, as human rights treaties have been in existence for a relatively long time -this is the case of the ICCPR- they are at risk of becoming outdated. Therefore, it is essential to refine and expand existing rights through treaty interpretations. One of the ways in which rights and treaty obligations evolve is through general comments or recommendations issued by treaty bodies. Such clarifications are regarded as a form of secondary treaty law, which derives its authority from the binding nature of the treaty and the implied consent of states to it. Nevertheless, there is no consensus regarding whether treaty body interpretations can be considered a source of human rights law. Some have argued that treaty bodies do not possess law-making competence and that states may view a particular treaty body as having exceeded its authority in certain situations.[117]

This argument loses strength if we take into consideration that the ICJ has acknowledged the evolution of law or normative change since its inception, particularly in the context of general comments.[118] In the Advisory Opinion concerning the *Complaint Filed against the International Fund for Agricultural Development*, the ICJ cited two general comments to emphasize the progress made in the principle of equality in accessing the court.[119]

Max Lesch and Nina Reiners argue that treaty bodies use general comments to informally shape international law.[120] For these scholars, "general comments are law-making instruments because, despite their non-binding nature, they shape the interpretation, application and development of international human rights law. They are not only important points of reference for the treaty bodies themselves, but they are also cited by other international legal institutions and in domestic legal proceedings."[121] In this

[116] Article 25 of the ICCPR states that: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country".
[117] Chinkin (2018) 68-69
[118] ibid 70.
[119] *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (International Court of Justice (ICJ)). Para. 39
[120] Max Lesch & Nina Reiners 'Informal human rights law-making: How treaty bodies use General Comments to develop international law' (Cambridge University Press 2023) 379.
[121] Ibid. 383

sense, Lesch and Reiners argue that general comments challenge the state-centric perspective of international law-making process.[122]

General Comment No. 25 was issued by the Human Rights Committee established under the ICCPR to safeguard the full enjoyment of all civil and political rights guaranteed in the Covenant, without discrimination.[123] On it the Human Rights Committee stated that all individuals had the right to participate in the public affairs, at all levels, be it local, regional, national, or international.[124] Thus, this interpretation should be understand as a further development of Article 25 (a) of the ICCPR.

General Comments can also contribute to create state practice which leads to customary international law - the second source of law recognized by Article 38(1) of the ICJ Statute. One way to identify state practice is through declarations or resolutions adopted by states. In the case of the right to participate at the international level, there are different non-binding and binding international instruments that have recognize it after the adoption of General Comment No. 25. The United Nations Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007, recognizes the right of indigenous peoples to participate in decision-making processes that affect their lives and lands, both at the national and international levels.[125] Binding international treaties uphold the right to participation as well. For instance, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Union in 2003, recognizes in Article 18 the obligation of State parties to ensure greater participation of women in the planning, management, and preservation of the environment and the sustainable use of natural resources at all levels. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted in 2005, in Article 11 recognizes the participation of civil society in the efforts to achieve the objectives of the Convention, such as the promotion of respect for the

[122] Two examples used by these authors of how general comments have shaped international law are General Comment No. 15 adopted by the Committee for Economic, Social and Cultural Rights that recognizes the right to water that amends a general treaty in the area of economic, social and cultural rights. And General Comment No. 2 adopted by the Committee against Torture that defends the torture prohibition.

[123] 'Human Rights Committee' (*OHCHR*) <https://www.ohchr.org/en/treaty-bodies/ccpr> accessed 19 April 2023.

[124] Human Rights Committee. General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) CCPR/C/21/Rev.1/Add.7 (1996) Para 1 & 4.

[125] Article 41 states: "The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established." United Nations Declaration on the Rights of Indigenous Peoples. Resolution adopted by the General Assembly, U.N. Doc. A/Res/61/295 (2 October 2007).

diversity of cultural expressions at the local, national, and international levels.[126]

Also, the UN human rights treaty system has seen a number of multilateral treaties[127], as well as additional protocols to existing treaties. The right to participation in the international sphere has been exercised by civil society and NGOs when such treaties have been negotiated. NGOs' recommendations and monitoring activities have influenced state acceptance of these treaties, such as the Convention against Torture Other Cruel, Inhuman or Degrading Treatment (1984); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006). Although civil society has participated at various levels, and in some instances, has been directly involved in the creation process of certain treaties, their participation has always been subject to the consent of the state. However, civil society's participation in the creation process of certain treaties, although subject to state consent, has increased and for some, this can be considered customary practice.

The third source of law listed in Article 38 (1) of the ICJ Statute refers to the general principles of law, which are often debated because they are described in the Statute as those 'recognized by civilized nations'. However, Christine Chinkin argues that this expression encompasses principles that are found in most, if not all, national legal systems, such as notions of procedural fairness and equity. While general principles of law may not be as clearly defined as other sources, they nevertheless play an important role in shaping the development of IHRL. [128] Samantha Besson and José Luis Martí argue in favour of civil society actors' involvement as legitimate complementary actors in international law-making, citing the principle of civil society participation. This principle, as per their viewpoint, allows private entities from civil society to assume a meaningful role in the process of international law-making and, as a result, gain legitimacy as actors in this field.[129]

The fourth source of law, according to the ICJ Statute, are judicial decisions and the teachings of the most highly qualified publicists of various nations. Courts at the national, regional, and international levels are especially significant in shaping human rights law as they respond to changing social

[126] United Nations Educational, Scientific and Cultural Organization (UNESCO) 'Convention for the Protection and Promotion of the Diversity of Cultural Expressions' (15 February 2018)

[127] These treaties are: International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and its Optional Protocol; International Convention on the Rights of the Child and three optional protocols; the International Convention on the Protection of the Rights of All Migrants Workers and Member of their Families; the Convention on the Rights of Persons with Disabilities and its Optional Protocol; and the International Convention for the Protection of All Persons from Enforced Disappearance.

[128] Chinkin (2018). 74

[129] Samantha Besson & José Luis Martí. 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (Jurisprudence 2018) 504.

circumstances and evolving understandings of rights.[130] It is undeniable that individuals and civil society actors play an essential role in judicial decisions, not only by presenting claims but also by developing litigation strategies and submitting amicus briefs through global networks of human rights activists. Such participation enhances the legitimacy of judicial decisions and helps to ensure the protection of rights.

Regarding the writings of jurists, Chinkin notes that this includes reports from the UN Human Rights Council special procedures, the former Sub-Commission on Human Rights, reports from the OHCHR, and the human rights work of UN specialized agencies, as well as NGO reports, such as those of Human Rights Watch and Amnesty International. These sources reflect the diversity of perspectives and ideas that inform the development of IHRL.[131] The right to participation has also been recognized and until a certain point developed not through reports but in the forms of guidelines issued by the OHCHR.[132]

In conclusion, the sources of law according to the ICJ Statute provide a basis for recognizing the right to participation in public affairs in the international level. Although the state-centric nature of international law and the pre-eminent role of states in law-making is evident in Article 38(1) of the Statute, the complexity and diversity of contemporary IHRL necessitates the involvement of civil society and NGOs in the law-making process. The recognition of this right in the ICCPR and its subsequent development through General Comment No. 25, along with its incorporation into both binding and non-binding instruments, highlight the need for its full recognition and further advancement through a new general comment from the Human Rights Committee.

[130] Chinkin (2018) 75.
[131] ibid 79.
[132] Some examples are: 'A Practical Guide for Civil Society. Civil Society Space and the United Nations Human Rights System'; 'Working with the United Nations Human Rights Programme: A Handbook for Civil Society'; and, the 'Guidelines for States on the Effective Implementation of the Rights to Participate in Public Affairs'.

# 4 Civil society's participation in International Human Rights Law

This chapter will analyze how civil society has participated in the law-making process of IHRL through the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. By exploring the participation of civil society in these two treaties, this chapter will contribute to a deeper understanding of the crucial role civil society plays in the development and implementation of IHRL, what does the right to participation in the international sphere entails and how it can be strengthened for a more inclusive and participatory global governance system.

NGOs have been considered the iceberg of international civil society and a form of how the right to participation has been exercised in the international sphere – through association. Therefore, it is important to first understand how the participation of NGOs is conceived within the UN Charter through the Department of Economic and Social Council (ECOSOC), since the UN Charter provides the legal basis and principles of international law. For that I analyze the relationship of NGOs with ECOSOC through the resolution 1996/31. Likewise, in order to determine if there is a balance of representation between NGOs with consultative status from countries considered as the Global North and the Global South, I will analyze the list of NGOs registered in ECOSOC according to their webpage. This will be done with the purpose to determine if the non-recognition of the right to participation in the international level has created an imbalance of representation.

## 4.1 NGO's participation in the UN Charter

The participation of civil society in the international sphere is usually understood as the participation of NGOs, which has been considered the iceberg of international civil society.[133] The UN Charter is one of the most important instruments in international law, providing the legal basis for many of the norms and principles of international law. The founders of the UN clearly envisioned active participation of NGOs within the UN structure. Article 71 of the UN Charter states: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where

[133] Holly Cullen & Karen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation'. 10

appropriate, with national organizations after consultation with the Members of the United Nations."[134]

The first time that NGOs took a role in formal UN deliberations was through the ECOSOC in 1946. The relationship of NGOs with ECOSOC is based on a consultative relationship governed today by ECOSOC resolution 1996/31. This resolution was approved with the aim of introducing coherence in the rules governing the participation of NGOs in international conferences convened by the UN. Likewise, it intended that the bodies and specialized agencies of the UN system examine the principles and practices relating to their consultations with NGOs and take action, to promote coherence in light of the provisions of the resolution.

To monitor the evolving relationship between NGOs and the UN, the resolution 1996/31 creates the Council Committee of Non-Governmental Organizations. This resolution also makes a clear distinction between 'participation' and 'consultation'. In this sense, the arrangements for consultation should not be such as to accord to NGOs the same rights of participation as are accorded to States not members of the Council and to the specialized agencies brought into relationship with the UN. The resolution also states that the arrangement should not transform the Council into a general forum for discussion.[135]

The resolution stipulates that the consultative arrangements should adhere to the principle that they serve two purposes: firstly, to provide the Council or its subsidiary bodies with expert information or advice from organizations that possess specialized knowledge in the relevant subject matter; and secondly, to enable national, subregional, regional, and international organizations that represent significant public opinions to express their perspectives. As a result, the consultation arrangements with each organization should be specific to the subjects in which that organization has particular expertise or interest. In the case of the consultation of NGOs in the human rights field, the resolution states that their interest should pursue the goals of promotion and protection of human rights in accordance with the UN Charter and the UDHR.[136]

The resolution also states the requirements for NGOs' accreditations in international conferences convened by the UN. The accreditation is based on their background and involvement in the conference's subject areas. Active participation of NGOs does not entail a negotiating role but instead the opportunity to briefly address the preparatory committee and the conference in plenary meetings and their subsidiary bodies. Likewise, they may make written presentations during the preparatory process in the official languages of the UN as they deem appropriate. Those written presentations are not

[134] United Nations, 'Chapter X: The Economic and Social Council (Articles 61-72)' (*United Nations*) <https://www.un.org/en/about-us/un-charter/chapter-10> accessed 5 April 2023.
[135] *1996/31 Consultative relationship between the United Nations and non-governmental organizations* (The Economic and Social Council).
[136] ibid.

issued as official documents except in accordance with UN rules of procedure.

NGOs may be suspended or withdrawn from their consultative status by the decision of the ECOSOC on the recommendation of the Council Committee on Non-Governmental Organizations.[137] The resolution sets out the grounds for either suspension for up to three years or withdrawal, which are as follows: (a) if an organization or its affiliates or representatives acting on its behalf engages in a consistent pattern of acts that go against the principles and goals of the UN Charter, including politically motivated actions or unproven allegations against UN Member States; (b) if there is proven evidence of involvement in criminal activities that are internationally recognized, such as the trade of illegal drugs, money laundering or arms trafficking; (c) if, within the past three years, an organization did not make any meaningful or valuable contributions to the work of the UN, including the Council and its subsidiary organs.[138]

The resolution emphasizes that the Committee, which reviews applications for consultative status, must strive to facilitate the participation of NGOs from all regions of the world, particularly those from developing countries. This is crucial to ensuring that NGOs have a fair, equitable, and meaningful role in the consultative process.[139]

In this sense, since the adoption of the UN Charter, the involvement of civil society, particularly NGOs, has been an integral part of the organization's structure and its role in the international community. However, it is evident that even though the resolution 1996/31 was approved a couple of days after the General Comment No. 25[140] the participation of NGOs within the UN structure was not designed as an individual's right to participation but rather as an opportunity for governments to utilize these groups' specialized knowledge and skills. Since its conception in Art. 71 the participation of NGOs within the UN structure was conceived from a state-centric perspective. Significantly, Art. 71 allows the participation of NGOs after consultation with the members of the UN.

The participation of individuals through associations, such as NGOs, is seen as either expert participation or as a representation of public opinion. NGOs are accredited to attend international conferences based on their background and involvement in the subject areas of the conference. Therefore, their participation in the international sphere does not provide them with a formal negotiation role, but rather the opportunity to provide their expertise or express their perspectives.

[137] ibid.
[138] ibid.
[139] ibid.
[140] The General Comment No. 25 was adopted on 12 July, 1996 and the Resolution 1996/31 on the 25 July, 1996.

In that respect, the participation in the international sphere, including in the law-making process, will depend on an individual's or organization's expertise on the subject or their significant representation of public opinion in order to contribute with different perspectives. This approach may limit the exercise of the right to participate in the decision-making process in an international sphere, by not giving them a formal negotiation or decision-making role. However, by recognizing the right to participate of individuals at an international level and value NGOs' contributions, the international community can foster a more inclusive and informed decision-making process, promoting greater diversity and inclusivity in the international arena.

Until now there has been limited effort to evaluate their actual impact on UN activities. This is due, at least in part, on the difficulties involved in how to assess this impact. However, their participation in the international sphere can be tracked through the list of NGOs in consultative status with ECOSOC. The ECOSOC website provides a search function that allows users to filter NGOs by country and consultative status. Currently, there are 6343 organizations in consultative status, which are divided into three categories: General consultative status, Special consultative status, and Roster status. NGOs with general consultative status are typically large international organizations with a broad geographic reach, covering most of the issues on the agenda of ECOSOC and its subsidiary bodies. In contrast, NGOs with special consultative status tend to be smaller and more recently established organizations with special competence in a few fields of activity covered by ECOSOC. Organizations that do not fit into either of these categories are placed on the Roster.[141]

It is important to note that the criteria for obtaining consultative status vary by category, and the evaluation process can be challenging for NGOs, particularly those from underrepresented regions. Nevertheless, the list of NGOs in consultative status with ECOSOC provides a useful starting point for evaluating the participation of NGOs in the international arena, and for identifying gaps in representation that require further attention.

As of April 2023, the number of NGOs in consultative status with ECOSOC was: 142 NGOs in general consultative status, 5235 NGOs in special consultative status, and 966 on the Roster, making a total of 6343. A breakdown of the number of NGOs in each category by country is provided in Annex 1. Among the countries with NGOs in general consultative status, the United States had the highest number with 31 organizations, followed by Switzerland with 19, and the United Kingdom with 15. Other countries with a significant number of NGOs in general consultative status include France (11), the Russian Federation (7), Italy (6), India (5), Canada (4), China (4), Belgium (4), Japan (4), and Spain (4).

The data clearly demonstrates that there is a significant imbalance in the distribution of NGOs with general consultative status, with the majority of

[141] ECOSOC, NGO Branch <https://csonet.org/index.php?menu=30> Accessed April 03, 2023

these organizations being located in the Global North. The United States, Switzerland, and the United Kingdom, in particular, have a disproportionately high number of NGOs in this category, with the United States alone accounting for 21.68% of the total.

On the other hand, most countries from the Global South have very little representation in this category, with the vast majority having no NGOs at all with general consultative status. Countries such as South Africa, Nigeria, Pakistan, Panama, and Colombia -which are the countries that have the most- only have one or two NGOs with general consultative status. This disparity highlights the need for greater efforts to address systemic barriers that prevent NGOs from the Global South from obtaining consultative status, to promote greater diversity, inclusivity, and equality of participation within ECOSOC.

NGOs with special consultative status show a more diverse geographic distribution of representation compared to those with general consultative status. The United States continued to have the highest number of NGOs with special consultative status, with 1056 organizations, followed by Nigeria with 355, India with 296, and the United Kingdom with 226. Other countries with a notable presence of NGOs with special consultative status include Switzerland (220), France (169), Canada (141), Cameroon (141), Italy (111), and China (91).

It is interesting to note that there is an increase in participation from the Global South among NGOs with special consultative status, this may indicate that NGOs from the Global South are smaller NGOs. While the United States still has the highest number of NGOs in this category -representing 20.17% of the total-, countries such as Nigeria, India, and Cameroon have a significant presence. Switzerland, France, and the United Kingdom also continue to maintain a strong presence in this category. However, despite this increased participation, 64 countries mostly from the Global South have between 1 to 5 NGOs[142], and 36 countries have no NGOs with special consultative status[143], with 35 of those countries also lacking NGOs with general consultative status. In this sense, a more diverse and inclusive representation of NGOs from all regions of the world is necessary in order to promote greater equity and

[142] Holy see; Cyprus; Syrian Arab Republic; Angola; Antigua and Barbuda; Bahamas; Belarus; Botswana; Cambodia; Central African Republic; Comoros; Dominica; Gabon; Guinea-Bissau; Honduras; Lesotho; Maldives; Montenegro; Mozambique; Myanmar; Paraguay; San Marino; Seychelles; South Sudan; Suriname; Panama; Barbados; Mongolia Bosnia and Herzegovina; Lithuania; Madagascar; Malawi; North Macedonia; Zambia; Luxembourg; El Salvador; Monaco; Czechia; Gambia; Slovenia; Uruguay; Plurinational State of Bolivia; Fiji; Slovakia; Costa Rica; Ethiopia; Guatemala; Jamaica; Algeria; Republic of Moldova; Rwanda; Saint Lucia; Somalia; Kyrgyzstan; United Arab Emirates; Albania; Bulgaria; Croatia; Ecuador; Estonia; Latvia; Uzbekistan; Vietnam; Zimbabwe.

[143] Tajikistan; Andorra; Belize; Bhutan; Brunei Darussalam; Cabo Verde; Democratic People's Republic of Korea; Djibouti; Equatorial Guinea; Eritrea; Eswatini; Grenada; Guyana; Iceland; Kiribati; Lao People's Democratic Republic; Liechtenstein; Marshall Islands; Federated States of Micronesia; Namibia; Nauru; Nicaragua; Oman; Palau; Papua; New Guinea; Saint Kitts and Nevis; Saint Vincent and the Grenadines; Samoa; São Tomé and Príncipe; Solomon Islands; Timor-Leste; Tonga; Turkmenistan; Tuvalu; Vanuatu.

balance in the decision-making processes of ECOSOC and probably within the UN Structure.

Finally, the countries with the highest number of NGOs in roster consultative status are the United States of America (187), followed by the United Kingdom (62), Switzerland (45), Belgium (45), France (36), Canada (31), Germany (23), the Netherlands (19), Italy (18), and India (17).

The concentration of NGOs participation in countries from the Global North suggests that there may be structural barriers or disparities that make it more difficult for NGOs from the Global South to participate. This is particularly concerning since the UN Charter envisions NGOs' involvement in the UN structure. To tackle this inequality, the first step should be the recognition of the right to participation in the international sphere since this will oblige states to take further steps to identify and eliminate any barriers that may exist and international organizations to actively encourage greater participation from NGOs from the Global South. By cultivating greater inclusivity and diversity, we can ensure that the voices and perspectives of all regions are considered in the international decision-making process.

## 4.2 Participation of civil society in the drafting process of IHRL treaties

After analyzing how the participation of NGOs is regulated and exercised within the UN, it is important to examine the Convention on the Rights of the Child (CRC) as well as the Convention on the Rights of People with Disabilities (CRPD), as they had inclusive drafting processes, which involved a significant participation from civil society. This makes this process one of the well-documented examples of the role of civil society in the drafting of an IHRL treaty.

### 4.2.1 Convention on the Rights of the Child

According to the OHCHR the drafting of the Convention on the Rights of the Child (CRC) took place in a working group set up by the United Nations Commission on Human Rights.[144] The drafting process of the CRC started before the adoption of the General Comment No. 25 of the Human Rights Committee which recognized the right to participation in public affairs at an international level. However, the drafting process of the CRC has been recognized for its extensive consultation process, which included the active involvement of civil society actors, particularly NGOs.

[144] OHCHR, *Background to the Convention, Committee on the Rights of the Child* <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>
Accessed April 04, 2023

The roots of the CRC can be traced to the NGO Save the Children International Union (SCIU). In 1924 the SCIU drafted the first declaration of the rights of the child known as the Declaration of Geneva. One year after its adoption by the SCIU, the Declaration of Geneva was also adopted by the League of Nations. It was this 1924 Declaration that inspired the 1959 United Nations Declaration of the Rights of the Child.[145]

In 1979 in honor of the twentieth anniversary of the 1959 Declaration, the General Assembly authorized the Commission on Human Rights to draft a convention on children. The Working Group set up by the Commission began its drafting of the CRC in 1979.[146] According to the OHCHR the government delegates formed the core of the drafting group, but representatives of UN bodies and specialized agencies, as well as a number of NGOs, took part in the deliberations.[147]

The consultative status with the ECOSOC served as an enabler for NGOs during the codification of children's rights in the form of an internationally binding Convention. NGOs participated in every stage of the drafting process. From the beginning since Poland submitted the CRC draft to the Commission on Human Rights, several NGOs enjoying consultative status submitted a written statement to the Commission on Human Rights, welcoming the draft Convention but urging the postponement of its negotiation until results from NGO research and studies on children's rights and on the implementation of the 1959 Declaration were available.[148]

Initially, the views of NGOs were more readily accepted when they aligned with state-set agendas, rather than attempting to set their own. However, as the drafting process progressed, NGOs were given formal participation rights in the substantive debates.[149] During the second revision of the draft resolution, the Commission on Human Rights granted NGOs a formal role in the subsequent consultation phase by inviting them to communicate their views, observations, and suggestions on the convention. This allowed NGOs to contribute meaningfully to the development of the CRC, and their input was taken into account in subsequent revisions of the draft text.[150]

The discussions on the draft Convention ensued in an Open-ended Working Group (OEWG) throughout the 1980s. The open-ended nature of the Working Group allowed those who were not members of the Commission on Human Rights, such as UN Member and Observer States, NGOs with ECOSOC consultative status, and inter-governmental organisations, to attend its public

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[145]Cynthia Price Cohen. 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (Human Rights Quarterly 1990) 138

[146] ibid.

[147] OHCHR, *Background to the Convention, Committee on the Rights of the Child* <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> Accessed April 04, 2023

[148] G Erdem Turkelli & W Vandenhole. 'The Convention on the Rights of the Child: Repertoires of NGO Participation' (Human Rights Law Review 2012)

[149] ibid

[150] ibid. 37-38

meetings as observers. With the support of the United Nations Children's Fund (UNICEF) NGOs organized themselves through the creation of an Informal NGO Ad Hoc Group on the Drafting of the CRC (NGO Ad Hoc Group). The NGO Ad Hoc Group regularly produced reports during the drafting process that were distributed to the delegations in the Working Group as well as government missions in Geneva. While the NGO Ad Hoc Group's reports were not among the official documents distributed for deliberations, they nonetheless seem to have had considerable impact. The Group's proposals were incorporated in the article-by-article compilation of proposals by the Secretariat alongside governmental proposals.[151]

Initially, the NGO Ad Hoc Group's attention was focused on lobbying activities towards governments during the drafting process, due to the nature of the process. Even though there is no official record of the impact of the group's efforts on the agenda-setting during the drafting phase, many reports assert that it was significant. For example, Turkelli and Vandenhole argue that at least 13 proposals made by the NGO Ad Hoc Group were included in the Convention, either as individual paragraphs or entire articles.[152] The influence of the NGOs on the text extended beyond specific proposals to encompass the entire Convention, with the use of gender-neutral language and the inclusion of standards for school discipline, encouragement of breastfeeding, and the discouragement of harmful traditional practices such as female circumcision.[153]

The CRC marked the first time that NGOs participated in such an extensive capacity in a treaty-drafting process at the international level. Their participation was based on the expertise NGOs provided to the working group. The NGOs that acted as main participants were the ones that had a consultative status with ECOSOC. Because this process was before the adoption of General Comment No. 25 it is possible that it had an influence on the recognition of the right to participation at the international level. One of the main attributes of the CRC that makes it atypical among the nine core UN human rights treaties, is article 45 which allows the Committee on the Rights of the Child to invite the specialized agencies, UNICEF and other competent bodies to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The term 'other competent bodies' has been seen and used as a way to invite NGOs to participate in the Committees activities, such as the draft process of optional protocols and general comments issued by the Committee.

Influential international NGOs have also participated in the drafting process of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; Optional Protocol on the Involvement of Children in Armed Conflict; and, the Optional Protocol to the CRC on a communications procedure. The participation of NGOs at the international level impact will

[151] ibid.
[152] ibid.
[153] ibid. 40

depend more on the way they are organized than because there has been a recognition of the right to participation at the international level.

### 4.2.2 Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted in December 2006, is not only the first human rights treaty of the 21st century but also a significant achievement in terms of inclusive participation in the drafting process. Following the precedent established by the CRC, the treaty's development involved extensive engagement with civil society actors, especially NGOs including people with disabilities organizations (PDOs). This led to a highly collaborative and comprehensive framework for promoting and protecting the rights of persons with disabilities.

The CRPD was negotiated during eight sessions of an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee) created by the General Assembly from 2002 to 2006, making it the fastest negotiated human rights treaty.[154] The CRPD has been considered the most expediently negotiated UN convention due to the participation of NGOs and the involvement of persons with disabilities.[155] Additionally, the CRPD has been widely ratified, with 182 countries endorsing the treaty, demonstrating a global commitment to advancing disability rights and ensuring the full and equal enjoyment of all human rights and fundamental freedoms.

During the first session of the Ad Hoc Committee, it was agreed to include the participation of NGOs in the process by allowing them to attend meetings, make statements, receive documents, and distribute their own statements. However, tensions between NGOs and state delegations were also present, as some state representatives believed they were already accommodating enough towards NGOs. Furthermore, as noted by Woodburn, the initial Ad Hoc Committee meetings did not involve the participation of people with disabilities. [156]

Similar to the CRC and the ECOSOC, the participation of civil society in the Ad Hoc Committee was dependent on the expertise provided by the involved NGOs. To harness the knowledge of the various PDOs and NGOs, the

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[154] Department of Economic and Social Affairs, *Convention on the rights of persons with disabilities (CRPD)* <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd> Accesed April 04, 2023

[155] Hanna Woodburn, 'Nothing about us without civil society: The role of civil society actors in the formation of the UN Convention on the Rights of Persons with Disabilities.' (Political Perspectives 2013) 75

[156] Hanna Woodburn. (2013) 82

International Disability Caucus was established[157]. This caucus, which represented a significant number of NGOs, INGOs, and PDOs, was driven by consensus, and sought to present a cohesive agenda that would be both applicable and beneficial to all individuals with disabilities. [158]

The drafting process of the CRPD was noteworthy for several reasons, including the establishment of funding opportunities through the Voluntary Fund to assist with travel costs for NGOs and persons with disabilities from economically disadvantaged nations. Out of the 12 NGOs that participated in the working group responsible for creating the initial draft, one was from the Middle East (Jordan), one from Latin America (Costa Rica), one from Africa (South Africa), and there were representatives from India and the Philippines. The remaining seven were from developed countries in the Global North, including New Zealand. This limited representation from economically disadvantaged nations in the working group highlights the importance of the Voluntary Fund and similar initiatives that aim to increase the participation of marginalized communities in international processes. [159]

The International Disability Caucus played a significant role in the selection of NGO representatives for the Working Group, with the first seven seats allocated to members of the International Disability Alliance. The remaining five positions in the Working Group were allocated based on geographic location. However, there was disproportionate representation of NGOs from the West, even among those involved but not selected for the Working Group. Furthermore, it has been noted that even among NGOs representing people with disabilities globally, there are inherent biases based on the cultural background of the involved organizations. These biases can influence the perspectives and priorities of these NGOs in the drafting process, which can have implications for the resulting treaty's effectiveness in protecting the rights of people with disabilities worldwide.[160]

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[157] The International Disability Caucus according to their Final Statement at the Fourth Session International Disability Caucus issued the 3rd September, 2004 was conformed by the following NGOs: Australian Federation of Disability Organizations, Bizchut , The Israel Human Rights Center for People with Disabilities, Canadian Association for Community Living, Center for International Rehabilitation, Council for Canadians with Disabilities, Danish Organization of disabled people, Disability Australia Ltd, Disabled Peoples International, European Disability Forum, Forum of people with disabilities, Forum for Human Rights of people with disabilities - Costa Rica, Fiji Disabled People's Association, Handicap International, Inclusion International, Inter-American Institute on Disability, International Disability Convention Solidarity in Korea, Japan Disability Forum, Landmine Survivors Network, Lebanese Council of Disabled People LCDP, National Disability Party, National Association of Community Legal Centres, National Disability Council of Netherlands, People with Disability Australia Incorporated, People Who, Rehab Group, Rehabilitation International, Support Coalition International, World Blind Union, World Federation of the Deaf, World Federation of the Deafblind, World Network of Users and Survivors of Psychiatry, World Union for Progressive Judaism.

[158] Hanna Woodburn. (2013) 82

[159] ibid. 83

[160] ibid.

The tensions between civil society actors and state delegations became more apparent during the third and fourth sessions of the Ad Hoc Committee.[161] The debate centered around the extent to which NGOs should be allowed to participate in the informal sessions where many critical policy decisions were being made. While some state delegations sought to limit the continued involvement of civil society actors, an agreement was eventually reached to allow accredited NGOs to participate in formal sessions and observe the informal proceedings.

However, the establishment of so-called 'open informals' created an opportunity for some discussions to occur in closed-door, off-the-record meetings, reducing the transparency of these negotiations. The International Disability Caucus at the conclusion of the fourth Ad Hoc Committee meeting issued a statement indicating that they wished to be further utilized and included in the process. According to the Caucus, the NGOs participation was not only relevant because of the expertise they provide, but also because the Convention text was going to include the obligation to involve persons with disabilities through their organizations in the implementation of the Convention. The Caucus highlights that this involvement, even partnership as some government delegates call it, has to happen during the whole of the negotiation process and specially in this final stage of the process.[162]

A noteworthy aspect is the term 'partnership' used by government delegates, as mentioned by the Caucus. Peter Willets, notes that in the 1990s, numerous UN documents referred to NGOs as being in 'social partnership' with governments. Willets believes that the term 'consultative status' conferred upon NGOs by Article 71 of the UN Charter was deliberately chosen to denote a secondary role, whereby NGOs could provide advice but not participate in the decision-making process. Therefore, the use of the word 'partnership' suggests that NGOs and governments are equal partners, while also acknowledging that they are distinct entities. Willets further contends that NGOs have gained some participation rights that extend beyond mere consultation.[163]

Despite the tensions between NGOs and governments during the drafting process of the CRPD, NGOs were still able to exert a significant influence on the outcomes of the Convention through their participation and advocacy efforts. While these debates highlight the challenges and tensions inherent in the process of developing human rights treaties, they also underscore the importance of ensuring meaningful participation and transparency in decision-making processes to advance the protection of human rights for all.

[161] ibid.
[162] International Disability Caucus. Comments by NGOs at the Fourth Session International Disability Caucus - Final Statement. (2004)
[163] Peter Willetts, 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN' (Global Governance, Vol. 6. 2000) 191-192

# 5 Addressing the challenges and defining the scope of the right to participation in the international law-making process

Article 25(a) of the ICCPR specifically emphasizes the right to take part in the conduct of public affairs, either directly or through freely chosen representatives, without discrimination or unreasonable restrictions. This right extends to all aspects of public administration and policy formulation at international, national, regional, and local levels, as clarified by General Comment No. 25. However, the practical application of this right in the international law-making process remains underdeveloped.

Recognizing and developing the right to participate in the international law-making process is crucial in order to empower individuals on a global scale. This chapter aims to highlight the challenges faced by civil society with the aim of determining what this right should entail. Firstly, it addresses the critical issue of the lack of full recognition and development of the right to participation in the international law-making process, emphasizing the urgent need to bridge this gap to ensure more effective protection of this fundamental right. Secondly, it examines the challenge posed by state consent in civils society's international participation, shedding light on the complications that arise when individual involvement depends on the consent of states. Thirdly, it explores the obstacle of unequal participation, acknowledging the existing disparities between the Global South and the Global North, as well as the exclusion of marginalized and vulnerable populations from meaningful participation. Lastly, it emphasizes that the right to participation should not be confused with the right to vote; rather, it aims to establish a set of minimum requirements that guarantee its protection and facilitate meaningful engagement at the international level.

## 5.1 Lack of full recognition and development

The right to participation stated in Article 25 of the ICCPR contains electoral and non-electoral elements. The advocacy for the recognition of the right to participation of individuals in international law-making is based on Article 25 (a) of the ICCPR. According to this disposition, "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of

public affairs, directly or through freely chosen representatives…" Public affairs according to General Comment No. 25 covers all "aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels." According to the Human Rights Committee, in order to exercise this right, the allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws. It is clear that this was envisioned for its application at the domestic level, even though it recognizes its exercise in an international sphere. This leaves a lack of development and understanding of how this right should be exercised at an international level.

Under general international law, the closest provision in this regard is Article 71 of the UN Charter. However, as has been mentioned before it conceives the participation of civil society only through NGOs. This is problematic because the participation of NGOs within the UN structure was not designed as an individual's right to participate but rather as an opportunity for governments to utilize these groups' specialized knowledge and skills. Therefore, as it was mentioned earlier on this thesis, it does not conceive individuals as the primary actors, rather it limits their participation only through NGOs - constraining the forms in which individuals can participate. The exclusive recognition of NGOs in Article 71 of the UN Charter potentially undermines the full exercise of the right to participation by individuals within the UN structure. Urging for full recognition and development of Article 25 (a) of the ICCPR at the international level.

Under IHRL, the OHCHR when referring to the individual participation within the UN Human Rights System, provides a definition of civil society. This is helpful because it allows the exercise of this right at an international level individually or in association. From a global governance perspective, it has been argued that a definition of a global civil society is problematic and even that it should be used with caution.[164] However, I consider that the definition given by the OHCHR encompasses, in a general sense, what is expected from a civil society within an international framework in the law-making process.[165] This is mainly because it conceives that the participation of civil society should be compatible with the purposes or values of the UN, such as the maintenance of peace and security, the realization of development, and the promotion and respect of human rights. These elements should apply transversally to all areas of international law.

Advocating for the recognition of the right to participation in the international law-making process, is based on the idea of empowering individuals in the international sphere. It is clear that the actors will vary depending on the area

[164] John Keane, *Global Civil Society? (Contemporary Political Theory* (Cambridge University Press 2003) 2

[165] The OHCHR defines civil society as: "individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights."

of international law, but a general definition should be given as the one provided by the OHCHR.

Finally, under international law, various multilateral conventions conceive the 'participation', 'cooperation', or 'consultation' of NGOs.[166] However, in light of the right to participation it is more appropriate to refer to a 'participatory status'. In order to overcome the challenge of its lack of recognition, it is important to fully recognize the right to participation in the international law-making process. Therefore, I consider that full recognition of this right should be done through an international treaty. However, a first step could be done by recognizing this right through a new general comment from the Human Rights Committee.

## 5.2 State consent

One of the problems of not fully recognizing and developing the right to participation in the law-making process is that participation individually or in association depends on the consent of the states. This was the case of the two most participatory drafting treaty processes in IHRL: the CRC and the CRPD. In the case of the CRC, NGOs were included because of the initiative of NGOs with consultative status in the ECOSOC in requesting the delegated Commission in the drafting process to wait for NGO's research and studies on children's rights. In the CRPD, the participation of NGOs was agreed at the first meeting of the drafting process, mainly because of the expertise that NGOs provided in the elaboration of the CRC.

The state's consent in incorporating the participation of individuals in the treaty drafting process, creates different problems. First, in these two treaties individual participation was conceived only through NGOs because their participation was based on the expertise they provided to state delegations. This is problematic, since for example in the case of the CRPD at the beginning people with disabilities were left aside from this process. Second, it is hard for civil society to have its own agenda in these drafting processes since any suggestion will be more readily accepted when aligned with state-set agendas. Third, there is no formal documentation of the participation of civil society in these processes, as well as the impact they have during the law-making of treaties. And fourth, tensions between states and NGOs could lead to reduce the participation of civil society actors and even to close-door and off-record discussions among states.

[166] Anne Peters highlights the following treaty provision in the field of economic law and environmental: Art. 12 c) OECD-Convention (1960); Art. 13 (2) Convention Establishing the WIPO (1967); Art V.2. WTO Agreement (1994). Art XI(7) CITES Treaty (1973); Art 6(5) Vienna Convention on the Protection of the Ozone Layer (1985); Art 11(5) of the Montreal Protocol on Ozone Depletion (1987); Art 15(6) Basel Convention on the Trans-boundary Movement of Hazardous Waste (1989); Art 10(5) Aarhus Convention (1998); Art 22 (7) UN Convention to Combat Desertifiation (UNCCD, 1994); Art 23(5) Biodiversity Convention (1992); Art 29(8) Cartagena Protocol on Biosafety (2000); Art 7(6) UNFCCC (Framework Convention on Climate Change, 1992); Art 13(8) Kyoto Protocol (1997). Jan Klabbers, Anne Peters, et.al. (2011). P.220

A recent example of a process in which the participation of individuals has been considered is in the establishment of a Permanent Forum for People of African Descent[167], which will serve as a consultation mechanism for people of African descent and other interested parties. The establishment of this forum is considered the first step towards the adoption of a legally binding instrument on the promotion and full respect of the human rights of people of African descent.[168] Nevertheless, the modalities, format, and substantive and procedural aspects of the permanent forum will be agreed upon by the Member States and Observer States.[169] Since this is a novel forum, it is to soon to tell if there will be adequate NGO participation, however this is problematic since the level of participation and consultation will depend on the states consent, even though it conceives that further consultations regarding these aspects will be held with civil society actors.

Some positive aspects in moving forward in the participation of civil society are that for the sessions of the permanent forum, the OHCHR invites civil society actors, such as NGOs, academics, experts on issues related to people of African descent, to submit inputs on topics to be considered for discussion. Likewise, it allows all stakeholders to organize side events to expand discussions beyond the plenary of the session.[170]

In other sources of law, such as general comments and amicus curiae individual participation does not depend on state consent. In general comments the common practice is that the treaty body in charge of issuing it, extend an invitation to all stakeholders interested in participating, including civil society. An example is the process of consultation done by the Human Rights Committee for the General Comment No. 37 on Article 21 of the ICCPR adopted on 23 July 2020.[171] This process has been recognized for the efforts done by the Committee to meet and hear from as many civil society actors as possible in order to understand the real issues they were facing and hear their opinion on the draft text that was prepared.[172] Another relevant

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[167] In August 2021, the General Assembly adopted resolution 75/314, which operationalized the Permanent Forum on People of African Descent as "a consultative mechanism for people of African descent and other relevant stakeholders" and "as a platform for improving the safety and quality of life and livelihoods of people of African descent." The Permanent Forum also operates as an advisory body to the Human Rights Council, in line with the programme of activities for the implementation of the International Decade for People of African Descent and in coordination with existing UN mechanisms promoting action to combat racism against people of African descent. OHCHR website: < https://www.ohchr.org/en/events/forums/2022/1st-session-permanent-forum-people-african-descent>

[168] United Nations General Assembly. A /RES/73/262. 15 January 2019.

[169] ibid.

[170] OHCHR website. <https://www.ohchr.org/en/events/sessions/2023/second-session-permanent-forum-people-african-descent#:~:text=The%20Office%20of%20the%20United,York%2C%20United%20States%20of%20America Accessed May, 2023.

[171] OHCHR. 'Call for inputs' <https://www.ohchr.org/en/calls-for-input/call-comment-no-37-article-21-international-covenant-civil-and-political-rights >Accessed May, 2023.

[172] European Center for Non-for-Profit Law. 'The path towards general comment no. 37 on Article 21, ICCPR (right of peaceful assembly) A role model for the future.'

aspect of the adoption of this General Comment is that due to the COVID-19 pandemic it was adopted in an online session. In the case of the amicus curiae, the regional courts of human rights in their rules of court expressly allow the participation of individuals through amicus curiae in contentious proceedings, not depending on the consent of states.[173]

In the advisory opinions, even though they may not be requested by civil society actors -except in the African System of Human Rights[174]- through their rules the regional courts human rights allow the invitation to stakeholders to submit information regarding the advisory opinion.[175]

In conclusion, the participation of civil society in the law-making process should not be left to the states consent, on the contrary, it should be considered a legal requirement. Thus, the right to participate in the international law-making process, should be developed through the drafting of a new general comment of the Human Rights Committee, which should establish a list of minimum requirements of the modalities and mechanisms to guarantee the effective participation of civil society actors at the international level. Additionally, when accreditations are required Anne Peters suggests the establishment of a uniform and standardized procedure designed for all international institutions.[176] Finally, it is essential for civil society to have its own agenda, as it is crucial that the international body responsible for drafting the international instrument acts as a mediator between the agendas of states and civil society. The aim is to find common ground and bridge any differences that may arise.

[173] According to Article 44 of the Rules of procedure of the Inter-American Court any person or institution unrelated to the litigation and the process, who presents to the Court arguments regarding the facts contained in the submission of the case or provides legal considerations on the subject matter of the proceedings, through a written document or an oral statement during a hearing, can participate as an amicus curiae. The Rules of the European Court of Human Rights based on Article 36.2 of the convention grant third parties invited or granted leave to intervene and to put before the Court, as impartially and objectively as possible, legal or factual points capable of assisting it in resolving the matters in dispute before it on a more enlightened basis. The African Court of human rights in article 45.1 of the rules of the court also grants individuals and NGOs to bring expertise to the court through amicus curiae.

[174] Article 4.1. of the Protocol to the African charter on human and peoples' rights on the establishment of an African court on human and peoples' rights, authorizes the African Court to issue advisory opinions "upon demand by [...] an African organization recognized by the AU". This disposition opens the possibilities for NGOs to request advisory opinions. An example of a non-state actor requesting an advisory opinion, is the advisory opinion No. 001/2018, of 4 Dec. 2020 requested by the Pan African Lawyers Union (PALU), one of the leading civil society organizations in Africa in relation to the vagrancy laws.

[175] The Inter-American Court in its rules of procedure in Article 73.3 allows the invitation of any interest person in submitting information relevant for the advisory opinion. The European Court of Human Rights through Article 3 of Protocol 16 allows the invitation of any person to submit written comments or take part in any hearing of the advisory opinion.

[176] Jan Klabbers, Anne Peters, Et. al. (2011) 223

## 5.3 Unequal participation

Another challenge for civil society is unequal participation at an international level. A more diverse and inclusive participation of civil society actors from all regions of the world is necessary in order to promote greater equality and balance in decision-making at the international level. The concentration of civil society actors' participation in countries from the Global North suggest the existence of structural barriers or disparities that make it more difficult for civil society from the Global South to participate.

The unequal participation of NGOs with consultative status at ECOSOC is a clear example. Despite its origins dating back to the adoption of the UN Charter, as of 2023, ECOSOC has yet to ensure more equitable participation of accredited NGOs. There exists a significant disparity between the involvement of NGOs from the Global South and those from the Global North. Thus, I consider it necessary for ECOSOC to promote the accreditation of NGOs of the Global South, especially from those countries that don't have any or have too few NGOs accredited.

Likewise, unequal participation in international forums is heavily influenced by the financial capacity of civil society actors. Those with greater financial resources have more opportunities to participate -especially in international forums- creating an imbalance in representation. This issue is particularly evident in the UN headquarters, located in New York City, United States, and Geneva, Switzerland, where crucial deliberations in the law-making process take place. An example is the Permanent Forum on People of African Descent, which conducted its inaugural session from 5 to 8 December 2022 in Geneva and has a second session scheduled from 30 May to 2 June 2023 that will place in New York. While registration is open to civil society actors interested in the subject, it was explicitly stated that participation does not come with any financial assistance.[177] Therefore, it's more probable that the civil society actors participating are those with more financial capacity. However, it is important to emphasize that the OHCHR has made a significant advance by publishing a comprehensive account of the inaugural session, documenting the debates and participants involved, including civil society actors engaged in the various discussions. This notable development serves as an important milestone, as it provides formal documentation of the process.

In addressing the disparity of financial capacity, a notable effort was the approach taken during the drafting process of the CRPD. One good practice was the establishment of a voluntary fund that provided funding opportunities for NGOs and people with disabilities from economically disadvantaged nations, assisting with their travel costs. This initiative recognized the need to enhance representation from economically disadvantaged nations within the

[177] OHCHR website. <https://www.ohchr.org/en/events/sessions/2023/second-session-permanent-forum-people-african-descent#:~:text=The%20Office%20of%20the%20United,York%2C%20United%20States%20of%20America> Accessed May, 2023.

working group. It highlights the significance of the Voluntary Fund and similar initiatives aimed at promoting the participation of marginalized communities in international processes.

Similarly, the COVID-19 pandemic has presented new opportunities for engaging civil society actors from the Global South. An illustrative example is the utilization of online sessions, as demonstrated during the adoption of General Comment No. 37. This approach can be further employed to facilitate regional sessions, enabling the active participation and input of civil society in each respective region. By leveraging digital platforms, the voices of civil society can be effectively heard and included in the decision-making processes.

Another dimension of unequal participation lies in the involvement of civil society at the international level, which often is based on their specific expertise and knowledge. This approach can give preference to certain sectors within civil society, leading to potential problems. For instance, during the early stages of the CRPD, people with disabilities were initially excluded from the drafting process, as civil society participation was primarily seen as a way to provide expertise and knowledge to drafting process. Even though this is crucial in any international law-making process, it has to be kept in mind that the main goal of advocating for the empowerment of individuals at an international level is to shed light on marginalized and excluded groups, ensuring their visibility and inclusion.

## 5.4 Voice not vote

The participation of civil society actors in the international law-making process raises an important question regarding if it entails the right to vote. From a constitutionalist perspective, Anne Peters argues that civil society participation does not entail voting rights but instead involves certain requirements for their meaningful involvement.[178] I agree with this approach since I believe that recognizing the right to vote in the international law-making process requires a more cohesive global civil society, which is currently lacking. However, taking the initial steps toward creating a more unified global civil society is crucial, and I believe that granting the right to participation in the international law-making process serves as a positive starting point.

The right to participation, especially in the drafting process of international instruments should entail open invitations to participate in the discussion sessions; notification of sessions; access to relevant information such as documents, drafts for comments, agenda items; the option to distribute documents; make written statements; submit inputs on topics to be considered for discussion; and make oral statements following the rules of the conference.

[178] Jan Klabbers, Anne Peters, et. al. (2011) 226.

Likewise, from a constitutionalist perspective, it has been contended that this right also encompasses the obligation of the international body responsible for the drafting process to provide explicit and well-founded justifications when civil society actors are denied registration or accreditation for a session or the opportunity to present oral statements and written submissions. Moreover, this right imposes a procedural duty of good faith on both international bodies and state delegations to genuinely consider the inputs offered by civil society actors.[179]

The exercise of this right may face practical limitations, including constraints related to time and space during the drafting process. It is essential that, prior to each process, the specific rules are clearly defined to ensure maximum participation of civil society according to the particularities of each case. Moreover, the international body responsible for the drafting process should make diligent efforts to prevent these limitations from becoming restrictive rules that hinder civil society's meaningful participation.

In conclusion, the right to participation of civil society actors in the international law-making process does not grant them voting rights. Instead, it emphasizes the importance of meeting certain requirements to ensure their meaningful and effective involvement. By recognizing and fulfilling these requirements, we can foster a more inclusive and diverse decision-making process. The recognition of the right to participation in the international law-making process holds significant value in the context of global constitutionalism, not only because it aims to empower individuals on the international stage but also because among of its core principles are constituent power and the protection of rights.

[179] Ibid. 227

# 6 Conclusions

Global constitutionalism is a strand of thought that advocates for the application of constitutionalist principles in the international legal sphere. Two of these principles are constituent power and the protection of rights. The concept of constituent power emphasizes the critical role of people as a legitimizing force, particularly in today's interconnected world where international treaties can impact domestic constitutions. Therefore, individual participation becomes crucial in legitimizing international treaties. Additionally, the principle of the protection of rights acknowledges that individuals inherently possess rights, this includes the right to participation contained in Article 25 of the ICCPR.

The constitutionalization of international law has been justified based on various factors, including the fragmentation of international law, the challenges posed by globalization, and the need to address global emergencies. Regarding the two latters, globalization presents a challenge to the traditional democratic political community, as political power and decision-making extend beyond the confines of a single nation-state. State constitutions are no longer comprehensive in scope, as certain governmental functions are transferred to the supranational level. This becomes particularly evident in the context of responding to global emergencies. The collaboration of diverse actors is a key element to effectively address global challenges.

In global constitutionalism, inclusiveness is essential, with individuals as primary members, and NGOs playing a crucial role in representing global civil society. Therefore, from a global constitutional perspective, the international legal order should shift towards an individual-oriented system that reflects the recognition of democratic values at transnational levels. This will contribute to ensuring the legitimacy of decision-making on the international stage. However, the traditional dichotomy of ‘subject’ and ‘object’ was for long considered the dominant legal doctrine in international law. This view holds that states are the main ‘subjects’ of international law, while individuals are mere ‘objects’ of the international legal system. This understanding has been increasingly challenged since the latter half of the 20th century, with scholars arguing that individuals and other non-state actors should also be recognized as ‘subjects’ of international law or as alternative position ‘participants’.

In the international sphere, both individuals and NGOs have played an important role in IHRL. The acknowledgment of the participation of individuals and NGOs in the field of IHRL has been justified by the necessity of safeguarding and promoting the fundamental rights and welfare of human beings. As a result, individuals, NGOs, and other civil society entities participate in both the development and implementation of international norms. This can be seen as a reflection of the democratization of international relations.

In this sense, IHRL has made a significant contribution to promoting democratic global governance by acknowledging that the right to participation includes participation in the conduct of public affairs at all levels, including the international sphere. The Human Rights Committee's General Comment No. 25 asserts that Article 25 (a) of ICCPR protects the right of all individuals to participate in public affairs, including the formulation and implementation of policies at all levels, be it local, regional, national, or international. Likewise, according to the Human Rights Committee, the right to participation has a close relationship with the right of freedom of association since it can be exercised individually or in association -e.g., NGOs. This is why because of the important role played by individuals, NGOs, and other entities in the UN Human Rights System, another important contribution of IHRL is the definition of civil society provided by the OHCHR. In this sense, civil society refers to individuals and groups who engage voluntarily in public participation and action based on shared interests, purposes, or values that align with the goals of the UN. These goals include the maintenance of peace and security, the achievement of development, and the promotion and respect of human rights. This definition is relevant since it promotes participation in IHRL from actors different than the state.

Therefore, IHRL challenges the dichotomy of 'subjects' and 'objects' in international law through Article 25 (a) ICCPR and its interpretation in General Comment No. 25. Since from this perspective it provides individuals a 'participatory status' in public affairs at an international level. The IHRL interpretation of participation aligns closely with Rossalyn Higgins view of international law as a decision-making process. Likewise, when referring to individuals and civil society groups the OHCHR doesn't refer to them as subjects, but as right holders, and their involvement in the law-making at the international and regional level is born from their right to participation.

Another important contribution of IHRL in promoting individuals 'participatory status' in the international sphere is the increased participation of individuals in the law-making process. Two examples are the CRC and CRPD, which have been recognized for the significant participation of civil society in the drafting process in IHRL. However, the interpretation of General Comment No. 25 of Article 25 (a) has not been enough in recognizing individuals right to participate in the international law-making process.

I consider it necessary to fully recognize and develop the right to participation in the international law-making process. Article 25 (a) of the ICCPR, should be interpreted in light of the general rules of interpretation established in Article 31 of the VCLT and the sources of law outlined in Article 38 (1) of the ICJ Statute. It is crucial to interpret the meaning of Article 25 (a) in the context of our current globalized world, where public affairs extend beyond national boundaries. While traditionally seen as applicable only at the domestic level, Article 25 (a) does not limit its exercise to national contexts. Furthermore, the ICCPR preamble explicitly acknowledges that covenant

rights stem from the inherent dignity of every human being, rather than from state consent. Therefore, it is evident that the right to participation enshrined in Article 25 (a) of the ICCPR should be fully recognized and upheld at the international level.

These reasons are further strengthened if we take into consideration the sources of law. First, the right to participation is conceived in the ICCPR, which is an international treaty and the primary source of law. To ensure that human rights treaties remain relevant and adaptable over time, as they can become outdated, treaty bodies issue general comments or recommendations that help interpret and update treaty obligations. Article 25 was interpreted by the Human Rights Committee -responsible for safeguarding civil and political rights under the ICCPR- through General Comment No. 25. On it, Article 25 (a) of the ICCPR regarding the right of all individuals to participate in public affairs, was extended to an international level.

Additionally, general comments can contribute to the development of customary international law through state practice, which can be identified through declarations and resolutions adopted by states. In the case of the right to participate at the international level, various non-binding and binding international instruments have provided a participatory status -or at least consultative status- to individuals and NGOs following the adoption of General Comment No. 25. Moreover, individuals and civil society actors play a vital role in shaping judicial decisions, not only by submitting claims but also by strategizing litigation and submitting amicus briefs. The OHCHR has also played a significant role in promoting the participation of civil society within the UN human rights system.

Overall, the recognition and development of the right to participation in international law is supported by the ICCPR, supplemented by general comments, state practice, international instruments, and the active involvement of individuals and civil society actors in international sphere. However, in practice civil society faces several challenges when participating in the international law-making process. The main challenge is the lack of full recognition and development of the right to participate in the international law-making process; state consent; and unequal participation.

In order to overcome the challenge of its lack of recognition, it is important to fully recognize the right to participation in the international law-making process. Therefore, I conclude that a first step could be done by recognizing this right through a new general comment from the Human Rights Committee. On it, it should emphasize that the participation of civil society in the law-making process should not be left to the states consent, on the contrary, it should be considered a legal requirement. Likewise, a general comment of the Human Rights Committee, should establish a list of minimum requirements of the modalities and mechanisms to guarantee the effective participation of civil society actors. For instance, the establishment of a uniform and standardized procedure for accreditations designed for all international institutions. Likewise, it is crucial that the international body

responsible for drafting the international instrument acts as a mediator between the agendas of states and civil society. The aim is to find common ground and bridge any differences that may arise.

Civil society participation in the law-making process does not entail voting rights but instead involves certain requirements for their meaningful involvement. The right to participation, especially in the drafting process of international instruments should entail open invitations to participate in the discussion sessions; notification of sessions; access to relevant information such as documents, drafts for comments, agenda items; the option to distribute documents; make written statements; submit inputs on topics to be considered for discussion; and, make oral statements following the rules of the conference. Likewise, this right should also encompasses the obligation of the international body responsible for the drafting process to provide explicit and well-founded justifications when civil society actors are denied registration or accreditation for a session or the opportunity to present oral statements and written submissions. Moreover, this right should impose a procedural duty of good faith on both international bodies and state delegations to genuinely consider the inputs offered by civil society actors.

In order to reduce the unequal participation, voluntary funds and similar initiatives should be considered to promote the participation of marginalized communities in international processes. Similarly, online sessions or the use of technology can be further employed to enable the active participation and input of civil society in each respective region. By leveraging digital platforms or enhacing funds, the voices of civil society can be effectively heard and included in the decision-making processes.

Finally, the recognition of the right to participation in the international law-making process holds significant value in the context of global constitutionalism, not only because it aims to empower individuals on the international stage but also because one of its core principles is constituent power and the protection of rights. The recognition of the participation of individuals in the international law-making process is a first step in empowering individuals in the international sphere. The recognition of this right is an initial step toward creating a more unified global civil society. Likewise, it will allow us to start academically questioning individual candidacies to international organizations that depends exclusively on state proposals and negotiations.

# Bibliography

**Academic literature:**

**i. Books**


Kant I., *Perpetual peace, A philosophical essay* (A Project Gutenberg Ebook 1795) < https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>

Higgins R., *Problems and Process: International Law and How We Use It* (OSAIL 1995)

Marcus A., *Meditations* (Penguin Classics 2006)

Klabbers J., Peters A. et. al., *The Constitutionalization of International Law* (Oxford University Press 2009)

McCorquodale R., 'Non-State Actors and International Human Rights Law' in Sarah J. and Adam M., *International Human Rights Law* (Edward Elgar 2009)

Cançado Trindade A.A., *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers 2010)

Schwöbel C.E.J., *Global constitutionalism in international legal perspective* (Martinus Nijhoff Publisher 2011)

Weiss T.G., *Thinking about Global Governance: Why People and Ideas Matter* (Routledge 2011)

De Sousa Santos B. & Meneses M., *Epistemologías Del Sur (Perspectivas)* (Ediciones Akal, SA 2014)

Moeckli D., Shah S. and Sivakumaran S. (eds) *International Human Rights Law* (Oxford University Press 2018)

Crawford J., *Brownlie's Principles of Public International Law* (Oxford University Press 2019)

De Sousa Santos B., *Construyendo las Epistemologías del Sur para un pensamiento alternativo de alternativas* (CLACSO 2019)

Ferrajoli L. *Por una constitución de la Tierra: La humanidad en la encrucijada* (Editorial Trotta S.A. 2022)

Hall N., *Transnational Advocacy in the Digital Era: Think Global, Act Local* (Oxford Academics 2022

### ii. Book chapter:

D'aspremont J., 'International legal constitutionalism, legal forms and the need of villains', in Lang A.F. & Wiener A. (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing Limited 2017)

Fassbender B., 'Written versus unwritten: two views on the form of an international constitution.' In Lang A.F. & Wiener A. (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing Limited 2017)

Harries J., 'Global Constitutionalism: the ancient world', in Lang A.F. & Wiener A. (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing Limited 2017)

Lang A.F. & Wiener A., 'A Constitutionalising Global Order: An Introduction', in *Handbook on Global Constitutionalism*. (Edward Elgar Publishing Limited 2017)

Thornhill C., 'The enlightenment and global constitutionalism', in Lang A.F. & Wiener A. (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing Limited 2017)

Van Ittersum M.J., 'Global constitutionalism in the early modern period: the role of empires, treaties and natural law' in Lang A.F. & Wiener A. (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing Limited 2017)

Chinkin C., 'Sources' in Moeckli D., Shah S. and Sivakumaran S. (eds) *International Human Rights Law* (Oxford University Press 2018)

### iii. Journal articles

Price Cohen C., 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (Human Rights Quarterly 1990)

Held D., 'Democracy and Globalization*'* (Global Governance 1997)

Jochnick C., 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (Human Rights Quarterly 1999)

Willetts P., 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN.' (Global Governance 2000)

Cullen H. & Morrow K., 'International Civil Society in International Law: The Growth of NGO Participation' (Non-State Actors and International Law 2001)

Keane J., 'Global Civil Society? (Contemporary Political Theory)' (Cambridge University Press 2003)

McCorquodale R., 'Beyond State Sovereignty: The International Legal System and Non-State Participants.' (Revista Colombiana de Derecho Internacional 2006)

Peters A., 'Compensatory Constitutionalism: The function and potential of fundamental international norms and structures' (Leiden Journal of International Law 2006)

Ssenyonjo M., 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (International Journal of Human Rights 2008)

McCorquodale R., 'Non-State Actors and International Human Rights Law' in Sarah J. and Adam M., *International Human Rights Law* (Edward Elgar 2009)

Peters A., 'The merits of global constitutionalism' (Indiana Journal of Global Legal Studies 2009)

Clapham A., 'The Role of the Individual in International Law' (European Journal of International Law. 2010)

Erdem Turkelli G. & Vandenhole W., 'The Convention on the Rights of the Child: Repertoires of NGO Participation' (Human Rights Law Review 2012)

Woodburn H., 'Nothing about us without civil society: The role of civil society actors in the formation of the UN Convention on the Rights of Persons with Disabilities.' (Political Perspectives 2013)

Maisley N., 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (European Journal of International Law 2017)

Besson S. & Martí J.L., 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (Jurisprudence 2018)

Mora-Carvajal D.A., 'Global Constitutionalism: Opportunity to have a more unitary and coherent International Law' (Revista Derechos del Estado 2020)

Khan Y.S. & Majinge C., 'Advancing the Rule of Law and Human Rights Protection through United Nations Mandated Mechanisms: The Cases of the Syrian Arab Republic and the State of Libya' (Max Planck Yearbook of United Nations Law Online 2021)

Lesch M. & Reiners N., ‘Informal human rights law-making: How treaty bodies use General Comments to develop international law’ (Cambridge University Press 2023)

**Legal instruments:**

UNGA, United Nations Charter (26 June 1945)

UNGA, Statute of the International Court of Justice (26 June 1945)

UNGA, Vienna Convention on the Law of Treaties, Treaty Series vol. 1155 (23 May 1969)

UNGA, International Law Commission, Articles on State Responsibility Resolution A/RES/56/83 (12 December 2001)

UNGA, United Nations Declaration on the Rights of Indigenous Peoples A/Res/61/295 (2 October 2007)

UNGA, Convention for the Protection and Promotion of the Diversity of Cultural Expressions (15 February 2018)

**Resolutions and reports of International Organizations:**

UNHRC ‘General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (1996) CCPR/C/21/Rev.1/Add.7.

UNHRC ‘General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13.

OHCHR ‘Working with the United Nations Human Rights Programme: A Handbook for Civil Society’ (2008)

OHCHR ‘Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011)

OHCHR ‘A Practical Guide for Civil Society. Civil Society Space and the United Nations Human Rights System’ (2014)

UNGA ‘A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action’ (2019) A/RES/73/262

AGNU ‘Resolución aprobada por la Asamblea General, Creación del Foro Permanente de Afrodescendientes’ (2021) A/RES/75/314

OHCHR 'Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs'

**NGOs reports:**

International Disability Caucus 'Comments by NGOs at the Fourth Session International Disability Caucus - Final Statement' (2004)

**Online resources:**

Department of Economic and Social Affairs, *Convention on the rights of persons with disabilities (CRPD)* <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>

OHCHR, *Human Rights Committee* <https://www.ohchr.org/en/treaty-bodies/ccpr>

ECOSOC, *NGO Branch* <https://csonet.org/index.php?menu=30>

OHCHR, *Background to the Convention, Committee on the Rights of the Child* <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>

OHCHR, 'Calls for input' <https://www.ohchr.org/en/calls-for-input/call-comment-no-37-article-21-international-covenant-civil-and-political-rights>

# Table of Cases

Permanent Court of International Justice (PCIJ). SS Wimbledon case (United Kingdom and ors v Germany) Series A no.1. 16 January 1923

Inter-American Court of Human Rights (IACHR). Case Velasquez Rodriguez v Honduras (Ser. C) No. 4. 1988.

International Court of Justice (ICJ). La Grand Case (Germany v. United States of America). June 27, 2001.

International Court of Justice (ICJ). The Arrest Warrant case. (Belgium v. Congo) 2002.

International Court of Justice (ICJ). Dispute regarding navigational and related rights (Costa Rica v. Nicaragua). 13 July 2009.

# Annex 1

Table 1 summarizes data obtained from the ECOSOC website search function, which provides information on NGOs in consultative status. The website allows users to filter NGOs according to their consultative status categories: special, general, and roster. Additionally, six different filters can be used to refine the search: country of activity, other accreditations, organization type, region(s), country, and other geographic designations.

The table is based on a database of 6343 organizations in consultative status, which were categorized according to their consultative status and country. The table presents the countries listed in alphabetical order. My primary interest was to determine which countries had the most NGOs participating in the ECOSOC. However, it is important to note that the absence of a country's participation through an NGO does not necessarily mean that the country's situation is not represented in the ECOSOC, as international organizations that operate in all UN member countries may report their activities to the ECOSOC.

The table also includes tabs for 'countries not available' in the search function for countries, as well as Jammu and Kashmir, which was listed under the 'other geographic designations' filter, but had two special organizations.

| Country | Special | General | Roster |
|---|---|---|---|
| Afghanistan | 9 | 0 | 0 |
| Albania | 5 | 0 | 0 |
| Algeria | 4 | 0 | 0 |
| Andorra | 0 | 0 | 0 |
| Angola | 1 | 0 | 0 |
| Antigua and Barbuda | 1 | 0 | 0 |
| Argentina | 37 | 0 | 8 |
| Armenia | 9 | 0 | 0 |
| Australia | 70 | 0 | 5 |
| Austria | 38 | 2 | 11 |
| Azerbaijan | 13 | 1 | 0 |
| Bahamas | 1 | 0 | 0 |
| Bahrain | 6 | 0 | 0 |
| Bangladesh | 63 | 1 | 3 |
| Barbados | 2 | 0 | 2 |

| | | | |
|---|---|---|---|
| Belarus | 1 | 0 | 0 |
| Belgium | 90 | 4 | 45 |
| Belize | 0 | 0 | 0 |
| Benin[b] | 19 | 0 | 2 |
| Bhutan | 0 | 0 | 0 |
| Plurinational State of Bolivia | 3 | 0 | 0 |
| Bosnia and Herzegovina | 2 | 0 | 0 |
| Botswana | 1 | 0 | 0 |
| Brazil | 60 | 1 | 5 |
| Brunei Darussalam | 0 | 0 | 0 |
| Bulgaria | 5 | 0 | 0 |
| Burkina Faso | 10 | 0 | 0 |
| Burundi | 13 | 0 | 0 |
| Cabo Verde | 0 | 0 | 0 |
| Cambodia | 1 | 0 | 0 |
| Cameroon | 122 | 1 | 3 |
| Canada | 141 | 4 | 31 |
| Central African Republic | 1 | 0 | 0 |
| Chad | 11 | 0 | 0 |
| Chile | 20 | 0 | 1 |
| China | 91 | 4 | 2 |
| Colombia | 32 | 1 | 1 |
| Comoros | 1 | 0 | 0 |
| Congo | 12 | 0 | 0 |
| Costa Rica | 4 | 0 | 2 |
| Côte d'Ivoire | 12 | 0 | 1 |
| Croatia | 5 | 0 | 0 |
| Cuba | 19 | 0 | 1 |
| Cyprus | 1 | 0 | 1 |
| Czechia | 3 | 0 | 1 |
| Democratic People's Republic of Korea | 0 | 0 | 0 |

| | | | |
|---|---|---|---|
| Democratic Republic of the Congo | 83 | 0 | 0 |
| Denmark | 17 | 0 | 3 |
| Djibouti | 0 | 0 | 0 |
| Dominica | 1 | 0 | 0 |
| Dominican Republic | 6 | 1 | 0 |
| Ecuador | 5 | 0 | 0 |
| Egypt | 29 | 0 | 1 |
| El Salvador | 3 | 1 | 0 |
| Equatorial Guinea | 0 | 0 | 0 |
| Eritrea | 0 | 0 | 0 |
| Estonia | 5 | 0 | 0 |
| Eswatini | 0 | 0 | 0 |
| Ethiopia | 4 | 0 | 2 |
| Fiji | 3 | 0 | 0 |
| Finland | 6 | 1 | 1 |
| France | 169 | 11 | 36 |
| Gabon | 1 | 0 | 0 |
| Gambia | 3 | 0 | 1 |
| Georgia | 9 | 0 | 0 |
| Germany | 72 | 0 | 23 |
| Ghana | 68 | 0 | 5 |
| Greece | 16 | 1 | 5 |
| Grenada | 0 | 0 | 0 |
| Guatemala | 4 | 0 | 1 |
| Guinea | 9 | 0 | 0 |
| Guinea-Bissau | 1 | 0 | 0 |
| Guyana | 0 | 0 | 0 |
| Haiti | 14 | 0 | 2 |
| Holy see | 1 | 1 | 1 |
| Honduras | 1 | 0 | 0 |
| Hungary | 6 | 0 | 0 |
| Iceland | 0 | 0 | 0 |

| | | | |
|---|---|---|---|
| India | 296 | 5 | 17 |
| Indonesia | 16 | 1 | 1 |
| Islamic Republic of Iran | 68 | 0 | 1 |
| Iraq | 26 | 0 | 0 |
| Ireland | 12 | 0 | 1 |
| Israel | 54 | 0 | 1 |
| Italy | 111 | 6 | 18 |
| Jamaica | 4 | 0 | 1 |
| Japan | 56 | 4 | 13 |
| Jordan | 8 | 0 | 0 |
| Kazakhstan | 7 | 0 | 1 |
| Kenya | 51 | 0 | 3 |
| Kiribati | 0 | 0 | 0 |
| Kuwait | 7 | 0 | 0 |
| Kyrgyzstan | 5 | 0 | 1 |
| Lao People's Democratic Republic | 0 | 0 | 0 |
| Latvia | 5 | 0 | 0 |
| Lebanon | 29 | 0 | 3 |
| Lesotho | 1 | 0 | 0 |
| Liberia | 15 | 0 | 0 |
| Libya[s] | 7 | 0 | 1 |
| Liechtenstein | 0 | 0 | 0 |
| Lithuania | 2 | 0 | 0 |
| Luxembourg | 3 | 1 | 1 |
| Madagascar | 2 | 0 | 0 |
| Malawi | 2 | 0 | 0 |
| Malaysia | 20 | 2 | 4 |
| Maldives | 1 | 0 | 0 |
| Mali | 22 | 0 | 0 |
| Malta | 6 | 0 | 0 |
| Marshall Islands | 0 | 0 | 0 |
| Mauritania | 35 | 0 | 2 |

| | | | |
|---|---|---|---|
| Mauritius | 6 | 0 | 0 |
| Mexico | 59 | 0 | 2 |
| Federated States of Micronesia | 0 | 0 | 0 |
| Monaco | 3 | 0 | 2 |
| Mongolia | 2 | 0 | 1 |
| Montenegro | 1 | 0 | 0 |
| Morocco | 26 | 0 | 4 |
| Mozambique | 1 | 0 | 0 |
| Myanmar | 1 | 0 | 0 |
| Namibia | 0 | 0 | 0 |
| Nauru | 0 | 0 | 0 |
| Nepal | 37 | 0 | 0 |
| Netherlands | 73 | 1 | 19 |
| New Zealand | 15 | 0 | 2 |
| Nicaragua | 0 | 0 | 0 |
| Niger | 9 | 0 | 2 |
| Nigeria | 355 | 1 | 7 |
| North Macedonia | 2 | 0 | 0 |
| Norway | 28 | 0 | 2 |
| Oman | 0 | 0 | 0 |
| Pakistan | 70 | 1 | 6 |
| Palau | 0 | 0 | 0 |
| Panama | 2 | 1 | 2 |
| Papua New Guinea | 0 | 0 | 0 |
| Paraguay | 1 | 0 | 0 |
| Peru | 14 | 0 | 3 |
| Philippines | 23 | 1 | 6 |
| Poland | 6 | 0 | 1 |
| Portugal | 13 | 0 | 1 |
| Qatar | 6 | 0 | 0 |
| Republic of Korea | 79 | 1 | 4 |
| Republic of Moldova | 4 | 0 | 0 |

| | | | |
|---|---|---|---|
| Romania | 6 | 0 | 1 |
| Russian Federation | 63 | 7 | 1 |
| Rwanda | 4 | 0 | 0 |
| Saint Kitts and Nevis | 0 | 0 | 0 |
| Saint Lucia | 4 | 0 | 0 |
| Saint Vincent and the Grenadines | 0 | 0 | 0 |
| Samoa | 0 | 0 | 0 |
| San Marino | 1 | 0 | 0 |
| São Tomé and Príncipe | 0 | 0 | 0 |
| Saudi Arabia | 9 | 2 | 1 |
| Senegal | 14 | 2 | 3 |
| Serbia | 9 | 0 | 0 |
| Seychelles | 1 | 0 | 0 |
| Sierra Leone | 13 | 0 | 0 |
| Singapore | 13 | 0 | 0 |
| Slovakia | 3 | 0 | 0 |
| Slovenia | 3 | 0 | 1 |
| Solomon Islands | 0 | 0 | 0 |
| Somalia | 4 | 0 | 0 |
| South Africa | 39 | 2 | 0 |
| South Sudan | 1 | 0 | 0 |
| Spain | 67 | 4 | 8 |
| Sri Lanka | 6 | 0 | 0 |
| Sudan | 20 | 0 | 0 |
| Suriname | 1 | 0 | 0 |
| Sweden | 32 | 0 | 7 |
| Switzerland | 220 | 19 | 45 |
| Syrian Arab Republic | 1 | 0 | 1 |
| Tajikistan | 0 | 0 | 1 |
| Thailand | 14 | 0 | 3 |
| Timor-Leste | 0 | 0 | 0 |
| Togo | 47 | 0 | 0 |

| | | | |
|---|---|---|---|
| Tonga | 0 | 0 | 0 |
| Trinidad and Tobago | 6 | 0 | 0 |
| Tunisia | 12 | 0 | 2 |
| Türkiye | 48 | 0 | 1 |
| Turkmenistan | 0 | 0 | 0 |
| Tuvalu | 0 | 0 | 0 |
| Uganda | 29 | 0 | 0 |
| Ukraine | 13 | 0 | 0 |
| United Arab Emirates | 5 | 0 | 1 |
| United Kingdom of Great Britain and Northern Ireland | 226 | 15 | 62 |
| United Republic of Tanzania | 10 | 0 | 0 |
| United States of America | 1056 | 31 | 187 |
| Uruguay | 3 | 0 | 1 |
| Uzbekistan | 5 | 0 | 0 |
| Vanuatu | 0 | 0 | 0 |
| Bolivarian Republic of Venezuela | 7 | 0 | 2 |
| Viet Nam | 5 | 0 | 0 |
| Yemen | 13 | 0 | 0 |
| Zambia | 2 | 0 | 0 |
| Zimbabwe | 5 | 0 | 0 |
| Country not available | 3 | 0 | 299 |
| Jammu and Kashmir | 2 | 0 | 0 |
| State of Palestine | 8 | 0 | 0 |
| **Total** | **5235** | **142** | **966** |