The European Journal of International Law Vol. 28 no. 1

The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making

Nahuel Maisley*

Abstract

Most international legal scholars consider that although the inclusion of civil society in international law-making would be desirable, it is not yet legally required. In this article, I argue that civil society groups already do have a right to participate in international law-making. Although I believe there are various paths that can be taken to defend this idea, in this article I focus on only one. I hold that the right can be derived from Article 25(a) of the International Covenant on Civil and Political Rights, which grants every citizen 'the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives'. Specifically, I interpret Article 25(a) in accordance with the Vienna Convention on the Law of Treaties. I argue, first, that the article can be interpreted as applying internationally (considering the ordinary meaning, the context, the subsequent practice and other rules of international law) and, second, that it should be interpreted in this way (if read in good faith and considering the object and purpose of the treaty).

After years of negotiation, in late 2015, the representatives from 12 states announced that they had reached an agreement regarding the text of the Trans-Pacific Partnership (TPP), a treaty regulating trade-related issues.[1] A few days earlier, Zahara Heckscher, a cancer patient from the USA, had been arrested as she refused to leave the premises

* PhD candidate, Universidad de Buenos Aires – CONICET, Buenos Aires, Argentina. Email: nmaisley@derecho.uba.ar. This article is a preliminary result of my ongoing doctoral research at the Universidad de Buenos Aires. Earlier versions were presented at the University of British Columbia's Allard School of Law 2015 Junior Scholars Workshop, at the Universitat Pompeu Fabra, and at the Max Planck Institute for Comparative Public Law and International Law.

1 Trans-Pacific Partnership, 4 February 2016 (not yet entered into force), available at http://tpp.mfat.govt.nz (last visited 25 February 2016).

where the final wording of the treaty was being settled by the governments.[2] As the policemen handcuffed her, she peacefully denounced that the intellectual property clauses included in the trade agreement constituted a 'death sentence' for cancer patients like herself, and she demanded that her position and that of other civil society groups be heard before a final decision on the wording of the treaty was made.[3] She was not the only one to make this claim. Although some state representatives asserted that 'public engagement process[es]' had been put in place,[4] civil society groups considered that the negotiations actually 'lacked transparency and multi-stakeholder participation, with the only players involved being member governments and cleared advisors from large companies'.[5] In fact, this apprehension of the process united 48 non-governmental organizations, who reminded the governments of the 'principles of transparency and public participation in rule making' and requested – minimally – that the text that was being negotiated should become publicly known,[6] something that did not happen until after the wording was definitively settled.

The case of Zahara and the TPP is interesting because it illustrates the material effects of a theoretical discussion that has been growing in importance among international legal scholars in the past few years, regarding the legal entitlements of civil society groups in the international law-making process. In a report published in 2012, the Committee on Non-State Actors (NSAs) of the International Law Association (ILA) concluded that 'NSAs may not … have a general right to access and participation' in international law-making, but 'there may be said to be at least an *expectation* that NSAs are included in [these] deliberative processes'.[7] Despite the optimistic wording, the report reflected a traditional perception that is still shared by most international lawyers: that although the inclusion of civil society actors in the global law-making process would be desirable, it is not yet legally required.[8]

In this article, I will try to argue the opposite. I will claim that civil society groups do already have a right to participate in international law-making. Although I believe there are various paths that can be taken to defend this idea, in this article

2 DemocracyNow.org, Breast Cancer Patient Arrested for Protesting TPP, 6 October 2015, available at www.democracynow.org/2015/10/6/breast_cancer_patient_arrested_for_protesting (last visited 10 October 2015).

3 *Ibid.* The videos are available at https://youtu.be/ENpMpf2TMhg, https://youtu.be/3CO_hU6Wz5g, and https://youtu.be/pO6hr32Yr-8 (last visited 10 October 2015).

4 United States Trade Representative (USTR), Stakeholder Input Sharpens, Focuses US Work on Pharmaceutical IPR in the TPP, November 2013, available at https://ustr.gov/about-us/policy-offices/press-office/blog/2013/November/stakeholder-input-sharpens-focuses-us-work-on-pharmaceutical-IP-in-TPP (last visited 10 October 2015).

5 Public Knowledge, Trans-Pacific Partnership Agreement (TPP), available at www.publicknowledge.org/trans-pacific-partnership-agreement-tpp (last visited 10 October 2015).

6 Electronic Frontier Foundation, TPP Transparency Letter to Trade Ministers, December 2014, available at www.eff.org/files/2014/12/10/tpp_transparencyletter_12-2014-fnl.pdf (last visited 10 October 2015).

7 International Law Association (ILA), Second Report of the Committee Non-State Actors in International Law: Lawmaking and Participation Rights (2012), available at www.ila-hq.org/download.cfm/docid/E1B513C8-FCFF-4F8D-8C047815E1FDF8AE (last visited 10 October 2015).

8 See section 1 below.

I will focus on only one. I will hold that the right can be derived from Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which grants citizens not only the right to vote in elections, but also 'the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives'.[9] As opposed to most scholars, who consider that this article is only applicable to the domestic law-making sphere,[10] I will argue that this provision grants global citizens a right to take part in international law-making. This does not mean that individuals must be deemed to have 'treaty-making power' or that every law-making decision requires the creation of an assembly with the citizens involved. Instead, it minimally requires that civil society organizations (that is, voluntary associations of citizens) should be granted a say in the international deliberations of state representatives with regard to law-making. This is consistent with the Human Rights Committee's (HRC) interpretation of Article 25(a), according to which citizens can 'take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves'.[11]

The article will be divided in three sections. In the first section, I will map the different positions on the legal status of civil society in relation to international law-making. In the second section, I will use Article 25(a) of the ICCPR to challenge the prevailing assumption that holds that civil society does not have a legal right to participate in the creation of global rules. To that purpose, I will interpret the article in accordance with the rules of treaty interpretation established in the 1969 Vienna Convention on the Law of Treaties (VCLT).[12] The third and final section will be devoted to a brief reflection on the implications of my proposal, including some thoughts on the content and the implementation of this right.

1 Current Positions on the Right of Civil Society to Participate in International Law-Making

International law was originally conceived as a system regulating the relations between sovereign states.[13] According to the traditional conception, as it was seminally explained by the Permanent Court of International Justice in 1923, 'the right of entering into international engagements is an attribute of State sovereignty'.[14] Thus, for classical scholarship, states – as the primary owners of the system – could decide

[9] International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 25(a).

[10] See, e.g., Steiner, 'Political Participation as a Human Right', 1 *Harvard Human Rights Yearbook* (1988) 77; G.H. Fox, *Democracy, Right to, International Protection* (2008); S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2013), at 727–758.

[11] Human Rights Committee (HRC), General Comment 25 (HRC GC 25), 7 December 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 8.

[12] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[13] See, classically, L. Oppenheim, *International Law: A Treatise* (1905), at 341.

[14] *The S.S. Wimbledon*, 1923 PCIJ Series A, No. 1, at 25.

to arbitrarily exclude other actors from any process of international law-making and, despite potential problems of legitimacy, the process would still be completely lawful.[15]

In the years that have passed since the Permanent Court of International Justice's (PCIJ) decision, considerable change has occurred in the sphere of international relations. Nevertheless, the position denying civil society groups any entitlement to participate in the deliberative process that precedes the creation of global rules is still predominant.[16] In their classic book on international law-making, Alan Boyle and Christine Chinkin hold that despite the growing role of civil society it is still 'premature to assert that there is a right to access and participation'.[17] This position of denial is shared by Stephen Tully, who argues that 'non-state actor participation also depends upon government discretion or that of intergovernmental agents as circumstances and needs dictate'.[18] For Cedric Ryngaert, despite its desirability, 'non-state actor participation in international norm-setting processes remains a "discretionary" decision of relevant bodies and institutions'.[19] Arnold Pronto, senior legal officer of the United Nations (UN), also shares this position, arguing that 'even though NGOs [non-governmental organizations] have, on occasion, been granted formal participation rights, these remain the exception to the rule and are generally limited in scope and subject to the will of states, which nonetheless retain the monopoly on decision-making'.[20] Most international law textbooks implicitly coincide with the negation of this right to participation,[21] and some even do it explicitly, such as Peter Malanczuk: '[T]he role of NGOs in the international legal system is primarily an informal one' and 'at least with regard to international law-making, … it is unlikely that NGOs will be included in the formal process in the near future.'[22]

A more nuanced, albeit still rejecting, position is reflected in the ILA's committee report and in the work of an important strand of the literature. Using the same wording later adopted by the ILA, both Anne Peters and Anna-Karin Lindblom suggest

15 A. McNair, *The Law of Treaties* (1961), at 35; L. Oppenheim, *Oppenheim's International Law*, edited by Robert Y. Jennings and Arthur Watts (9th edn, 1992), at 1217. See also the discussion in A. Peters, *Treaty Making Power* (2009), paras 15–18; McCorquodale, 'An Inclusive International Legal System', 17 *Leiden Journal of International Law* (2004) 477, at 479.

16 For this same assessment, see Charnovitz, 'The Illegitimacy of Preventing NGO Participation', 36 *Brooklyn Journal of International Law* 891, at 895; McCorquodale, *supra* note 15, at 480.

17 A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 57.

18 S. Tully, *Corporations and International Lawmaking* (2007), at 329.

19 Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law', in M. Noortmann and C. Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law Taking to Law Making?* (2010) 69, at 81. Nevertheless, Ryngaert is a strong supporter of the 'creation' of this right. *Ibid.*, at 85.

20 Pronto, 'Some Thoughts on the Making of International Law', 19 *European Journal of International Law* (*EJIL*) (2008) 601, at 605.

21 See, e.g., M. Shaw, *International Law* (5th edn, 2003), at 163; I. Brownlie, *Principles of International Law* (7th edn, 2008), at 287–295. See also A.-K. Lindblom, *Non-Governmental Organisations in International Law* (2006), at 5.

22 P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), at 97, 100. See also D. Nguyen Quoc, P. Daillier and A. Pellet, *Droit International Public* (2002), at 653.

that while there is still no right there is at least a 'legitimate expectation of participation'.[23] Steve Charnovitz also denies the existence of the right,[24] but he mentions several pathways that suggest that the obligation will develop in the near future and holds that some basic demands are already in place, such as freedom of expression in the global public sphere.[25] A similar position is adopted by Thomas Kleinlein, who specifically mentions a broader interpretation of Article 25 of the ICCPR as a potential entitlement to participation but considers its application to the international sphere as still no 'more than a legal fiction'.[26] Emanuele Rebasti argues that 'non-governmental participation is strongly emerging as a parameter of good governance for Inter-Governmental Organizations',[27] but he suggests that this parameter is of a political, and not of a legal, nature.[28] Barbara Woodward presents an extensive analysis of the participation of global civil society in international law-making and concludes that 'though States formally make international law by their consent, [they] also need the approval of those likely to be affected' to provide legitimacy to the rules.[29] However, she does not translate this into a legal provision and cautiously holds that 'questions concerning the role of NGOs and the wider dimensions of Global Civil Society in global governance remain unanswered'.[30]

The Panel of Eminent Persons convened in 2004 by the UN Secretary-General to evaluate the relations of the organization with civil society did not pronounce itself on the existence of a right of these associations to participate in international law-making. However, the wording adopted in its 'Cardoso Report' suggests that they did not consider the participation of civil society a legal right but merely a desirable goal. The panel stated, for example, that the UN '*should* permit the carefully planned participation of actors besides central Governments in its processes'[31] and that it '*should* foster multi-constituency processes as new conduits for discussion of United Nations

[23] Peters, 'Membership in the Global Constitutional Community', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 153, at 221–227; Lindblom, *supra* note 21, at 526.

[24] He states that 'the question whether states or IOs have a duty to consult NGOs is an interesting one. The answer appears to be no at this time'. Charnovitz, 'Nongovernmental Organizations and International Law', 100 *American Journal of International Law* (*AJIL*) (2006) 348, at 368–372.

[25] *Ibid.*, at 368–372; Charnovitz, *supra* note 24, at 908–909.

[26] Kleinlein, 'Non-State Actors from an International Constitutionalist Perspective. Participation Matters!', in J. D'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 41, at 48.

[27] Rebasti, 'Beyond Consultative Status: Which Legal Framework for Enhanced Interaction between NGOs and Intergovernmental Organizations?', in P.-M. Dupuy and L. Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (2008) 21, at 66.

[28] *Ibid.*, at 67.

[29] B. Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice* (2010), at 390.

[30] *Ibid.*, at 40.

[31] Panel of Eminent Persons on United Nations–Civil Society Relations, We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations–Civil Society Relations (Cardoso Report), UN Doc. A/58/817, 11 June 2004, Proposal 6 (emphasis added).

priorities'.[32] The report emphasized the existence of considerable restrictions in the current system, according to which the organizations 'can speak only when invited and are not participants in their own right'.[33] However, it 'urge[d] Member States to recognize formally what has been an emerging pattern' – that is, that civil society actors 'have become relevant to intergovernmental forums beyond the Economic and Social Council – the organ assigned by Article 71 of the Charter to be responsible for arrangements for non-governmental participation'.[34]

Finally, there are a few authors who suggest that the right of civil society to participation indeed already exists, although usually without presenting a thorough legal investigation to support their claim. Janne Nijman, for example, speaks of a 'natural right to such participation'. According to her, where 'the voices of certain minorities, or of a whole people, or of the entire female population, are silenced and suppressed, the international community has a duty to invite and accommodate these groups on stage and to be an audience to their representatives, like NGOs, or to make their voices heard through other channels'.[35] Peter Willetts also argues that the right already exists, at least in the context of the UN: '[T]he strongest evidence that NGO rights have become established in customary law is the way in which NGOs can often gain access to intergovernmental proceedings even when the political climate turns against them and there is significant opposition to their presence.'[36] Eduardo Szazi builds a quantitative argument regarding the acceptance of NGOs' consultative status in international organizations and concludes that it currently holds a customary nature.[37] Others argue the same thing but only with respect to the specific context of certain international legal regimes, like environmental law.[38] Finally, authors like Laurence Boisson de Chazournes and Philippe Sands acknowledge 'the growing entitlement of individuals and non-governmental organizations to a more formal and informal involvement in international judicial and quasi-judicial proceedings',[39] which may in turn have an impact on the judicial creation of international law.[40]

In sum, there is no consensus in the literature regarding the existence of a right of global civil society to participate in international law-making. While some have

[32] *Ibid.*, Proposal 5 (emphasis added).

[33] *Ibid.*, at 43.

[34] *Ibid.*, at 122.

[35] J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004), at 469.

[36] Willetts, 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN', 6 *Global Governance* (2000) 191, at 163.

[37] E. Szazi, *NGOs: Legitimate Subjects of International Law* (2012), at 143–169.

[38] Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997) 51; Maisley, 'The Case for Large Participatory Conferences as a Means of Decision Making in International Environmental Law', 25 *Environmental Claims Journal* (2013) 111.

[39] Boisson de Chazournes and Sands, 'Introduction', in Boisson de Chazournes and Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 1, at 10. See also Lindblom, *supra* note 21, at 218–365.

[40] See Boyle and Chinkin, *supra* note 17, at 263–312.

presented arguments in this regard, the prevailing position still holds that although such participation may be desirable, it is not legally required. Further, even those who do defend the existence of the right rarely ground their claims on human rights arguments, and even fewer refer to the specific right to take part in the conduct of public affairs. The purpose of the following section is to try to fill this scholarly gap, interpreting Article 25(a) of the ICCPR as the basis for the right of civil society to participate in international law-making.

2 An Interpretation of Article 25(a) of the ICCPR

Article 25(a) of the ICCPR grants individuals the right to take part in the conduct of public affairs, not only through their representatives but also 'directly'. If this right were considered to be applicable not only to *domestic* public affairs but also to *international* public affairs, individuals would then have a right to participate directly in international law-making, either on their own or as part of larger voluntary associations.[41] These associations can be referred to with the deliberately 'fuzzy and contested concept'[42] of 'global civil society'.[43] To understand whether the reach of Article 25(a) is limited to the domestic sphere or whether it can be expanded to international public affairs, the provision must be interpreted in accordance with the rules of treaty interpretation established in the VCLT.[44] These rules require that the interpreter takes into account a series of elements, which can be divided into (i) empirical elements and (ii) normative elements. In what follows, I will consider my proposal of expanding the interpretation of Article 25(a) to the global sphere in accordance with these different requisites.

A *The Empirical Elements: Why Article 25(a) Can Be Interpreted as Being Applicable to the International Sphere*

1 'In Accordance with the Ordinary Meaning to Be Given to the Terms of the Treaty'

The VCLT rules demand that the proposed interpretation of the treaty is 'in accordance with the ordinary meaning to be given to the terms of the treaty'.[45] As explained by Mark Villiger, this means that 'the starting point of the process of interpretation' consists in finding the 'current and normal (regular, usual) meaning' of the

[41] See section 3.A.1 below.

[42] Anheier, Glasius and Kaldor, 'Introducing Global Civil Society', in H. Anheier, M. Glasius and M. Kaldor (eds), *Global Civil Society 2001* (2001) 3, at 11.

[43] There is a discussion in the literature as to the limits of the concept of 'civil society', with which I do not want to engage here. I will thus assume the simple definition of 'voluntary associations of individuals'.

[44] VCLT, *supra* note 12, Arts 31–33. The rules are considered to be part of customary international law, and, thus, they are applicable to the ICCPR, although it is previous to the VCLT. See, e.g., *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Reports (1994) 6, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 12 December 1996, ICJ Reports (1996) 803, para. 23.

[45] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 426.

phrases involved.[46] As proven by the case law of the International Court of Justice (ICJ), this empirical task can be covered by referring to regular, non-legal, dictionary definitions.[47]

In this case, the discussion on whether the article only grants a right to participate through voting, or also through some role in the deliberative process that precedes the decision making, seems to be settled since both the HRC[48] and the relevant literature consider that Article 25 guarantees both electoral and non-electoral participation.[49] The term 'citizen', in turn, does not raise as many concerns as it may in the domestic sphere since every person can be considered a 'citizen' of the international community in regard to the creation of international law.[50] Thus, the crucial interpretive question is whether the term 'public affairs' involves only domestic or also international affairs.

The answers of dictionaries to this question are quite straightforward: 'public affairs' are defined as 'the business of governing'[51] or as a series of 'events and questions, especially political ones, which have an effect on most people'.[52] Both definitions seem to include not only the domestic sphere of affairs but also the international sphere, as governance functions that have an effect on people occur at both levels.[53] Furthermore, the ICJ has explained that when generic terms are used in a treaty, they must be given an evolutionary interpretation – that is, they 'must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning'.[54] In this case, even if the term 'public affairs' could have been understood 50 years ago as only relating to those matters within the

46 *Ibid.*, at 426.

47 See, e.g., *Oil Platforms*, *supra* note 44, para. 45.

48 HRC, GC 25, *supra* note 11, para. 8.

49 Steiner, *supra* note 10, at 77; Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539, at 555.

50 See HRC, GC 25, *supra* note 11, para. 3. Having said this, an interpretive question might arise as to who would be entitled to participate in the creation of rules that are not universal in nature, such as bilateral treaties. However, this question would be posterior to the one of whether the right is applicable beyond the borders of states: it would not consider *if* civil society groups should be granted participation but, rather, *which* organizations should be allowed to participate. See note 167 below.

51 *Collins English Dictionary*, 'Public Affairs', available at www.collinsdictionary.com/dictionary/english/public-affairs (last visited 29 April 2015).

52 *Longman Dictionary of Contemporary English*, 'Public Affairs', available at www.ldoceonline.com/dictionary/public-affairs (last visited 29 April 2015).

53 Charlesworth, Chinkin and Wright argue that the fact that 'the application of international law affects individuals … has been recognized by international law in several cases'. Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613, at 625. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 56, para. 125; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, 25 July 1974, ICJ Reports (1974) 3, para. 59.

54 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009 ICJ Reports (2009) 213, para. 70. Although the applicability of this interpretive method to every area of international law may be questioned, human rights tribunals have used it somewhat consistently. See, e.g., Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 *EJIL* (2010) 509, at 513–520.

sphere of the state, this interpretation can no longer be sustained in our current globalized world, where 'decisions about collective life are taken not only in national settings, but also in a multiplicity of non-national settings'.[55] Hence, limiting the right to participation to the former would result in a considerable weakening of the guarantee originally established by the convention.

Finally, the suitability of this reading of the text of Article 25(a) has been hinted at by the HRC itself.[56] In its General Comment 25, the committee indicated that '[t]he conduct of public affairs, referred to in paragraph (a) [of Article 25] is a broad concept which … covers all aspects of public administration, and the formulation and implementation of policy at *international*, national, regional and local levels'.[57] Although the wording is not straightforward, this at least suggests that the committee might acknowledge the applicability of the right beyond the sphere of the state.[58]

2 Considering the Terms 'in Their Context'

The second empirical rule included in the VCLT mandates interpreters to understand the terms of the treaty 'in their context',[59] which is something that acquires particular relevance in this case due to the indivisible nature of human rights.[60] Specifically, the HRC has explained that the participation of citizens in public affairs 'is supported by ensuring freedom of expression, assembly and association'.[61] In turn, these three rights have been considered fully applicable to the international sphere. First, with regard to the freedom of expression, Article 19(2) establishes that 'everyone shall have the right to freedom of expression … *regardless of frontiers*'.[62] And, second, with regard to the other two rights, a special rapporteur has noted that they 'are equally fundamental, and protected, at the international level. These rights are necessary in order to aggregate and amplify the voices of those who would otherwise not be heard on the multilateral stage'.[63] Thus, the rights that constitute the relevant context for Article

[55] S. Marks, *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* (2000), at 77.

[56] Although the committee has never had the chance to pronounce itself on a specific case related to the application of Article 25(a) to the international sphere of decision making, it did find that it was indeed applicable to the domestic sphere of decision making in matters related to international law (although in the case at bar the right had not been breached). See *HRC, Beydon and 19 Other Members of the Association 'DIH Mouvement de protestation civique' v. France*, UN Doc. CCPR/C/85/D/1400/2005, 31 October 2005.

[57] HRC GC 25, *supra* note 11, para. 5 (emphasis added).

[58] Foster, 'Public Opinion and the Interpretation of the World Trade Organisation's Agreement on Sanitary and Phytosanitary Measures', 11 *Journal of International Economic Law* (2008) 427, at 453–454.

[59] VCLT, *supra* note 12, Art. 31.1.

[60] Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Mr. Maina Kiai (Maina Kiai Report), 1 September 2014, UN Doc. A/69/365, para. 15.

[61] HRC GC 25, *supra* note 11, para. 8. See also HRC, *General Comment 34*, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 20.

[62] ICCPR, *supra* note 9, Art. 19(2) (emphasis added). See also Charnovitz, *supra* note 24, at 369.

[63] Maina Kiai Report, *supra* note 60, para. 14. See also Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Ms. Magdalena Sepúlveda Carmona, UN Doc. A/HRC/23/36, 11 March 2013, para. 12.

25(a) are applicable internationally, suggesting that the right to take part in the conduct of public affairs might also be so.

Another relevant element in terms of context is the wording of the rest of Article 25 itself. As opposed to section (a), which does not make any reference to the geographical ambit of the right to 'take part in the conduct of public affairs', section (c), which refers to access to public service, does limit its scope to services required 'in [the] country [of the citizen]'. Hence, while the drafters of the ICCPR explicitly considered the right to hold office to be limited to the domestic sphere, they did not reach the same conclusion regarding the right to participate, which has no geographical limitation and may be applicable internationally.

3 Considering the 'Subsequent Practice in the Application of the Treaty'

A third requirement established by the VCLT is that the interpreter takes into account the 'subsequent practice in the application of the treaty'.[64] Two elements must be considered in this respect: first, whether there was any practice subsequent to the treaty and, second, whether this practice was, in fact, 'in application of the treaty'.[65]

(a) The subsequent practice to the ICCPR

In the almost 50 years that have elapsed since the signing of the ICCPR, global civil society has been granted a continuously growing access to different processes of international law-making. Significantly, this has not been an exclusive feature of a certain international legal regime but, instead, a practice that – as required by the VCLT rules – is 'concordant, common and consistent' in almost every process of international law-making.[66] The most prominent examples are usually drawn from international environmental law, a field in which most 'decision-making processes have included an important degree of public participation',[67] and international human rights law, where civil society has not only had a voice in every law-making venue[68] but has also proposed, supported and even drafted new international regulations.[69]

But in other areas, such as international economic law and the maintenance of peace and security, the involvement of civil society has also grown. The World Bank now has participatory mechanisms in its decision-making processes,[70] and the World

64 VCLT, *supra* note 12, Art. 31.3.b.

65 Dörr, 'Article 31. General Rule of Interpretation', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) 521, at 557; Villiger, *supra* note 45, at 431.

66 Dörr, *supra* note 65, at 556; Villiger, *supra* note 45, at 431.

67 Maisley, *supra* note 38, at 117. See also Raustiala, 'The "Participatory Revolution" in International Environmental Law', 21 *Harvard Environmental Law Review* (1997) 537, at 538; Ebbesson, *supra* note 38.

68 Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Indiana Journal of Global Legal Studies* (1999) 579, at 625; Martens, 'Civil Society and Accountability of the United Nations', in J.A. Scholte (ed.), *Building Global Democracy? Civil Society and Accountable Global Governance* (2011) 45.

69 Boyle and Chinkin, *supra* note 17, at 67–71; Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society', 11 *EJIL* (2000) 91.

70 Peters, *supra* note 23, at 120; Clarke, 'The World Bank and Civil Society: An Evolving Experience', in J.A. Scholte and A. Schnabel (eds), *Civil Society and Global Finance* (2002) 111, at 111.

Trade Organization – although still quite restrictive[71] – has also expanded participation[72] and acknowledged that there should be 'a more active role in its direct contacts with NGOs'.[73] Even the UN Security Council, a venue that had traditionally remained impenetrable for civil society,[74] now conducts gatherings with civil society members, and, according to a commentator, 'the more active and credible NGOs have little trouble making their voices heard'.[75]

However, despite this trend of increasing participation, there are obviously certain areas where access is still unavailable, restricted or insufficient. In order to assess these shortcomings, two elements must be noted. First, the appearance of certain deviations from the common conduct does not necessarily constitute an obstacle for the existence of a general practice. As the ICJ has noted, with reference to the stricter rules on customary law, 'it is not to be expected that in the practice of States the application of the rules in question should have been perfect';[76] in fact, 'too much importance need not be attached to the few uncertainties or contradictions, real or apparent' that may be discovered.[77] And, second, although there is certainly a lot of progress to be made in certain areas, the current practice seems to be already compatible with an understanding of the right as a 'programmatic' right – that is, as one 'that is responsive to a shared ideal, to be realized progressively in different contexts through invention and planning'.[78] If the right is understood in this way, as several commentators have proposed in the domestic sphere,[79] then the international community has, on the one hand, an obligation not to restrict the access it has already granted and, on the other hand, an obligation to strive for the opening of more instances of law-making to public participation. And, in fact, these two obligations seem to be wholly concordant with the practice subsequent to the ICCPR.

(b) The practice as an application of the ICCPR

According to most commentators, when Article 31 requires the practice to be carried out 'in the application of the treaty', it means that a subjective link is required –

71 Peters, *supra* note 23, at 160; Nanz and Steffek, 'Global Governance, Participation and the Public Sphere', 39 *Government and Opposition* (2004) 314; Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 *International Organization* (2002) 339.

72 Steffek and Kissling, 'Why Co-Operate? Civil Society Participation at the WTO', in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006) 135, at 151–152; Nanz and Steffek, *supra* note 71, at 330.

73 See Guidelines for Arrangements on Relations with Non-Governmental Organizations, WTO Doc. WT/L/162, 23 July 1996, para. IV.

74 Mayer, 'Civil Society Participation in International Security Organizations: The Cases of NATO and the OSCE', in J. Steffek, C. Kissling and P. Nanz (eds), *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (2008) 116, at 116.

75 Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003) 437, at 462.

76 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 186.

77 *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951) 116, at 138.

78 Steiner, *supra* note 10, at 130.

79 *Ibid.*, at 130; Fox, *supra* note 49, at 555.

that is, that the parties must, at least tacitly, act the way they do for the purpose of fulfilling their treaty obligations.[80] In this case, although it seems far-fetched to argue that states have accepted the participation of global civil society in international law-making specifically having Article 25(a) of the ICCPR in mind, it is quite sensible to assume that in most cases this participation was allowed by taking into consideration the civil and political rights of the citizenry. In fact, it is no coincidence that the first serious instances of civil society participation occurred simultaneously to the emergence of international human rights law[81] and that the expansion and consolidation of this participation came about when human rights were codified in international treaties, like the ICCPR.[82] At the very minimum, it seems like states tacitly accepted that the consolidation of civil and political rights brought about certain entitlements for civil society groups in the international sphere.

4 Considering the 'Relevant Rules of International Law Applicable in the Relations between the Parties'

A fourth requirement established by the VCLT is that the interpreter considers the 'relevant rules of international law applicable in the relations between the parties'.[83] In this case, four kinds of rules provide the relevant legal context for the interpretation of Article 25(a) of the ICCPR. First, there are several human rights rules in instruments other than the ICCPR that grant civil society members a degree of participation in international law-making within their specific sphere of authority[84] and that confirm the suitability of the global interpretation of Article 25(a). The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for example, acknowledges the right 'to take part in the political and public life'[85] and specifies that this includes the right to 'perform all public functions at all levels of government',[86] to 'participate in non-governmental organizations'[87] and to 'represent their Governments at the international level and to participate in the work of international organizations'.[88]

[80] Dörr, *supra* note 65, at 557; Villiger, *supra* note 45, at 431.

[81] A. Drainville, *Contesting Globalization: Space and Place in the World Economy* (2004), at 106.

[82] Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Michigan Journal of International Law* (1997) 183, at 261.

[83] VCLT, *supra* note 12, Art. 31.3.c.

[84] Another prominent example is the International Labor Organization Convention 169, which binds states to consult with indigenous peoples in decisions that might affect them 'at all levels of decision making'. Convention no. 169 Concerning Indigenous and Tribal People in Independent Countries 1989, 1650 UNTS 383, Art. 6.1. For other examples, see Secker, 'Expanding the Concept of Participatory Rights', 13 *International Journal of Human Rights* (2009) 697, at 697.

[85] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13, Art. 7. See also Committee on the Elimination of Discrimination against Women, General Comment 23, UN Doc A/52/38, 24 June 1997, para. 5.

[86] CEDAW, *supra* note 85, Art. 7.b.

[87] *Ibid.*, Art. 7.c.

[88] *Ibid.*, Art. 8. The Committee explained that '[u]nder article 8, Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs'. General Comment 23, *supra* note 85, paras 35, 39. See also HRC, General Comment 28, UN Doc. HRI/GEN/1/Rev.9, 29 March 2000, para. 29.

Second, there are several international treaties that specifically grant civil society actors a right to participate in international law-making, making it coherent to understand Article 25(a) in this sense.[89] The most significant example in this regard is the Aarhus Convention, signed by 45 European states, which specifically establishes participatory processes for the regime of international environmental law.[90] But several other treaties could be mentioned, from the UN Charter itself[91] to treaties that have been themselves drafted without significant civil society participation, like the TPP.[92]

Third, the state practice mentioned in the previous section seems to be giving place to an incipient customary right to participation. This is because the general conduct documented in the previous section is usually accompanied by a growing conviction regarding the fundamental role played by civil society in international law-making, as evinced both by the instruments mentioned in the previous paragraphs and other statements of states in this regard, such as the 2011 Human Rights Council resolution that acknowledged 'the right to equitable participation of all, without any discrimination, in domestic and global decision-making'.[93]

Finally, general principles of law must be taken into account to interpret Article 25(a). Despite the different conceptions of this source of law[94] and the different methods proposed to identify it,[95] most authors agree that this status is reserved for principles 'so basic and fundamental as to compose the substratum from which positive rules may be derived'.[96] Thus, it is not surprising that scholars have considered that those human rights principles[97] and constitutional principles[98] that are fundamental for the rule of law – such as democracy, accountability, freedom of expression, freedom of assembly, access to information and so on – are general principles of law in the sense of Article 38(1)(c) of the ICJ Statute and thus applicable to the subjects of this

89 Charnovitz, *supra* note 24, at 369.

90 See Ebbesson, *supra* note 38, at 53. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998, 2161 UNTS 447.

91 UN Charter, Art. 71.

92 According to the summary of the TPP published by the USTR, three organs created by the treaty are committed to admit stakeholder participation in their functioning. See USTR, Summary of the TPP Agreement, October 2015, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership (last visited 10 October 2015).

93 Human Rights Council Resolution 18/6, Promotion of a Democratic and Equitable International Order, UN Doc. A/HRC/RES/18/6, 13 October 2011, para. 6.h. See also UNGA Resolution 41/128, UN Doc. A/RES/41/128, 4 December 1986, preamble, Art. 8.2; UNGA Resolution 53/144, UN Doc. A/RES/53/144, 8 March 1999, Art. 1; Human Rights Council Resolution 27/31, UN Doc. A/HRC/27/L.24, 23 September 2014, para. 12.

94 Shaw, *supra* note 21, at 93–94.

95 Compare Akehurst, 'Equity and General Principles of Law', 25 *International and Comparative Law Quarterly* (1976) 801, at 814; Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations: A Study', 10 *University of California Los Angeles Law Review* (1963) 1041, at 1044.

96 Jalet, *supra* note 95, at 1085–1086.

97 Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1989) 82, at 102–106.

98 See, e.g., Peters, 'Bienes Jurídicos Globales en un Orden Mundial Constitucionalizado', 16 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2012) 75, at 82–86.

legal system.[99] In this case, the application of these principles would suggest that the constitutional principle of 'openness', for example,[100] is equally applicable between an individual and his government as it is between that same individual – as a 'primary international legal person'[101] – and international governance institutions. In sum, a look at the relevant rules of international law also points in the direction that an interpretation of Article 25(a) of the ICCPR that expands its scope to the global sphere is at least plausible.

B *The Normative Elements: Why Article 25(a) Should Be Interpreted as Being Applicable to the International Sphere*

In the previous section, I tried to prove that the understanding of Article 25(a) as being applicable to global decision making is at least compatible with the text and the interpretive practice of the ICCPR or, in other words, that interpreters *could* read it this way. In this section, I will argue that interpreters actually *should* read Article 25(a) in this way, as a result of the mandate in the VCLT that treaties should be interpreted 'in good faith' and according to their 'object and purpose'.[102] The first of these phrases, as seminally explained by Hersch Lauterpacht,[103] and later confirmed by the International Law Commission,[104] requires the interpreter to choose the best possible reading among those presented by the text and its interpretive practice. The evaluation of this best reading (the most 'effective' reading, in Lauterpacht's terms) cannot be based on legal reasons of an empirical nature but only on normative considerations.[105] In turn, the reference to the 'object and purpose' points in the same direction. As explained by George Letsas: '[T]he task of individuating the object and purpose of a treaty and of interpreting the treaty in the light of them, is – from beginning to end – a thoroughly evaluative, not empirical, exercise.'[106]

In what follows, I will present a normative argument explaining why I believe that the best possible reading of Article 25(a), in relation to the object and purpose of the ICCPR, is one that expands its scope to the global sphere. To this purpose, I will, first, briefly introduce what I understand as the object and purpose of the ICCPR and, second, will explain why reading Article 25(a) as applicable to international law-making is more compatible with this object and purpose than limiting its scope to the domestic sphere.

[99] Statute of the International Court of Justice 1945, 1 UNTS 993.

[100] Peters, *supra* note 23, at 222.

[101] *Ibid.*, at 157.

[102] VCLT, *supra* note 12, Art. 31.1.

[103] Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *British Yearbook of International Law* (1949) 48, at 53.

[104] International Law Commission (ILC), 'Draft Articles on the Law of Treaties with Commentaries', 2 *ILC Yearbook* (1966) 219.

[105] See Peters, 'Realizing Utopia as a Scholarly Endeavour', 24 *EJIL* (2013) 533, at 550–552; C.S. Nino, *Derecho, Moral Y Política: Una Revisión de La Teoría General Del Derecho* (2014).

[106] Letsas, *supra* note 54, at 535.

1 The Object and Purpose of the ICCPR

Human rights treaties, like the ICCPR, constitute a particular kind of international agreement. As explained by Rosalyn Higgins, 'human rights treaties are not just an exchange of obligations between states where they can agree at will'; instead, they 'reflect rights inherent in human beings, not dependent upon grant by the state'.[107] This is explicitly acknowledged by the preamble to the ICCPR, which clearly asserts that the rights in the covenant do not derive from the consent of states but, rather, 'from the inherent dignity of the human person'.[108] The object and purpose of the ICCPR, then, is not to 'create' these rights but, rather, as explained by the HRC, to 'define' them, to establish the standards in relation to which they are to be measured and to place them 'in a framework of obligations which are legally binding for those States which ratify [the Covenant]'.[109]

Although still not sufficiently precise, this first formulation of the object and purpose of the ICCPR is already useful to discard the application to this case of a classical approximation to the interpretation of treaties: the rule known as *in dubio mitius*, according to which the best interpretation is that which is less restrictive of the sovereignty of the parties.[110] The foundations of this rule can be traced back to the PCIJ's decision in the seminal 1927 *Lotus* case. On that occasion, the court explained that international rules are binding upon states when they 'emanate from their own free will'[111] and that 'restrictions upon the independence of States cannot … be presumed'.[112] In the case of the ICCPR, however, the precedence of the rights of individuals over the rights of states, acknowledged in the preamble, makes this restrictive logic incoherent. Thus, the interpretation of the treaty must not be guided by the ultimate goal of protecting the sovereignty of states but, instead, as anticipated by Hersch Lauterpacht, by that of 'giv[ing an] imprimatur to the indestructible sovereignty of man'.[113] In this case, the interpretation that is more favourable to the individual is that which expands the scope of her right, globally, and not that which restricts it to the domestic sphere.

However, despite this provisional conclusion, the object and purpose of the ICCPR, if defined more precisely, can be of further assistance in the interpretation of the treaty. In its case law, the ICJ has derived the object and purpose of treaties from two elements: '[F]irst, the preambular provisions, and second, the preceding work of the

[107] Higgins, 'Human Rights: Some Questions of Integrity', 15 *Commonwealth Law Bulletin* (1989) 598, at 607.

[108] ICCPR, *supra* note 9, preamble.

[109] Human Rights Committee, General Comment 24, UN Doc CCPR/C/21/Rev.1/Add.6, 2 November 1994, para. 7.

[110] Oppenheim, *supra* note 13, at 561; Fitzmaurice, 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', 28 *British Yearbook of International Law* (1951) 1, at 9.

[111] *The S.S. Lotus Case*, 1927 PCIJ Series A, No. 10, at 18.

[112] *Ibid.*

[113] H. Lauterpacht, *An International Bill of the Rights of Man* (2013), at 49. See also Pinto, 'El Principio pro Homine: Criterios de Hermenéutica Y Pautas Para La Regulación de Los Derechos Humanos', in M. Abregú and C. Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (1997) 163.

General Assembly [or other relevant bodies] as reflected in resolutions on the topic.'[114] In our case, the preamble of the ICCPR refers to 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want' and to 'the inherent dignity and … the equal and inalienable rights of all members of the human family'. The preceding work of the UN General Assembly, in turn, includes references to 'the fundamental freedoms for all without distinction'[115] and to the fact that 'all human beings are born free and equal in dignity and rights'.[116] Two elements seem to be common to all of these references: on the one hand, the purpose of ensuring the freedom of the individual and, on the other, the purpose of ensuring it in an egalitarian manner. Thus, it is not far-fetched to assume that the object and purpose of the ICCPR is the protection of the equal freedom of all individuals, a goal that, not surprisingly, is also 'at the heart of all plausible political theories'.[117]

2 Article 25(a) of the ICCPR and the Equal Freedom of Individuals

If the reasoning presented in the preceding section is correct, then the interpretation of Article 25(a) of the ICCPR should include a reflection on which of the two readings available – that is, that it either applies to the global sphere or that it does not – is more compatible with the purpose of securing the equal freedom of individuals around the world.

I believe there are two sets of reasons that explain why the global interpretation of the right is more compatible with this ultimate goal.[118] The first set is composed by instrumental reasons – that is, reasons why participation can enhance the guarantee of the equal freedom of individuals around the world. For example, the participation of civil society in global decision making can help make decisions 'of a better quality than decisions taken by a more limited and partly unrepresentative group of people without any process of external consultation'.[119] Individuals and their voluntary associations can contribute to the deliberations with their technical expertise in certain areas, and they can provide relevant information for the decision-making process. This, in turn, can lead to an international order that is more efficient and, thus, more conducive to the conditions for the fulfilment of other human rights. Further, the participation of civil society in international law-making can be relevant for the sociological legitimacy of the rules and, thus, for what Thomas Franck famously called 'the compliance pull' of international norms.[120] The idea, in its simplest form,

[114] Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', 8 *Finnish Yearbook of International Law* (1997) 138, at 156.

[115] GA Res. 2200 (XXI), 16 December 1966, preamble.

[116] GA Res. 217 A (III), 10 December 1948; Universal Declaration of Human Rights, UN Doc. A/RES/3/217 A, Art. 1.

[117] W. Kymlicka, *Contemporary Political Philosophy. An Introduction* (2nd edn, 2002), at 4. See also M. Alegre, *Igualdad, Derecho Y Política* (2010), at 13.

[118] Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295, at 302–303.

[119] Lindblom, *supra* note 21, at 30.

[120] T. Franck, *Fairness in International Law and Institutions* (1995), at 25.

is that the compliance of international law augments when the subjects perceive the rules as legitimate. This enhancement of the rule of law is, in turn, highly beneficial for the purpose of securing the rights of individuals.

Yet besides these instrumental reasons, there are more fundamental, inherent reasons to understand the right to participation as applicable internationally. As explained by Jeremy Waldron, the ultimate justification of the right to participate has to do 'with avoiding the insult, dishonor, or denigration that is involved when one person's views are treated of less account than the views of others'.[121] The right to participate can thus be considered a direct derivation of the equal freedom of all individuals.[122] Whenever there are political matters that ought to be collectively settled – as in this case[123] – the equal standing of all persons mandates that they be settled by allowing the participation of everyone potentially affected by the decision.[124] Otherwise, the decision will not only lack legitimacy, but it will also violate the rights of those excluded from the process.

However, two arguments have been put forward against this idea, based on reasons closely related to the ultimate goal of equal freedom. First, Thomas Nagel has famously argued that the freedom of individuals is not at stake when they are excluded from decision-making procedures at the international level.[125] Nagel's argument is based on the premise that international rules, as opposed to domestic law:

> are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally.[126]

Thus, since individuals would have the chance of avoiding the course of action required by these rules, they would not have sufficient standing to demand an egalitarian participation in their creation.

In my opinion, the problem with Nagel's argument is that his recollection of the reality of international law is not sufficiently precise, for two reasons. First, international institutions do speak in the name of humankind and, thus, in the name of individuals around the globe. The fact that they do it through references to collective entities, like nations, peoples or states, does not mean that the ultimate reference is not to the individual human beings that populate the world, which these entities merely represent.[127] And, second, most of international and global law is indeed nowadays

[121] J. Waldron, *Law and Disagreement* (1999), at 238.

[122] Urbinati and Saffon, 'Procedural Democracy, the Bulwark of Equal Liberty', 41 *Political Theory* (2013) 441, at 441; Benvenisti, 'The Law of Global Governance', 368 *Recueil des Cours de l'Academie de Droit International de La Haye* (2014) 49, at 137.

[123] Benvenisti, *supra* note 122, at 295; Martí, 'Política Y Bien Común Global', in C. Espósito and F.J. Garcimartín Alférez (eds), *La Protección de Bienes Jurídicos Globales* (2012) 17.

[124] C.S. Nino, *The Constitution of Deliberative Democracy* (1996), at 128–134; Gargarella, 'Full Representation, Deliberation, and Impartiality', in J. Elster (ed.), *Deliberative Democracy* (1998) 260; J.L. Martí, *La República Deliberativa: Una Teoría de La Democracia* (2006) 133.

[125] Nagel, 'The Problem of Global Justice', 33 *Philosophy and Public Affairs* (2005) 113.

[126] *Ibid.*, at 138.

[127] See Maisley, '*Cohen v. Cohen*: Why a Human Right to (Domestic and Global) Democracy Derives from the Right to Self-Determination', 4 *Latin American Journal of Political Philosophy* (2015) 4; Maisley, 'Completando Un Proyecto Inconcluso: Una Propuesta de Aplicación de La Teoría de La Democracia Deliberativa de Carlos Nino Al Plano Global', 35 *Análisis Filosófico* (2015) 275.

binding on states and their citizens, even when no centralized coercive mechanism is in place. For instance, states can avoid aviation regulations. However, they can only do so at the cost of renouncing international flight connections to their territory. This is too onerous to be an option, just as migrating is too supererogatory for individuals trying to avoid local regulations.

Besides Nagel's claim, there is a second argument against global political participation. Some authors have held that the best way to protect the equal freedom of individuals in relation to global decision making consists in assuring them that they are adequately represented by their states.[128] According to these scholars, the direct participation of individuals in the deliberative processes that precede international law-making can be counter-productive in terms of equality since (i) it is impossible that every single human being participates in the process and (ii) if only a few will participate, then representation via democratic states is the most egalitarian process available – much more egalitarian than allowing the imbalanced participation of those who have the resources to access the global sphere.

I believe there are four main problems with this argument. First, even if all states were to become democracies – something that is already a long shot – the representation of individuals in the process of international law creation would still be uneven, given the predominance of the executive branch of government in the negotiations at the global sphere. Supposing that all heads of states were chosen by 60 per cent of the votes in their countries, which is very unlikely, then an impressive 40 per cent of the people in the world would not be represented in international law-making processes.

Second, it is at least questionable that the diplomatic corps of states are – and ever could be – real representatives of the plurality of voices of the citizens of their countries. Diplomats are regularly appointed by a non-elected official (the minister of foreign affairs), who is in turn chosen by another civil servant (the head of state), who is indeed elected, but usually for reasons very unrelated to the conduct of the international relations of the state. In turn, these non-elected officials negotiate new norms behind closed doors in locations far away from their constituencies and speaking in languages that are hard to comprehend without adequate translators.[129]

Third, the voices of certain powerful minorities – corporations, interest groups and so on – are already taken into account as a matter of fact in the process of international law-making, simply because they have the resources and the connections necessary for this purpose. Guaranteeing a right to participation would imply levelling the playing field for other voices, which have greater difficulties in being heard.[130]

[128] W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (2001); Christiano, 'Democratic Legitimacy and International Institutions', in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (2010) 119; Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 139.

[129] Although it is true that elected officials have certain representative entitlements in international law (see, e.g., VCLT, *supra* note 12, Art. 7.2.a), most regulations are negotiated directly by non-elected diplomats.

[130] The HRC has underlined the importance of adopting 'positive legal measures' to ensure the participation of minorities 'in decisions which affect them', in accordance with the ICCPR, *supra* note 9, Art. 27. HRC, General Comment 23, UN Doc. CCPR/C/21/Rev.1/Add.5, 26 April 1994, para. 7.

And, fourth, as explained by the HRC, participation is not only about voting but also about being heard.[131] Even if a perfect representation is assured, the ICCPR requires the existence of an inclusive deliberation of all those potentially affected in order to 'guarantee and give effect to the free expression of the will of the electors'.[132]

In sum, I believe that there are sufficient reasons to consider that the reading of Article 25(a) that grants civil society the right to participate directly in international law-making is more consistent with the object and purpose of the ICCPR – namely, ensuring the equal freedom of all individuals – than it is with allowing participation only indirectly. This conclusion is reinforced by the belief that participation is not just another right among those chartered in international human rights instruments but, rather, that it actually has a particular nature, one that has led Jeremy Waldron to call it the 'right of rights'. For Waldron, the right to participate is not just beneficial, but also actually fundamental, for the realization of the rest of the rights of the individual since 'we are hardly in a position to say that [someone's rights are taken] seriously if at the same time we ignore or slight anything *he* has to say about the matter'.[133] Hence, if human rights are to be taken seriously, as required by the object and purpose of the ICCPR and by the VCLT's mandate of reading treaties in good faith, then Article 25(a) must be interpreted as granting individuals the right to take part in international law-making or, in other words, as recognizing that they have 'the international right of rights'.

3 From 'If' to 'How': The Human Right to Take Part in International Law-Making

If my argument from the previous sections is successful, it may seem that this international right of rights would require the creation of a global legislative assembly composed of over 7 billion persons, something which is obviously unfeasible. However, this is a *non sequitur*. As explained by the HRC, states may apply conditions on the exercise of the right to participation as long as they are 'based on objective and reasonable criteria'.[134] In this case, there is an obvious reasonableness in the decision of the international community of applying conditions on the exercise of this right, and of somehow channelling the participation of individuals, because 'otherwise the system would collapse'.[135] In what follows, I will first explore the conditions that can be imposed on the right and then conclude with a brief restatement of what I believe to be the actual content of the right.

[131] HRC GC 25, *supra* note 11, para. 8.
[132] *Ibid.*, para. 21.
[133] Waldron, *supra* note 121, at 251 (emphasis in original).
[134] HRC GC 25, *supra* note 11, para. 4.
[135] Peters, *supra* note 23, at 222.

A *Conditions on the Right to Participate*

1 From the Individual to Civil Society Organizations

The most prominent condition applied on the right to participate in international law-making is that it is not usually exercisable individually but, rather, through civil society organizations. This is not an unusual condition. In domestic politics, for example, individuals who want to seek public office through popular elections cannot usually do so on their own. Instead, they need to be organized in political parties, which normally have to comply with certain rules and meet some minimum standards. In the case of global law-making, the requirement of channelling individual voices through organized groups is an inevitable consequence of the enormous scale of the deliberations. Individuals may participate directly in the discussions, but, for that purpose, they must organize in voluntary associations.

Raphael Ben-Ari has recently claimed that this move from the rights of individuals to the rights of civil society organizations is 'conceptually wrong and legally flawed'.[136] Conceptually, he claims, 'aggregation is a very weak foundation from which to draw collective rights'.[137] According to him, 'an individual interest necessarily depends on a collective interest 'if and only if the individual interest either does not meaningfully exist or cannot meaningfully be fulfilled in the absence of a collective interest being fulfilled'.[138] As for the legal side, Ben-Ari claims that a NGO 'is by no means a more representative form of individual choice than the nation-state, and the individual does not enter into closer inherent relations with the INGO entity than with the state'.[139]

I believe Ben-Ari draws the wrong conclusions from the right premises. On the conceptual side, I agree that collective rights only emerge whenever the individual interest cannot be meaningfully fulfilled without the group.[140] However, I believe that this is precisely the case in the global scenario; it would be impossible for each individual to participate on her own in the deliberations, but it actually seems possible to protect this interest of participation if we demand that she channels her voice through an organization. On the legal side, I agree that civil society organizations cannot be deemed to be better representatives of the interests of the peoples of the world than states. They are certainly not; the most impartial assessment of the will of a certain people is that which derives from a democratic process of decision making,[141] something that can only be guaranteed by the state. However, civil society organizations, in fact, can better represent the interests of certain sectors of the population, particularly those who do not agree with the position of the government.[142] The statement

[136] R.H. Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law* (2012), at 310.
[137] *Ibid.*, at 310.
[138] *Ibid.*, at 310–311.
[139] *Ibid.*, at 311.
[140] Maisley, *supra* note 127, at 7–10.
[141] Cohen, 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity: Normative Analysis of the State* (1989) 17.
[142] Lindblom, *supra* note 18, at 378.

that individuals do not enter into closer relations with NGOs than they do with states is dogmatic – there are some who certainly do, while many others do not. In the case of those who do not, it is important that their voices are also heard, and civil society organizations can be instrumental in this purpose.

2 Accreditation Procedures

The second condition usually imposed at the global sphere on this right to participation is also peacefully accepted – at least in its most general formulation – in both the literature[143] and the actual practice of the international community.[144] Everyone agrees that not all civil society organizations may be admissible at the table. There are both practical and substantive reasons for this. First, it would be materially impossible to allow every single group of individuals, with no prerequisite whatsoever, to present their ideas before any decision is made in every international body.[145] This would either lead to never-ending discussions or it would derive in meaningless interventions.[146] Second, the admission of civil society groups into global law-making procedures might be abused by certain governments to promote their own interests or to blockade those of other states, distorting the deliberations.[147] In these cases, the organizations are not vehicles for the participation of individuals but, rather, instruments of states that wish to warp the discussions. In sum, for both material and normative reasons, 'some form of accreditation of NGOs that desire to become involved in global governance remains indispensable'.[148]

However, the disagreements begin when the discussion shifts, first, to *what* should be the requirements for accreditation and, second, to *who* should be in charge of this process. With respect to the first point, the most important rule regarding the participation of NGOs in international procedures – Resolution 96/31 of the Economic and Social Council (which regulates the general entitlement granted in Article 71 of the UN Charter) – currently mentions a series of demanding requisites for an organization to receive consultative status.[149] Some scholars have studied these requirements and claimed that some should be removed, while others should be added.[150] I do not wish to engage with these details here. As explained by Lindblom, the question of 'whether international law should provide and protect a form of political participation through non-governmental organization is on another and more fundamental level than the issue of which particular organizations should be entitled to participate in which

[143] Peters, *supra* note 23, at 223; Rebasti, *supra* note 27; Aston, 'The United Nations Committee on Non-Governmental Organizations: Guarding the Entrance to a Politically Divided House', 12 *EJIL* (2001) 943.

[144] Rebasti, *supra* note 27.

[145] See, e.g., Cardoso Report, *supra* note 31, at 23, 25, 123, 140, 142.

[146] Rebasti, *supra* note 27, at 42.

[147] Cardoso Report, *supra* note 31, para. 127. See also De Frouville, 'Domesticating Civil Society at the United Nations', in P.-M. Dupuy and L. Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (2008) 71, at 72–81.

[148] Peters, *supra* note 23, at 224.

[149] ESC Res. 1996/31, UN Doc. E/RES/1996/31, 25 July 1996, Arts 1, 2, 9, 10, 12, 13.

[150] Peters, *supra* note 23, at 224.

particular situations'.[151] As long as the requisites are not excessively restrictive of the right, they can be deemed reasonable and, thus, an acceptable condition.

These considerations do not apply so straightforwardly to the second point – that is, the question of who should evaluate the compliance with these requisites. In most of the procedures currently in place, this capacity is bestowed on states,[152] providing ample room for political manipulation. For example, human rights organizations that criticize the policies of some states are consistently excluded from participating in international bodies by the political operations of those very states that find legal excuses to silence their voices.[153] Jurij Aston, who has documented several instances of this scenario, has described the situation as 'the fox guarding the hen-house'.[154] Thus, there is certain agreement that, as explained by the Cardoso Report, 'the selection process should be technical rather than political'[155] and that this requires certain institutional reforms, such as, for example, enhancing the role of secretariats in the process.[156]

3 Voice but Not Vote

The third – and, probably, the most notable – condition that is imposed on the human right to participation is that individuals (and civil society organizations) are usually neither granted a right to vote on the outcome of this international process in which they take part nor a right to elect their direct representatives to global decision making. However, they do have the right to elect the representatives who are ultimately in charge of making the final decisions in the traditional processes of international law-making – that is, their governments. I do not think that the application of this condition to the right breaches the requisite of reasonableness or, what is the same, that the absence of a global parliament or assembly is in itself a violation of the right contained in Article 25(a) of the ICCPR. The key reason for this is that, as opposed to the ampler freedom regarding participation, the equal freedom with respect to voting is minimally assured by the representative processes that take place inside the state.

My position can be explained with an analogy. In most federal states, there is a divide between those authors who favour the existence of a single, multiple-winner district (which may be more representative of the interests of the people as a whole) and those authors who favour the existence of several, single-winner districts (which may be more representative of the interests of each district). Whatever the preference, as long as each individual has one vote, it is clear that the determination of the system is not a matter of human rights.[157] However, there would indeed be a problem of human rights if civil society groups were only allowed to make their voices heard in their local

[151] Lindblom, *supra* note 21, at 525.
[152] Rebasti, *supra* note 27; Lindblom, *supra* note 21, at 383–386.
[153] See the examples in Aston, *supra* note 144; Lindblom, *supra* note 19, at 383–386.
[154] Aston, *supra* note 143, at 950.
[155] Cardoso Report, *supra* note 31, para. 121.
[156] Peters, *supra* note 23, at 223.
[157] See HRC GC 25, *supra* note 11, para. 5.

districts and not at the federal level. The same distinction can be made with reference to the right of citizens in the international sphere. The defenders of global parliaments may claim that these institutions are more capable of reflecting the preferences of the individuals than the states,[158] and the defenders of inter-state decision making may argue that 'doing away with states would imply a single global polity, which would be remote from the citizens, inevitably inflexible, and complicated'.[159] The discussion is interesting, and it may be worth some reflection. However, it cannot be considered a matter of human rights.

Some may argue that, with the application of this condition, I am depriving the right of participation of all its significance. 'Being heard may be nice', they may say, 'but what actually counts, in the end, is only voting.' I strongly disagree with this position. If certain conditions – like the ones I believe the right to participation should be understood to guarantee[160] – are present, 'the power of the better argument' is significantly capable of exerting influence over the final decision and is a key component of political participation.[161] Several precedents can be brought to bear, both in terms of NGO initiative and of influence in the wording of regulations initially proposed by states. As for the first, the most prominent examples are probably the 1984 Torture Convention and the 1996 Landmines Convention, of which Amnesty International and the International Coalition to Ban Landmines are considered the masterminds, respectively.[162] In both cases, the NGOs managed to gather the support of states after a strong appeal to global public opinion. A similar process occurred in the negotiations of the Rome Statute, where feminist groups achieved an unprecedented quota of women judges at the International Criminal Court.[163] What these events prove is not that states have lost their role in decision making but, rather, as explained in the Cardoso Report, that 'participatory democracy is becoming more important alongside representative democracy' and that 'public opinion is rightly emerging as a powerful force in shaping policies and global priorities'.[164]

B *Summing Up: The Content of the Right to Participate*

Throughout this article, some clarifications have been provided on how the content of the right should be interpreted, particularly as a right derived from Article 25(a) of

[158] Martí, 'A Global Republic to Prevent Global Domination', 24 *Diacrítica: Revista do Centro de Estudos Humanísticos da Universidade do Minho* (2010) 31.

[159] Peters, 'Dual Democracy', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 263, at 272; Lindblom, *supra* note 21, at 30; Benvenisti, *supra* note 122, at 301.

[160] See Risse, '"Let's Argue!": Communicative Action in World Politics', 54 *International Organization* (2000) 1, at 35.

[161] J. Habermas, *Between Facts and Norms* (1998); Nanz and Steffek, *supra* note 71, at 322–324.

[162] Boyle and Chinkin, *supra* note 17, at 67–68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997, 2056 UNTS 241.

[163] M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (2006), at 77–93. Rome Statute on the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

[164] Cardoso Report, *supra* note 31, para. 37.

the ICCPR. I will now try to restate them in a more orderly fashion, breaking up the content of the right into three sets of guarantees.[165]

First, the right imposes on states[166] an obligation to establish accreditation procedures (formal or informal[167]) for civil society organizations in every instance of international law-making. This obligation can be minimally understood as programmatic, meaning that decision-making processes should be progressively adapted to allow for further popular involvement. Hence, civil society groups might be understood to have a prerogative to receive specific and concrete justifications in case their participation is denied, or, what is the same, a presumption of participation can be said to have been established.

Second, the right mandates all actors to respect and ensure certain minimum conditions that are essential for deliberation. This goes from practical issues, such as securing an egalitarian distribution of funding for participation[168] or gaining access to the buildings where meetings are being held,[169] to more structural issues, such as assuring the freedom of speech and assembly that is fundamental for the adequate functioning of civil society.[170]

Finally, and very centrally, the right to participation commands that, when admitted as participants, civil society organizations must be granted a meaningful voice in the procedures. International institutions, governmental officials and other participants in the process should not just let them speak, but they should 'duly take into account the input of NGOs'.[171] Thus, the organizations would be minimally 'entitled to

[165] This reconstruction of the clause 'to take part' is somewhat similar to the one suggested by the Committee on Economic, Social and Cultural Rights (CESCR) with regard to the right 'to take part in cultural life': it involves a broad opportunity of 'participation', some guarantees for 'access' and the chance of making an actual 'contribution'. See CESCR, General Comment 21, UN Doc. E/C.12/GC/21, 21 December 2009, para. 15.

[166] Since only states are parties to the ICCPR, *supra* note 9, only states carry the legal duty of making this right available to citizens. However, states may be liable, under the ICCPR, when they implement decisions made by international organizations. See HRC, *Sayadi & Vinck v. Belgium*, UN Doc. CCPR/C/94/D/1472/2006, 29 December 2008, para. 7.2. Thus, if, e.g., the rules of procedure of an international organization indicate state officers to unjustifiably exclude non-governmental organizations from international law-making procedures to which they previously had had access, the states of the officers who implement the measure may be liable for them doing so. Further, those states that voted in favour of said rules of procedure may be held liable as well. Another interesting question on this matter is whether a state may have a duty to grant citizens from other states the opportunity to participate in the making of international rules that will affect them but in which their own states are not involved. Although this certainly requires further research, my intuition is that they would, indeed, as those citizens would somehow be 'under their jurisdiction', being unavoidably affected by 'the activities of … diplomatic or consular agents abroad'. See ECtHR, *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, Judgment of 12 December 2001, para. 73.

[167] This is relevant in order to cover the expanding trend of law-making through non-institutionalized procedures.

[168] Enhancing the participation of civil society actors from the global south, for example, is an imperative derived from an egalitarian interpretation of the right. See Cardoso Report, *supra* note 31, paras 161–163.

[169] *Ibid.*, at paras 144–146.

[170] See Maina Kiai Report, *supra* note 60.

[171] Peters, *supra* note 23, at 227.

a summary acknowledgment of receipt and a response which shows that the content of their submission has been considered'.[172] This is certainly not equivalent to having the right to vote in the final decision-making process. But, nevertheless, it implies an important degree of influence, particularly when civil society organizations have an important role in shaping global public opinion and thus influencing the final decision of governments.

This brings us back to Zahara Heckscher and to her demand to be heard in the TPP negotiations. I have tried to argue throughout this article that the problem with the TPP is not (or is not only) that the final text may result in violations to the right to health of people like Zahara. The protection of this right may be the ultimate goal, but since there may be reasonable disagreements as to how to reach it the crucial question is what will be the process through which this decision will be made. My suggestion is that this process should include, rather than exclude, the voices of the citizenry. In the case of the TPP, the foundation for the establishment of a more just and peaceful trade regime seems to be the respect of the equal freedom of Zahara and of the other civil society groups that wish to participate in the discussion and contribute to a better world.

[172] *Ibid.*, at 227.