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Participation in International Human Rights Law: A Comparison of Theory and Practice

Submitted for the degree of Ph.D

December 2008

Lancaster University



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Abstract

This thesis is an exploration of the relationship between participation and international human rights law. It places participation in a human rights context through examining the concept of participation, and determining what types of participation are most appropriate for human rights. In order to do this it establishes and applies a four-point analytical structure of the modes, purposes, feasibility and norms of participation. The thesis compares the types of participation required in theory by human rights to the practices of human rights. It considers what kinds of participation are reflected in principles of international human rights law, through examining both the rights which explicitly protect forms of participation, and principles which enable the enjoyment of such rights. It then examines the ways in which participation is manifested in structures of human rights law-making, paying particular attention to the role of non-governmental organisations. The substantive analysis finally examines the forms of participation reflected in structures of access to human rights mechanisms, focussing on individual access to complaints procedures. This examination of participation in the principles and structures of international human rights law facilitates the identification of significant contradictions between participation in human rights theory and human rights practice. Finally, potential solutions to these discrepancies are briefly examined.

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Abbreviations

AfCHPR	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
CAT	Committee Against Torture
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Charter of Arusha	African Charter for Popular Participation in Development and Transformation
CRC	Committee on the Rights of the Child
DIP	Declaration on the Rights of Indigenous Peoples
DRD	Declaration on the Right to Development
DRM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
GC	General Comment
GR	General Recommendation
HRC	Human Rights Committee
ICAT	International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination 25ch1
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPD	Convention on the Rights of Persons with Disabilities
ICRC	Convention of the Rights of the Child
IGO	Inter-Governmental Organisation
ILO	International Labor Organisation
ILO 169	International Labour Organisation Convention 169: Indigenous and Tribal Peoples Convention
Inter-American Commission	Inter-American Commission on Human Rights
Inter-American Court	Inter-American Court of Human Rights
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

General Introduction

This thesis is an exploration of the relationship between participation and human rights. The primary research aim is to determine the type of participation appropriate for human rights, as derived from its inherent characteristics and underlying ideology, and to compare this to the types of participation manifested both in international human rights legal principles, and in practical structures concerning the construction of and access to international human rights law. This will allow consideration of the implications for human rights of any inconsistencies between the type of participation appropriate for human rights and that reflected in human rights, and the ways in which participatory elements of human rights could or should potentially be developed in order to make them more suitable and effective.

Participation in international human rights law as considered in this thesis therefore entails two forms of involvement: the definition of human rights principles and the application and accessibility of human rights standards. Participation in the *definition* of human rights law encompasses the development of the specific content of rights, the determination of legitimate participants in law-making, and of legitimate sources of law, and the construction of the fundamental principles which underlie human rights and themselves control what human rights is and by whom it may be developed. Understanding participation as the *application* of the law is concerned with two main issues: *whether* and *how* the law applies. Firstly, it questions whether the law is applicable to a particular individual or group, that is, whether they receive

theoretical protection from the law. Secondly, it is concerned with the accessibility of the law: how and to what extent those individuals and groups to whom the law applies are able to make use of its structures in order to safeguard their human rights

It is important to note that these two elements are not distinct but rather impact on one another. Participation in the definition of law may include participation in the development of legal principles regarding who the law applies to, and how it may be accessed. The way in which the law is used can in turn affect the future development both of the content of the law and the principles which control participation in law-making.

Furthermore, this study of participation in international human rights law encompasses the ways in which different actors are included in or excluded from the definition and the application of international human rights law, and examines the structures, practices and principles which enable or constrain such participation. Whilst the focus is on individual participation in human rights, participation of other actors must also be considered insofar as it enables or constrains individual participation, and to enable evaluation of the extent of individual participation compared to that of other actors. In this context, it should be noted that this thesis does not include substantial consideration of state obligations concerning participation, as the focus is on individuals' rights of participation and the opportunities for individual participation in human rights.

This thesis therefore has three main research objectives. Firstly, it must determine what type(s) of participation are required by human rights, in order for human rights

both to be internally consistent with regards to its theoretical and philosophical basis, and to be practically effective: to achieve its purpose of universal protection of individuals. The second objective is to identify what the legal principles and practical structures of human rights concerned with participation indicate about the conceptualisation of participation within human rights regarding both the definition and application of human rights. Thirdly, this analysis will enable comparison of the type of participation appropriate for human rights and that manifested within human rights, in order to highlight any contradictions and explore their implications.

Part 1: The importance of a participatory analysis of human rights

The rationale for the selection of this issue necessitates further explication. The relationship between human rights and participation requires specific and detailed examination because participation engages with numerous foundational issues regarding human rights, yet human rights has received very little analysis from a participatory perspective.

1.1: Participation as a conceptual connection within human rights

A participatory perspective is of value for analysis of international human rights law because it provides a means by which to examine a multiplicity of different issues and debates within the human rights discourse in a comprehensive and comparative way. Centralising the theme of participation within human rights can therefore provide a useful analytical context to conceptualise and analyse several fundamental themes.

Firstly, a participatory approach provides a means to assess international human rights law in relation to its own self-imposed standards of universality, non-discrimination and equality:¹ the *inclusivity* of human rights. The centrality of the principles of universality, non-discrimination and equality, whether real, rhetorical, aspirational or perceived, demonstrate the fundamentality of the principle of inclusion to human rights.² Human rights are therefore by nature inclusive, which requires that they are universally applicable. Participation understood as the applicability of human rights³ interrogates the extent of universal human rights in practice.

Secondly, a participatory approach provides a useful perspective from which to explore the historical and legal contexts for the development of human rights. It may provide a less politicised means to engage with debates regarding the contextual and biased nature of human rights principles than current attempts utilising the universalist/cultural relativist dichotomy. It also provides a means to analyse the normative development of the human rights discourse.⁴

Thirdly, participatory analysis is a means to engage with challenges to the legitimacy of human rights. International human rights law has been challenged as illegitimate on the basis of exclusion from its development.⁵ It has also been argued that there is no sense of ownership of the international human rights system, both on the individual and cultural levels, for many of the world's peoples.⁶ As participation is claimed to be

¹ See Chapter 1, section 2.1 for more detailed discussion of the relationship between the universality of human rights and participation.

² Schneider, 2000: 146

³ This is further explored in Chapter 4.

⁴ Structures of participation concerning the development of international human rights law are examined in Chapter 3.

⁵ See Chapter 3, section 3.4

⁶ Allott, 1990: 298-99, 16.8

of value through enabling actors to become more engaged with both processes and outcomes and thus enhancing commitment to such processes and outcomes,⁷ this lack of ownership may result in a lack of legitimacy and therefore of respect for human rights. Application of a participatory perspective to human rights allows both assessment of the validity of these claims, and potential means to resolve these problems.⁸

Fourthly, a participatory approach provides a useful means to examine the relationship between human rights and international law; primarily in relation to themes of justice and representation on the international level.⁹ A participatory approach examines human rights in the context of wider international law and has implications for understanding the dialectical relationship and interchange of influence between human rights and international law. A participatory analysis provides a means to critique the disparity between human rights principles and the structural constraints of international law.¹⁰ McCorquodale considers that international law requires a new conceptual framework based on participation, where “actual actions are given acknowledgement in terms of their impact on this system, rather than there being a prior, state-based, determination as to what actions will be taken into account”. The use of participation as a conceptual approach allows examination of involvement and inclusion in international law,¹¹ as well as in human rights.

⁷ Chapter 1, section 1.2.2

⁸ The relationship between legitimacy and human rights is discussed throughout the thesis, and especially in Chapter 5.

⁹ These themes are explored in Chapter 5, sections 2 and 4

¹⁰ This issue is examined in Chapter 5, section 4

¹¹ McCorquodale, 2004: 481-2

In summary, the application of participatory principles to human rights law provides a means to firstly assess that law from a participatory perspective, and secondly consider if the enhancement of participatory aspects of human rights law would be beneficial in terms of greater respect for and enforcement of human rights. Participation may well be a useful tool for understanding and addressing some of the weaknesses of current human rights principles and/or practice. Participation has been identified in areas such as the right to development as a vital tool for the realisation of all human rights;¹² the application of a participatory analysis of human rights allows the assessment of such declarations as rhetoric or reality. Enhanced, inclusive participation in international human rights law may have the potential to address some of the problematic aspects of the operation of this law.

1.2: Shortcomings of current analysis

It is clear that applying a participatory perspective to human rights would be of value, and that participation is an important means to conceptualize human rights. However, numerous analyses of human rights do not apply a specifically participatory perspective; many accounts of human rights provide no analysis of participation.¹³ Furthermore, those analyses which have addressed the relationship between participation and human rights display significant limitations, as they consider the connection between participation and human rights in a peripheral and fragmented rather than centralised and systemic manner. For example, whilst there has been

¹² Declaration on the Right to Development, Article 8(2)

¹³ See *inter alia* Steiner, Alston and Goodman, 2007; Donnelly, 2003; Haas, 2008; Gearty and Tomkins, 1996; Meron, 1984

considerable analysis of participation in the developmental¹⁴ and environmental¹⁵ contexts, and in relation to children's rights,¹⁶ these studies do not explore the relationship between participation and human rights but rather consider participation as one element (among others) of particular rights. Such analysis does not therefore constitute a consideration of human rights from a participatory perspective. Consequently, there are comparatively few analytical accounts of participation specifically as an element of human rights.

Furthermore, within those analyses that do specifically explore participation from a human rights perspective, there is a tendency to correlate the concept of a "right" to participation with political rights of participation. Either participation is expressly associated with political rights,¹⁷ or discussion of rights and participation is placed within a political context, thus creating a more implicit connection.¹⁸ This approach is typified by Waldron's account of the right to participation, which exclusively equates it with the political rights of the citizen.¹⁹ However, this conceptualisation of participation is overly restrictive and reductive, and consequently fails to take account of the varied potential meanings of participation and how these can affect human rights.²⁰

¹⁴ See *inter alia* Twomey, 2007; Zillman, Lucas and Pring, 2002; Parfitt, 2004; Oakley *et al*, 1991; Ginther, 1992.

¹⁵ See *inter alia* Steele, 2001; Lee and Abbot, 2003; 2002; see also the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters which is the only international treaty to explicitly deal with rights of participation.

¹⁶ Ang *et al*, 2006; Byrne, 2003

¹⁷ See *inter alia* Vidar, 2005, 157; see also the index listing in Steiner and Alston, 2000, 1486.

¹⁸ De Waart, 1995: 49-50; Fredman, 2008: 33-40

¹⁹ Waldron, 1998: 311-312

²⁰ See Chapter 1, section 1 for examination of the meanings of participation, and Chapter 2, section 1.1 for examination of both political and non-political participatory rights.

In addition, there have been a number of assertions of the value of participation in human rights but, fundamentally, extremely little analysis of what form this participation should take, and why it is so important. Where participation and human rights have been linked, the analysis has not been developed sufficiently in relation to why participation is essential to human rights, nor what that participation would entail.²¹

Whilst there are several areas of study concerned with issues of representation and exclusion in human rights, such analyses have not been specifically oriented to exploring what participation as a concept means, or should mean, for human rights; rather they have focussed on particular forms or lack of participation by certain actors. For example, critical analyses of international law such as Third World Approaches to International Law²² or feminist²³ approaches address the exclusion of the third world or women²⁴ respectively from the development of human rights, and consequently challenge the ability of human rights principles to represent and protect the concerns of these groups. However, such analysis is specifically concerned with the experiences of particular groups rather than the implications for the overall relationship between human rights and participation of such exclusion. Literature from the cultural relativist/universalist debate²⁵ has also considered issues of representation and exclusion in relation to human rights, but has not situated this in an explicit context of participation. In addition, analyses of the role of non-state actors²⁶

²¹ See for example Kenny, 2000: 18-21; Künnemann, 2004: 22-25. Whilst Kenny does offer a more developed understanding of participation in a human rights context than Künnemann, the analysis is limited to participation in the context of development and is therefore not fully developed concerning the relationship between human rights and participation.

²² Mutua, 2000

²³ Charlesworth and Chinkin, 2000: 49; Charlesworth, Chinkin and Wright, 2001: 644

²⁴ Ward, 1998, 161

²⁵ See Chapter 5, section 1.2

²⁶ Clapham, 2006; Alston, 2005; Butler, 2007

are concerned with structures of participation in the construction and implementation of human rights law, but do not explore how this impacts on the conceptual relationship between participation and human rights.

All these analyses reflect an implicit concern with the issue of participation in international human rights law but do not provide a specifically participatory analysis of human rights. Fundamentally, participation as previously considered has been an adjunct to the main issue under investigation, not the primary concern of analysis, and has consequently not received the detailed exploration required to enable a comprehensive understanding of the relationship between participation and human rights.

Finally, analyses of participation have not adopted a human rights approach. Such studies are largely concerned with forms of participation, in particular political participation and its relationship to democracy, how and why individuals and groups participate in society, and what barriers may exist to this participation.²⁷ They do not in general explore participation as a right, nor consider how it both does and should function in the context of international human rights. In consequence, there is little explicit analysis from either the discourse of participation or from human rights research concerning the relationship between participation and international human rights law.

²⁷ See for example Verba et al, 1978; Pateman, 1970; Lucas, 1978 and more recently Fung, 2003; Creasy, 2007.

Part 2: Key Questions

There is consequently a need for analysis of international human rights law from an explicitly participatory perspective. Such analysis must specifically explore the extent to which the type of participation reflected in human rights is the most appropriate form of participation to achieve the goals of human rights. Applying a participatory analysis to human rights requires consideration of a number of key issues. Firstly, the concept of ‘participation’ must be explored, in order to gain a full understanding of the phenomenon to be applied. Secondly, the type of participation required by human rights must be identified. Next, analysis of the type of participation reflected within human rights requires consideration of how participation is conceptualised in both human rights principles and in practical structures of participation relating to the definition and application of human rights. This will enable comparison between the type of participation required by human rights and the type found within human rights, and will consequently facilitate exploration of the implications of this evaluation.

Part 3: Methodology

3.1: Theoretical approach

In order to address these key questions, this project adopts a socio-legal approach to analysis of participation in human rights. Participation is a social phenomenon, of which existing analysis has predominantly come from the social sciences.²⁸ Furthermore, the aim of this thesis is to examine how participation is conceptualised by international human rights law, and to compare this with the form of participation

²⁸ See section 1.2 above; also Chapter 1, section 1

appropriate for human rights. While investigation of legal instruments and jurisprudence plays a role in this enquiry, a purely 'legal' approach focussing on these formal sources cannot enable analysis which goes beyond assessment of the legal rules of participation, to identify what that participation means, or should mean, for human rights, and how that meaning is constructed. Fundamentally, it would not encompass exploration of how informal structures of participation impact on how participation is conceptualised by human rights. An approach to participation which does not take account of both formal and informal, or legal and social, elements would restrict the ability of this project to further existing knowledge. Consequently, this project will of necessity have an interdisciplinary character.

3.2: Empirical research methods

In addition to textual analysis, this thesis explores the participatory roles of Non-Governmental Organisations (NGOs) through use of data collected via a series of qualitative interviews conducted with members of human rights NGOs. 26 interviews were carried out: 7 via email, 5 in person and 14 via telephone. A range of organisations took part in the research ranging from international groups with a global reach concerned with the totality of human rights to national or locally based groups which focussed on one specific area of rights.²⁹ Target organisations were selected on the criteria that they are major participants in the international system, explicitly concerned with the promotion and protection of participatory rights³⁰ or have a specific mandate to enable others to participate, for example through provision of information on the United Nations (UN) system.

²⁹ A more detailed guide to the categories of participant NGOs is found in Appendix 1. The interviews are held on file with the author, and are referenced by ID number and date.

³⁰ Chapter 2 explores the full range of participatory rights.

The interviews³¹ were based towards the unstructured end of the continuum³² to allow for maximum versatility.³³ The questioning process was of necessity reflexive in response to the development of other strands of the research. Such non-directive questioning techniques were used in order to allow the interviewee to tell their own story³⁴ and to “discover the unexpected and uncover the unknown”³⁵ via the interview process. As Jones argues, an inflexible questioning structure indicates that the researcher has prestructured the enquiry within their own frame of reference, and thus leaves little space for the respondents to elaborate their own perspectives.³⁶

The aim of this study is to explore the concept of participation in international human rights law, both in theory and in practice. A key aspect of such study is the exploration of the multiplicity of experiences of participation in human rights. Qualitative methods are most therefore appropriate to the nature of the research, as it is exploratory and stresses the importance of context and the participants’ own frames of reference.³⁷ Specifically, this aspect of the research project constitutes an exploration of the phenomena³⁸ of participation in international human rights law via the perspectives and experiences of those social actors who operate under the practical realities of the human rights regime, and who may have experience both of the constraints imposed by a lack of formal participatory rights, and the effects and potential benefits of more inclusive, but informal, modes of participation. Thus the

³¹ A sample interview is provided in appendix 2.

³² Denscombe, 2003: 167; Arksey and Knight, 1999: 4-9

³³ Taylor and Bogdan, 1984, 77

³⁴ Nievaard, 1996: 44

³⁵ Gerson and Horowitz, 2002: 204

³⁶ Jones, 1985: 46

³⁷ Marshall and Rossman, 1999, 58

³⁸ Maso, 1996: 34

understanding of participation produced by this research will be oriented to how these actors perceive the reality³⁹ of participation within international human rights law.

Furthermore, this research is intended to explore and develop the concept of participation within international human rights law as a dynamic process, rather than impose preconceived static categories on the people and events observed.⁴⁰ This research project thus requires an interpretivist methodological approach, proceeding from an epistemological position that knowledge is contextual, provisional and complex.⁴¹

Moreover, whilst the qualitative research initially proceeded from the identification of themes and concepts arising from the literature study, the analysis is emphatically not intended to be limited to such previously identified issues. Rather, it is intended to be reflexive in relation to potential new themes and concepts which may arise from the interview research process. The use of qualitative research techniques allows the researcher to be more responsive and flexible in relation to both the needs of respondents and the nature of the subject matter.⁴²

In addition, qualitative methods are necessary for research with an ethical perspective that identifies the importance of inclusion to human rights. It is therefore necessary to enable a multiplicity of different voices to contribute to the analysis. The use of qualitative interviews offers a means by which to incorporate the experiences and understandings of groups who may be marginalised within the formal structure of

³⁹ Taylor & Bogdan, 1984, 2

⁴⁰ Gerson and Horowitz, 2002: 199

⁴¹ Arksey and Knight, 1999: 19

⁴² Walker, 1985: 3

international human rights law into an enhanced understanding of participation. Furthermore, it is ethically appropriate when analysing the participatory experience of NGOs to inform the research through utilising such experience directly, rather than relying on mediated accounts from other sources.

Finally, although a range of organisations and consequent experiences of participation were explored, this data is emphatically not intended to be representative of a general NGO perspective on participation. Rather, it is designed to explore and illuminate the ways in which NGOs participate themselves and enable others to participate, and their rationales for doing so. The epistemological perspective of this project does not view social knowledge as objective and absolute, but rather as situated and partial. In this way it rejects the assertion that social research both should and can provide objective truths or facts about the world. As Hammersley and Atkinson contend “the aim is not to gather ‘pure’ data that are free from potential bias. There is no such thing”.⁴³ The fundamental concern of this research project is to explore how the meaning(s) of participation in international human rights law are understood. This will of necessity entail the collection of contextual data. The project is not concerned with uncovering the ‘true’ meaning and function of participation in international human rights law, but rather what different meanings exist, how and why these have been constructed and what impact they have on individuals’ and groups’ experiences of international human rights law, as “separating the truth or falsity of people’s beliefs from the analysis of those beliefs as social phenomena allows us to treat participants’ knowledge as both resource and topic”.⁴⁴

⁴³ Hammersley and Atkinson 1995: 131

⁴⁴ Hammersley and Atkinson, 1995: 126

3.3: Definitions: human rights

‘Human rights’ in this project refers to *international human rights law*. The analysis consequently examines the concept of participation reflected in human rights principles as expressed through international legal documents encompassing both hard and soft law, jurisprudence and attendant commentary. In addition, the structures of participation regarding the definition of and access to this law are considered, including analysis of the legal principles regarding sources of law. This is a necessarily reductive approach to the concept of participation in human rights. ‘Human rights’ has a meaning beyond that expressed in international legal principles; it is also mutually constitutive of a wider discourse of social ethics. A comprehensive approach to participation in human rights would therefore entail consideration of this wider discourse of human rights, requiring the exploration of the construction of its meaning beyond the definition of law, and the exploration of access to both legal and non-legal structures for the realisation of human rights. However, whilst such study is a logical continuation both of the themes and methodological approach of this thesis, it is beyond the scope of the current project.

Part 4: The role of NGOs

The analysis, particularly in Chapters 3-5,⁴⁵ includes considerable discussion of the participatory role of human rights NGOs⁴⁶ in international human rights law. Whilst other actors such as global corporations and international financial institutions also

⁴⁵ See the Chapter Overview in Part 5 below.

⁴⁶ The term ‘human rights NGOs’ is used in this thesis to mean NGOs concerned with the promotion and protection of human rights.

participate in human rights to the degree that their actions affect the definition and application of human rights,⁴⁷ they are not considered in this thesis.

This analysis focuses specifically on the participatory role of human rights NGOs for several reasons. This project must of necessity focus on particular aspects of participation; a comprehensive account of the influence of all participants within the international system on human rights is unrealistic. This thesis is primarily concerned with individual participation in human rights; however the major participants in international law are states. It is therefore important to consider the participatory role of NGOs as they are the major non-state participant in the definition and application of international human rights law. The importance of NGO participation is well recognised,⁴⁸ and it is contended that “the entire UN human rights system would quite simply cease to function without the NGOs”.⁴⁹ Furthermore, NGOs offer a means to examine alternative and/or intermediary structures of participation in human rights. A focus on NGOs enables examination of modes of participation that exist between the level of the state and that of the individual; they offer a means to bridge the gap between law and policy.⁵⁰ Although NGOs have some formal rights of participation⁵¹ a key aspect of this thesis is to also explore the implications of NGOs’ use of *informal* methods of participation. As active participants in the development of the rights, norms, values and facts of participation in international human rights law, they consequently provide a means to consider participatory structures outside the established hierarchy of participation.

⁴⁷ See *inter alia* Skogly, 2001; Howse, 2002; Clapham, 2006: 161-270; E/CN.4/Sub.2/2001/10, 2 August 2001, Section II

⁴⁸ Steiner, 1991: 1

⁴⁹ Brett, 1995: 100

⁵⁰ Breen, 2005: 102

⁵¹ See Chapter 3, section 1.2, and Chapter 4, section 2.2.1

Most importantly, NGOs have a vital, although informal, representative role within human rights in acting as a conduit for participation in international human rights law by other groups and individuals.⁵² Although this thesis is predominantly concerned with the relationship between participation and human rights as it applies to individuals, individual participation in human rights is very much reliant on the activities of NGOs, and it is therefore essential to consider how these organisations themselves participate and how this affects other structures of participation in human rights.

The definition of an NGO⁵³ is problematic,⁵⁴ and there is no clear definition in international law.⁵⁵ As Charnovitz identifies, “everything about NGOs is contested, including the meaning of the term”.⁵⁶ However, when discussing the nature of NGOs, certain characteristics are usually emphasized. NGOs are private organisations.⁵⁷ They are non-profit making,⁵⁸ and are composed of individuals acting of their own volition.⁵⁹ The focus of an NGO is defined via reference to a particular set of principles, and action is premised around the realisation of these values through shaping policy.⁶⁰ Furthermore, ‘human rights’ NGOs are distinct from other political actors as they seek to protect the rights not only of their own constituency but of all

⁵² See Chapter 5, section 2.2 for further discussion of NGOs’ representative role.

⁵³ As Gordenker and Weiss identify (1996: 18) there are at least ten other terms used to refer to these actors; see also Charnovitz, 1997: 186-188.

⁵⁴ For a more detailed discussion of the definition of NGOs see Butler, 2007: 146-150, also Willetts, 1996a: 2-3.

⁵⁵ Simma, 2002: 1072; Kaminga, 2005: 95; Brett, 1995: 97-99

⁵⁶ Charnovitz, 2006: 351

⁵⁷ Hartwick, 2001: 218

⁵⁸ Gordenker and Weiss, 1996: 20

⁵⁹ Gordenker and Weiss, 1996: 20

⁶⁰ Breen, 2005: 102; Kaminga, 2005: 96; Thurer, 1998: 43

members of society.⁶¹ This study follows the broad categorisation of human rights NGOs as dependent on the nature of the claims made and goals pursued, rather than requiring specific criticism of state conduct via reference to international human rights law.⁶²

This study will therefore consider human rights NGOs as international or national private bodies with a focus on the realisation of either general or specific human rights principles through influence over policy-making and implementation. Such NGOs have a dual participatory role in human rights; they are both participants in their own right, and are also potential facilitators of participation by others. The ways in and extent to which human rights NGOs enable participation by other individuals or groups is a key aspect of the analysis in this thesis.⁶³ However, regarding NGO participation in their own right, the purpose of this project is to explore what the ways in which NGOs participate in human rights indicates about the conceptualisation of participation as reflected in human rights. The nature of human rights NGOs and their main participatory activities as regards the definition and implementation of international human rights law will consequently not be detailed in depth. A short overview will therefore suffice.⁶⁴

Firstly, it is important to emphasize the diverse nature of human rights NGOs as a sector, and in consequence that these groups participate in different ways. Human

⁶¹ Brett, 1995: 97

⁶² Steiner, 1991: 5

⁶³ See in particular the discussion of representation in Chapter 5, section 2.2 and discussion of how NGOs enable individual access to human rights in Chapter 4, sections 2.3 and 3.3.

⁶⁴ There is a large and expanding literature on human rights NGOs and their role regarding human rights law. See for example Otto, 1996; Willetts, 1996; Korey, 1998; Charnovitz, 1997, 1999; Welch 2001; Clark, 2001; Alger 2002; Butler, 2007.

rights NGOs may be national⁶⁵ or international,⁶⁶ concerned with matters within or across state borders respectively.⁶⁷ They may be single-issue,⁶⁸ deal with a range of concerns grouped around a particular area of human rights⁶⁹ or geographical region,⁷⁰ or deal with human rights in their entirety.⁷¹ Some human rights NGOs have a large supporter base which they can mobilise to campaign on a particular issue.⁷² Other NGOs target their activities more towards research and information dissemination.⁷³

Most NGOs consist of a small group of policy makers and administrators, and others are effectively one-to-one organisations.⁷⁴

Secondly, human rights NGO activity in the international system is not a new phenomenon. As Charnovitz details, NGOs have been active in relation to international human rights concerns since the 1700s,⁷⁵ on issues including anti-slavery campaigns,⁷⁶ and workers'⁷⁷ and women's⁷⁸ rights. However, many of the major global human rights NGOs were founded in the post-war period; for example the International Commission of Jurists in 1952, Amnesty International in 1961 and Human Rights Watch in 1971,⁷⁹ although it should also be noted that the International

⁶⁵ For example, Albanian Centre for Human Rights, SERAC

⁶⁶ For example Human Rights Watch, International Federation for Human Rights

⁶⁷ Hartwick, 2001: 218

⁶⁸ For example, National Coalition to abolish the Death Penalty <http://www.ncadp.org/>

⁶⁹ For example Article 19, who campaign on the issues impacting on freedom of expression, or International Women's Rights Action Watch, which focuses on the protection of women's human rights.

⁷⁰ For example Human Rights in China, who campaign for the promotion and protection of human rights in China.

⁷¹ For example Amnesty International is concerned with enjoyment of all of the rights contained in the Universal Declaration of Human Rights (<http://www.amnesty.org.uk/content.asp?CategoryID=10091>). It should however be noted that Amnesty traditionally focussed on civil and political rights and have only relatively recently expanded their mandate to include economic, social and cultural rights.

⁷² For example Amnesty International

⁷³ For example, International Service for Human Rights, International Council on Human Rights Policy

⁷⁴ Steiner, 1991: 77

⁷⁵ Charnovitz, 1997: 189-268

⁷⁶ Charnovitz, 1997: 191-192

⁷⁷ Charnovitz, 1997: 193-194; 204-205

⁷⁸ Charnovitz, 1997: 214-215

⁷⁹ Originally Helsinki Watch

Committee of the Red Cross was founded in 1863. This parallels the overall expansion in the number of NGOs which increased exponentially in the late twentieth century, growing by approximately five times between 1970 and 2000.⁸⁰ 247 international human rights NGOs were identified in 2000.⁸¹

Thirdly, NGOs participate in both formal and informal ways. Some NGOs have consultative status with the UN, which entitles them to formally participate in specific ways in particular UN bodies.⁸² It must however be emphasized that not all NGOs have consultative status, and consequently many participate via more informal means. Although such participation in human rights takes a range of different forms, common methods include lobbying of governments officials, Inter-Governmental Organisations (IGOs) and/or private individuals, fact-finding regarding human rights violations, information provision to decision-makers in national governments, IGOs and to the wider public, and media campaigns regarding particular issues.

Finally, human rights NGO activity whether formal or informal is usually targeted towards two main areas. Firstly, NGOs have significantly contributed to the advancement of international standards in the field of human rights protection;⁸³ it is “beyond doubt that NGOs...have participated in the creation [and] development...of international law”,⁸⁴ and the degree and significance of NGO and private sector participation in law-making continues to increase.⁸⁵ They influence the development of human rights principles through processes of ‘consciousness-changing’ – bringing

⁸⁰ Butler, 2007: 151; see also Welch, 2001: 1

⁸¹ Butler, 2007: 152

⁸² NGOs consultative rights are detailed in Chapter 3, section 1.2

⁸³ Martens, 2003: 8; Steiner and Alston, 2000: 940

⁸⁴ McCorquodale, 2004: 496

⁸⁵ Charnovitz, 2005: 543

a particular issue to the attention of law makers - and agenda-setting – persuading delegates to discuss such issues in international forums.⁸⁶ NGOs can then have an influence over norm construction via formal and informal participation at conferences and in treaty negotiations.⁸⁷ NGOs use various lobbying techniques to impact on law-making: participation in the preparatory processes, coordinated lobbying during the conference, circulation of information and personal contact with conference delegates.⁸⁸

There are numerous illustrations of how NGOs have influenced the development of international human rights principles.⁸⁹ The experience of workers' and employers' groups through the International Labor Organization (ILO) is one of the earliest forms of participation by private groups in the formation of human rights standards.⁹⁰ In addition, NGO participation in drafting the Universal Declaration of Human Rights (UDHR) has been described as "instrumental";⁹¹ for example, much of articles 16 and 18 can be attributed to input from NGOs.⁹² An often-cited case is the role of Amnesty International and other NGOs in the development of international standards on the prohibition of torture, from awareness-raising regarding the practice of torture and the need to condemn and outlaw it, to the elaboration of the Committee Against Torture (CAT) in 1984.⁹³ "It seems reasonable to infer... that were it not for the systematic campaign organized by Amnesty International, it would have been much more difficult to achieve such a wide, almost universal, condemnation of torture".⁹⁴ Other

⁸⁶ Butler, 2007: 169-174

⁸⁷ Wedgwood, 1998: 25

⁸⁸ Friedman et al, 2005: 42-7, see also Lindblom, 2005: 473-4

⁸⁹ This issue is further considered in Chapter 3.

⁹⁰ Bianchi, 1997: 186

⁹¹ Korey, 1999: 154; see also Morsink, 1999: 4; 9

⁹² Van Boven, 1989: 211

⁹³ Cook, 1996: 189-191; see also Brett, 1995: 100; Clark, 2001: 37-69; Tolley, 1994: 167

⁹⁴ Bianchi, 1997, 186

examples include the role of NGOs in the drafting of the Convention on the Rights of the Child⁹⁵ and the role of the Coalition for an International Criminal Court regarding the drafting of the Rome Statute of the International Criminal Court (ICC).⁹⁶ NGOs also influence the development of human rights through interpretation of the law.⁹⁷

Secondly, NGOs are involved in various ways in human rights implementation,⁹⁸ and have a role in both monitoring and enforcement of human rights.⁹⁹ A key method used for human rights implementation by NGOs is information provision.¹⁰⁰ For example, NGOs participate in the work of the treaty monitoring bodies primarily via information provision to pre-sessional working groups, committee members and Country Rapporteurs.¹⁰¹ These UN human rights institutions rely heavily on the information collected by NGOs regarding human rights violations.¹⁰² NGOs also have an intermediary role in the dissemination of human rights principles and treaty obligations to the wider public.¹⁰³ Via fact finding missions, NGOs use information to impact government implementation of human rights,¹⁰⁴ as publicizing a state's poor human rights record "creates an aura of hostility and widespread negative attitude towards it"¹⁰⁵ and may consequently influence the state to change their behaviour. NGOs also provide assistance to treaty bodies through the provision of background knowledge and the documentation of violations,¹⁰⁶ and increasingly international legal

⁹⁵ Bianchi, 1997: 186-7; Longford, 1996: 214-240

⁹⁶ see Pace and Thieroff, 1999; Tornquist-Chesnier, 2004: 256-257

⁹⁷ Charnovitz, 2006: 352-353; see also Chapter 3, section 1.1

⁹⁸ Wiseberg-Scoble, 1979, cited in Bianchi, 1997: 188

⁹⁹ Hafner-Burton and Tsutsui, 2005: 1385

¹⁰⁰ Welch identifies information provision as 'perhaps the central goal' of human rights NGOs (2001:5).

¹⁰¹ Drzewinski, 2002: 5-6

¹⁰² Van Boven, 1989: 207

¹⁰³ Wedgwood, 1998: 23; Bianchi, 1997: 188

¹⁰⁴ Weissbrodt & McCarthy, 1982: 187; see also Brown, 2001: 74

¹⁰⁵ Bianchi, 1997: 191

¹⁰⁶ Breen, 2005: 113; Niemi and Scheinin, 2002: 11, 17

processes are dependent on NGOs for their effectiveness.¹⁰⁷ In addition, NGOs may affect human rights implementation through participation in legal proceedings. This may be indirect, though the provision of legal assistance to victims,¹⁰⁸ or direct participation via the use of *amicus curiae* briefs.¹⁰⁹ Finally, NGOs may be directly involved in the fulfilment of rights via development programmes.¹¹⁰

Part 5: Chapter overview

The starting point for understanding the relationship between participation and human rights must be to determine the meaning of participation in the context of human rights. **Part 1 of Chapter 1** explores the concept of participation through examination of the various ways in which it can be understood. This analysis utilises a range of philosophical and theoretical approaches in order to consider diverse understandings of participation in political, social and religious contexts. These various meanings of participation are analysed in relation to the four key concepts of modes, purposes, practicalities and norms of participation. The use of this four-point analytical structure – modes, purposes, practicalities and norms of participation - throughout subsequent Chapters allows a clear comparison between the nature of participation required by human rights as identified in Chapter 1, and the forms of participation as manifested in the principles and structures of human rights relating to participation as examined in Chapters 2 - 4. It must be noted however that neat categorisation is impossible, particularly regarding exploratory and interdisciplinary work, and consequently some issues may cut across these groupings.

¹⁰⁷ Cullen and Morrow, 2001: 13

¹⁰⁸ Welch, 2001: 6

¹⁰⁹ Bianchi, 1997: 187; see also Chapter 3, section 1.1

¹¹⁰ For example Oxfam, ActionAid

In **Part 2, Chapter 1** considers what type of participation is required or implied by human rights in relation to these four elements. Key characteristics of human rights are identified. The various modes, purposes, feasibility and norms of participation are then analysed in relation to these fundamental principles of human rights, in order to determine the form of participation most appropriate for human rights.

Having established the nature of participation required by human rights, the thesis must then consider the central question regarding the extent to which this type of participation is manifested in the principles and structures of participation found within international human rights law. This substantive analysis of participation in human rights begins in **Chapter 2**, which examines international legal principles concerned with participation as expressed through both hard and soft international legal instruments. The central concern of this Chapter is to compare the concept(s) of participation as manifested in participatory principles of human rights law with the type of participation required by human rights, as identified in Chapter 1.

The analysis then proceeds to consideration of the structures of participation in international human rights law, firstly through examination of participation in the definition of human rights law in **Chapter 3**. The study here focuses on the structures of participation regarding human rights law-making, paying particular attention to both the historical and ongoing role of NGOs in human rights norm construction and standard-setting in contrast to traditional understandings of the centrality of state participation and the established sources of law. As with Chapter 2, participation concerning both hard and soft law instruments is considered.

Examination of the structures of participation in international human rights law continues in **Chapter 4**, which considers participation in the application of human rights law through analysis of individual access to complaints mechanisms. This is a particularly important form of participation in international human rights law as it is the only way in which the individual is directly and actively able to claim their rights on an international level. Participation in human rights is not just concerned with determining what human rights are, it also requires being able to make use of them; being included in a system of human rights protection and being able to hold entities accountable for abuse. Access to legal structures therefore provides an opportunity for participation through rights claiming, law enforcement and expanded protection.¹¹¹ This Chapter identifies three elements required for individual access to human rights structures: determination of the applicability and content of state obligations, access to information concerning the content of rights and avenues for complaint, and the availability of mechanisms through which the individual can bring a grievance regarding human rights violations.

Both Chapters 3 and 4 facilitate comparison between the type of participation required by human rights and that reflected in structures concerning the definition and application of human rights law. However, the focus of these Chapters is substantially different with regard to the actors under consideration. Chapter 3 compares NGOs and states as the means by which individuals participate in law-making; Chapter 4 is more directly concerned with the role of individuals.

Having examined the extent to which the concept(s) of participation as reflected both in international human rights legal principles, and in structures of participation in the

¹¹¹ Cichowski, 2000: 51

definition of and access to human rights, reflects that required by human rights (as identified in Chapter 1) the implications of this analysis is considered in **Chapter 5**. In particular, the themes of representation and democracy, accountability, informal and formal participation and the normative construction of participation are analysed, and contradictions and inconsistencies identified.

Finally, the **Conclusion** demonstrates how the research questions have been answered. It considers the extent to which the types of participation identified in Chapter 1 as being most appropriate for human rights are actually manifested in the principles and structures of international human rights law. The Conclusion then discusses potential means by which the contradictions identified in Chapter 5 might be addressed, through identifying areas for further research and reform.

Chapter 1: The Concept of Participation

The purpose of this chapter is to explore the concept of participation in order to identify what kind(s) of participation are appropriate for human rights in terms of being both implied by the underlying principles of human rights and required in order to achieve the goals of human rights. However, whilst ‘participation’ may be broadly defined as ‘to take part, to be or become actively involved [or] to share’,¹¹² it is both in practice and theory a complex and variable concept, and consequently a multiplicity of different understandings of it exist. As Lucas states, “there is no one thing called participation”.¹¹³ Pateman agrees: “‘participation’ is used to refer to a wide variety of different situations by different people”.¹¹⁴ Participation is therefore “characterised by its diversity of practice and theory...with many different players using different definitions”,¹¹⁵ its meaning is “elastic”,¹¹⁶ and its role, function and importance are variable and contextual within and across geographic regions and cultures.¹¹⁷ Fundamentally, “participation defies any single attempt at definition or interpretation”.¹¹⁸

Furthermore, the concept of participation has historically lacked and continues to require its own theoretical base. Parfitt argued in 1976 that participation is “a practice in search of a theory”;¹¹⁹ Involve identified in 2005 that

¹¹² Concise Oxford English Dictionary 11th Edition, 2006; Collins Cobuild English Language Dictionary, 1987: 1045; Nagel, 1987: 1

¹¹³ Lucas, 1976, 136

¹¹⁴ Pateman, 1970:1

¹¹⁵ Involve, 2005b: 16; see also McCaul, 2000: 92

¹¹⁶ Drydyk, 2005: 248

¹¹⁷ Pring and Noé, 2002: 15-16; Wengert, 1976: 23

¹¹⁸ Oakley et al, 1991: 6

¹¹⁹ Parfitt, 1976

Currently the ways in which participation is assessed is based on an amalgam of the values and principles from the different fields in which participation began. For example, social scientists tend to focus on understanding the context and the people and their interactions, development studies is sensitive to the wider cultural pressures people may face (e.g. prejudice, oppression etc.) and political science often interprets people's actions as part of wider social movements. Each one of these perspectives is equally valid and must be considered as part of any new theoretical models.¹²⁰

As identified in the Introduction,¹²¹ this diversity is reflected in analyses of participation which consider it in relation to different fields, including political participation, or participation in planning, development or environmental policies – in essence a case study approach - rather than considering participation of itself as a concept. The analysis in this chapter is consequently drawn from these various sources in order to explore the key elements of participation.

It is clear that participation does not have one clearly defined meaning but rather several. In order to determine the type(s) of participation appropriate for human rights, this chapter must firstly consider the various ways in which participation is understood. Part 1 will therefore explore the different meanings of participation in relation to its modes, purpose, practicalities and norms.

Part 2 will then establish which of these various understandings of participation is most appropriate for human rights. It will firstly identify the fundamental principles and goals of human rights, in order to then consider what participation should mean and how it should be used in a human rights context.

¹²⁰ Involve, 2005a: 19

¹²¹ Introduction, section 1.2

Part 1: Understanding the concept of participation

Participation will be examined in relation to four elements: modes, purpose, practicalities and norms. ‘Modes’ refers to the *what* and the *how* of participation, and examines the range of activities which may be considered participatory and the contexts in which these take place. Consideration of the ‘purpose’ of participation requires exploration of *why* or to what ends it is used, and whose interests it furthers. Examination of the ‘feasibility’ of participation considers *who* has the opportunity and ability to participate, and the factors which affect this participation. Finally, analysis of the norms of participation applies these questions to the concept of participation itself, essentially questioning how, by whom and to what ends are structures of participation determined.

1.1: Modes of participation

‘Participation’ encompasses a multitude of different activities. This section does not propose simply to list these, but rather to consider the ways in which these forms of participation can be conceptualised. It does this by exploring three dichotomies within the concept of participation – public/private, formal/informal, and direct/representative – and by identifying and examining the different gradations of participation and the various levels at which participation occurs. The order in which these issues are considered is not meant to imply a hierarchy; rather it should be noted that these various aspects of participation are in reality interwoven with each other, and to some extent the divisions drawn here are imposed, but are necessary for the purpose of clarity in analysis.

1.1.1: Public (political) and private participation

Firstly, definitions and analyses of participation often understand it as a purely political, or public,¹²² activity. Macridis and Burg consider political participation as a fundamental process associated with the organisation of consent within political systems, viewing it as an important foundation of political order through providing active communication and interaction between the citizenry and those in control.¹²³ Hague *et al* define political participation as “activity by individuals formally intended to influence who governs or the decisions taken by governments”.¹²⁴ Similarly, participation is defined as “actions through which ordinary members of a political system influence or attempt to influence outcomes”,¹²⁵ and as “the concept that the governed should engage in their own governance”.¹²⁶ Participation is thus understood as a public, political activity which influences and regulates relationships between governments and citizens.

Such political or public participation is concerned with the state’s relationship with its citizens and how public business is carried out.¹²⁷ It takes many forms, both formal and informal,¹²⁸ including voting and standing for election, public enquiries and consultations, negotiated rule making, policy dialogues, citizens’ juries and involvement with NGOs.¹²⁹ As Pring and Noé identify, “‘public participation’ is an

¹²² Pring and Noé, 2002: 16

¹²³ Macridis and Burg, 1991, 10-11

¹²⁴ Hague, Harrop and Breslin, 1998: 80

¹²⁵ Nagel, 1987: 1

¹²⁶ Pring and Noé, 2002: 11

¹²⁷ Barton, 2002: 77

¹²⁸ See Chapter 1, section 1.1.2 below

¹²⁹ For a more extensive list see Barton, 2002: 80; see also Involve, 2005b: 53-105 which lists a range of modes of public participation.

all-encompassing label used to describe the various mechanisms that individuals or groups may use to communicate their views on a public issue".¹³⁰

Furthermore, social forms of participation may have an effect on political decision-making. Creasy distinguishes between social and political forms of participation in the UK context: "whether marching in Whitehall, signing petitions in their town squares or buying wrist bands to "Make Poverty History", the British public is giving time and energy to social rather than political outlets for their opinions".¹³¹ This blurs the boundary between social and political participation; these actions are not 'formally' political, but are intended to influence the political process.

However, it is clear that people can find fulfilment within society via modes of participation other than the purely political. Participation can have a cultural or spiritual role in society, which may be either linked to or separate from political modes of participation. Multiculturalist approaches¹³² view modes of participation which emphasize the political rather than the cultural as inherently exclusionary as they are oriented to a particular rather than universal understanding of participation, which prioritises the majority over the minority perspective.¹³³ Other forms of participation, such as social and cultural participation, exist which are not necessarily linked to political participation. The function and forms of participation within non-secular societies also indicates the importance of non-political participation. For example, Islamic philosophy is understood to "capture within itself the attempt to

¹³⁰ Pring and Noé, 2002: 15; see also Parry, 1972: 3

¹³¹ Creasy, 2007: 2

¹³² See Farrelly, 2004: 119-121; Kymlicka and Norman, 2000.

¹³³ Kymlicka and Norman, 2000: 9; see also Wheatley, 2003:519

reproduce politically the spiritual dimension of reality".¹³⁴ Within Islamic political philosophy, participation within society is the means by which both the individual and the group become closer to God; such participation is inherently spiritual and cultural but not necessarily political. Fundamentally, it propounds that all people can participate appropriately and effectively in society without having to necessarily participate politically.¹³⁵

In consequence, understandings of participation which consider participation to be inherently public and political; as involvement in political decision-making either regarding public issues or as decision-making via a public forum, are incomplete. 'Private' participation in the social and cultural discourse which defines the context for such political participation is equally important. This is reflected in Ross's wider definition of participation as "efforts on the part of members of a community to influence, either directly or indirectly, the authoritative allocation of values in their community".¹³⁶ It is also identified by Drydyk's broad understanding of 'political activity' as taking place in any sphere of life;¹³⁷ consequently 'political' participation may take place beyond what is traditionally considered the political realm, and may encompass other forms of 'private' or 'social' participation.

Furthermore, these public and private aspects of participation each influence the other. Participation in the construction of the norms and values of a society inevitably affects modes and structures of participation in political decision-making processes. Private motivations and beliefs can influence such public participation; for example

¹³⁴ Leaman, 1999: 135

¹³⁵ Leaman, 1999: 125

¹³⁶ Ross, 1988: 74

¹³⁷ Drydyk, 2005: 253

religion plays at least a passive role in influencing voting behaviour in many countries, and may also affect the existence or absence of protest against the current regime.¹³⁸ Feminist analysis¹³⁹ rejects the public/private distinction by arguing that the personal is political; that the private lives of women indicate the public dominance of male hegemony.¹⁴⁰ Thus women's ability to participate in public forums is constrained by 'private' gender roles and relationships. Similarly, participation in private spheres such as religion and other group membership has an impact on public participation. This is seen in the varied relationships between church and state in different societies, which may serve to link or to separate public and private forms of participation. The two aspects of participation cannot be separated but are intrinsically linked.

The public-private distinction can also be understood through consideration of the actors involved. Public actors are those individuals who act as organs of the state, including the government and the judiciary. They consequently participate in public forms of decision-making concerning the actions of the state. However, as well as the interplay between private and public forms of participation as noted above, public forms of participation are also influenced by private actors. These actors do not solely participate in private realms, but in public participatory processes. For example, both private individuals and NGOs, which are organisations consisting of private individuals, participate in and/or seek to influence a range of public processes, such as elections, policy-making and law-making. This interaction is also demonstrated by the rise of public-private partnerships, where private companies enter into partnership

¹³⁸ Moyser, 1991: 7-8

¹³⁹ It should however be noted that feminist philosophies are hugely diverse and do not represent a unified position (Charlesworth and Chinkin, 2000: 38; Fellmeth, 2000: 664)

¹⁴⁰ Charlesworth, Chinkin and Wright, 1991: 626

with the state to deliver public services, thus indicating an expansion of private actors into the public realm. The relationship between public and private actors and public spheres of participation therefore demonstrates a further way in which the public and private aspects of participation interact with one another.¹⁴¹

1.1.2: Formal and informal participation

Secondly, a distinction may be drawn between formal and informal modes of participation. Formal modes of participation are official and required structures. Verba *et al* term these “activities “within the system”...”regular” and legal ways of influencing politics...legitimate channels”.¹⁴² Such formal practices are often codified in legislation or regulations and constitute rights usually protected by law, or statutory requirements in relation to a particular process. Within a democratic political process, for example, formal participation encompasses activities such as voting and standing for election.¹⁴³

In contrast, informal modes of participation encompass activities which are outside this formalised sphere. These actions are intended to influence the formal procedure which is taking place, and are often undertaken by actors who either have no formal right to participate in that process, or who wish to enhance their formal participation by use of informal methods. These types of participation tend to be more wide ranging, and may include more innovative or unconventional activities. They may include activity on behalf of social movements, which use a hugely diverse range of

¹⁴¹ Note that Chapter 2 focuses on the extent to which both public and private forms of participation are manifested in human rights, whilst Chapters 3 and 4 concentrate on participation by public and private actors.

¹⁴² Verba, Nie and Kim, 1978: 48

¹⁴³ Involve, 2005a: 25

techniques of participation, which may be non-conformist or illegal in character, for example petitioning, lobbying, protests, marches, civil disobedience and direct action.¹⁴⁴ Use of media campaigns is another important type of informal participation. A further informal mode of participation is via political violence,¹⁴⁵ which can be committed by a state against its citizens, by individuals or groups against the state, or by one social group against another. For example, there are a number of Palestinian groups which have carried out politically motivated violence in attempts to influence their political relationship with Israel, and the violence and intimidation during the 2008 elections in Zimbabwe was intended as a means to influence the internal political processes.

It must however be noted that there is not a clear distinction between formal and informal modes of participation; rather, participation exists along a continuum and such activities are viewed differently in different contexts. The activities of trade unions, NGOs and other pressure groups seek to influence decision-making procedures through activities which are not directly part of that process, although they are not formally represented in decision-making bodies.¹⁴⁶ However, the informal forms of participation which are used could be considered formal in the sense that they are protected by law. Again this is contextual, as different processes provide for different levels of formalised participation, which means that the same type of activity may represent formal participation in some cases, but not in others. Furthermore, the same actors may participate in a decision-making process in both formal and informal ways. For example, Greenpeace took part as a formal stakeholder in the UK

¹⁴⁴ Myntti, 1996: 4

¹⁴⁵ Verba, Nie and Kim, 1978: 48

¹⁴⁶ Myntti, 1996: 4

government's recent consultation on the use of nuclear power,¹⁴⁷ and participated through the formal process of initiating a judicial review of a previous phase of the consultation,¹⁴⁸ but also used informal types of participation to influence the same decision.¹⁴⁹

The crucial distinction is that informal modes of participation are not guaranteed influence in the same way as formal types of participation. Formal modes of participation require that that participation is taken into account in decision-making; informal modes do not. Habermas distinguishes between influence (informal) and power (formal), arguing that influence can only be translated into power when it affects authorized decision-makers. It is thus transformed into power only through institutionalised procedures.¹⁵⁰ A formal right to participate in an established structure, such as the right to vote, provides a guarantee of influence over the outcome in a way that a public protest, or media campaign, does not. This is not to say that informal participation cannot be hugely influential in decision-making, rather than when justifying actions decision-makers must demonstrate how this is a result of formal participation. For example, an election result is justified by the number of votes cast for particular candidates, not by how much media coverage they received, although this informal mode of participation may be extremely influential or even crucial in determining the result.

¹⁴⁷ Department for Business, Enterprise and Regulatory Reform, 2008: para. 1.47

¹⁴⁸ *Greenpeace Limited v. Secretary of State for Trade and Industry* CO/8197/2006 [2007] EWHC 311 (Admin)

¹⁴⁹ For example, Greenpeace encourage their supporters to lobby the government and the publicize opposition to the use of nuclear power. See <http://www.greenpeace.org.uk/nuclear/what-you-can-do>

¹⁵⁰ Habermas, 1996a: 363

1.1.3: Direct and representative participation

Thirdly, participation can be direct or representative. Direct forms of participation entail the participant having unmediated input into the decision-making process. In contrast, within representative structures, a representative makes decisions or inputs to decisions on behalf of a wider group of individuals. Consequently, in structures of representation individuals do not participate directly in decision-making but rather through the selection of decision-makers.¹⁵¹ Once selected, representatives then serve as a conduit between a particular constituency and other constituents, interest groups and decision-makers, as well as providing a means by which different groups communicate with each other.¹⁵² Representative structures therefore may be considered to offer indirect forms of participation as influence over decision-making is mediated through representatives, rather than comprising the direct involvement of individuals.

The distinction between representative and direct participation is illustrated by debates regarding representative or deliberative democratic participation. Representative forms of democracy are, obviously, structured around individuals voting for representatives who then make decisions on behalf of their constituents. Deliberative democracy may be broadly defined as the principle that legitimate lawmaking issues from the public deliberation of citizens.¹⁵³ It therefore envisages a far more direct role for individuals, which goes beyond voting in elections to encompass public action via active participation in policy-making.¹⁵⁴

¹⁵¹ Myntti, 1996: 2-3

¹⁵² Mansbridge, 2000: 99

¹⁵³ Bohman and Rehg, 1997, ix

¹⁵⁴ Lauber and Knuth, 2000: 11; Pateman, 1970: 25

There is an important relationship between formal and informal types of participation, and direct and representative structures. Where formal participation is, for the majority, limited to the selection of representatives, informal modes can provide more direct forms of engagement. For example, taking part in a protest is an informal, but active and direct way to engage with an issue, whether political or non-political.

Interestingly, direct forms of democracy are older than current, more representative forms, with the concept of citizen in ancient Athens entailing direct participation in the affairs of the state.¹⁵⁵ However, current democratic structures generally favour the representative paradigm. Policy development and implementation in most democratic states is via structures of representation, where most people participate through voting on the selection of political representatives, and a few participate more directly through being selected and then making policy decisions. However, there are exceptions to this model, such as the Swiss cantons, which operate a more direct form of democracy.¹⁵⁶ In addition, more direct approaches to participation are developing at the local level regarding budgeting,¹⁵⁷ development planning,¹⁵⁸ and school and police systems.¹⁵⁹

Furthermore, there have been numerous critiques of the capacity of representative democracy to enable empowering, inclusive and meaningful participation by all sections of society. Firstly, there is a fundamental contradiction between the equality of opportunity for participation inherent in the ideal of democracy, and the profound

¹⁵⁵ Held, 1995: 6. It should be noted that the exclusionary aspects of Athenian politics have received considerable criticism; see for example Hewlett, 2000: 168.

¹⁵⁶ ICA, 2004: 1-2

¹⁵⁷ Wampler, 2007; Shah, 2007; Baiocchi, 2003

¹⁵⁸ Isaac and Heller, 2003

¹⁵⁹ Fung, 2003

inequalities of participation in democratic practice. Citizens within a democracy are differentially placed in terms of both their desire and their ability to participate in public life. Many citizens lack resources or operate within structures that create a sense of powerlessness that dissuades political organizing and expression.¹⁶⁰ Those higher on the social and economic hierarchies within a society are better able to participate in public life and thus to influence political decisions.¹⁶¹ The assumption that participation through representative democracy will inevitably lead to equality is therefore incorrect in the context of current democracies in practice.

In addition, representative democracy may be viewed as competitive and majoritarian; it is essentially a system of aggregation of interests, rather than inclusion of interests. As Wheatley argues, the aggregative model of democracy is centred around competition via elections, and in extreme cases does not represent the rule of the people but rather the rule of the elected representative.¹⁶² Government elites are often culturally distinct from the people whom they govern, and adopt policies in relation to national (or personal) interest as they see it rather than wider cultural values.¹⁶³ Such elites may have more in common with the elites of other states than the people within their own territory.¹⁶⁴ Once the representative is elected, the ability of the people to participate in political decision-making is fundamentally diminished, at least until the next election. As Spiro identifies “the franchise is a crude tool for keeping government authorities in line”...governments can get away with an awful lot before having answer to their memberships”.¹⁶⁵ Furthermore, both in established and new

¹⁶⁰ Wapner, 2002: 199

¹⁶¹ Verba, Nie and Kim, 1978: 5

¹⁶² Wheatley, 2003: 509

¹⁶³ Freeman, 1998: 28

¹⁶⁴ McCorquodale, 2004: 483

¹⁶⁵ Spiro, 2002: 164

democracies, voting and elections can be manipulated to be wholly unrepresentative. In addition, under a majoritarian electoral system, effective participation by minority groups may well be marginalised, as they do not possess the strength of numbers required to succeed in the competition to have their interests incorporated into political decisions.¹⁶⁶

In response to these evaluations of representative democracy, more deliberative or direct forms of participation have been advocated. However, direct democracy has also received criticism. Farely identifies two major challenges which deliberative democracy theory needs to address: firstly, that deliberation may have a destructive effect, and secondly, that the ideal of deliberative democracy is fundamentally utopian. Concerns regarding the potential destructive effect of deliberation centre around the time-consuming process of achieving consensus, particularly when addressing issues which may require immediate action.¹⁶⁷ Lucas contends that greater freedom to participate may force involvement from those who would prefer to remain aloof from the political process, in order to challenge opposing interests.¹⁶⁸ It is argued that is simply not realistic to combine mass participation and deliberation, given the size of modern democracies.¹⁶⁹ Certainly, current structures of political participation in modern democracies could not support this, although new modes of communication and interaction may offer greater opportunities for inclusion.

¹⁶⁶ Problematic elements of representative forms of participation are further explored in Chapter 5, section 2.

¹⁶⁷ Farely, 2004: 150-151

¹⁶⁸ Lucas, 1976: 161

¹⁶⁹ Farely, 2004: 152

1.1.4: Gradations of participation

Fourthly, different degrees of participation can be identified. A distinction between ‘active’ and ‘passive’, or ‘weak’ and ‘strong’ is commonly recognized in analyses of participation. For example, Arnstein considers that “there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process”.¹⁷⁰ Hunt *et al* agree:

The degree of public participation in decision-making depends on the amount of power transferred from the responsible authority to the public. Although the word is used loosely to indicate taking part in a process, and although participation can take place solely through taking account of a wider range of views, the strong sense infers participation in taking decisions, not merely in consultation on those decisions.¹⁷¹

There exist various models of the different grades of participation, with an early example being Arnstein’s ‘Ladder of Participation’ and more recently studies producing similar structures which identify a continuum from weaker to stronger forms.¹⁷²

Active or strong forms of participation entail a deliberate attempt to effect change and the potential to actually influence outcomes, with participants having either full or partial authority to develop approaches to problems and to authorise a course of action.¹⁷³ This level of participation may therefore be characterised as meaningful, which further requires it to be voluntary.¹⁷⁴ Such participation requires commitment from those in power to follow through the outcome of participation or consultation.¹⁷⁵ This type of participation is considered ‘true’ or ‘genuine’ participation.¹⁷⁶

¹⁷⁰ Arnstein, 1969: 216

¹⁷¹ Hunt, Day and Kemp, 2001: 4

¹⁷² Drydyk, 2005: 259-260, Interact, 2001, 14-15

¹⁷³ Interact, 2001, 14-15

¹⁷⁴ Verba, Nie and Kim, 1978: 10

¹⁷⁵ Creasy, 2007: 3

¹⁷⁶ See Chapter 1, section 1.4 below

In contrast, within weak or passive forms, participation is either directed by others or the participant makes no contribution, either deliberately or through no such opportunity being available. Such passive participation may be characterised as manipulative or tokenistic.¹⁷⁷ It has been used in political processes in totalitarian states to use inclusion to add greater legitimacy to outcomes, whilst effectively excluding individuals from any genuine participation which might challenge the status quo.¹⁷⁸ As Parry identifies, such participation is ‘unreal’ because the outcome is structurally predetermined.¹⁷⁹ Participation is thus irrelevant, except in order to add a veneer of legitimacy. This demonstrates how participation and inclusion can be manipulated for particular ends.¹⁸⁰ Alternatively, an individual may be part of a particular community without being an active participant in that group. For example, only 59.4% of UK voters participated in the 2001 election,¹⁸¹ and 61.4% in 2005, with over seventeen million people not participating who were entitled to vote.¹⁸² Participation simply understood as inclusion can therefore be passive.

Passive participation in the public realm has been characterised as activities such as socialising with a neighbour, using local facilities or voting in a television programme, as compared to active engagement such as charity work or the organisation of community events.¹⁸³ The LITMUS levels¹⁸⁴ consider information provision and consultation to be activities in which the public is either the passive recipient of information, or the passive source of ideas and concerns.¹⁸⁵ Similarly,

¹⁷⁷ Arnstein, 1969: 217

¹⁷⁸ Pring and Noé, 2002: 21

¹⁷⁹ Parry, 1972: 16

¹⁸⁰ See discussion in Chapter 1, section 1.2.3 below on participation as control or empowerment

¹⁸¹ Electoral Commission, 2005: 5

¹⁸² Electoral Commission, 2005: 7

¹⁸³ Harrison and Singer, 2007: 55

¹⁸⁴ Interact, 2001: 14-15

¹⁸⁵ Interact, 2001: 14

some analyses consider passive participation to be a technical means for the more effective implementation of a project, and active participation as a process of building confidence and solidarity.¹⁸⁶

1.1.5: Levels of participation

Finally, participation is commonly conceived as operating at the national level in its public/political role of regulating relations between state and citizen, as examined in section 1.1.1 above. However, it is important to recognise that participation can take place at different echelons of social and/or political structures, and may therefore enable influence over decision-making at different levels of society. These include the individual, family, community, national and international levels. For example, an individual would participate in different ways at different levels within the UK political context; depending on whether they participated as a voter, a local councillor, a national MP, an MEP or a Cabinet minister. Similarly in the context of the Catholic Church, participation could take place, for example, at the level of a local parishioner, a priest, a bishop, a cardinal or the Pope. There are hierarchies of participation within social and political structures. The impact of decisions therefore depends on the level at which they are being taken. For example, decisions taken within a national parliament will have effects across the state, whereas those taken at local government level will affect a much smaller area. Significantly, the level at which participation occurs may affect who is able to participate. For example, certain qualifications and/or experience may be required for participation at particular points in a hierarchy.

¹⁸⁶ Ginther, 1992: 73

In addition, it must be recognised that due to the increasingly globalised and interconnected nature of the international system, participation in one area or on one level can increasingly affect participation in another. Participation that may have been hitherto understood at the local or national level can also have an international element. Decisions taken by states and other organisations exert influence over individuals and groups over great distances; global interdependence is increasing.¹⁸⁷ This requires further consideration of participation at the international level, and has led to participatory critiques of international decision-making structures; the 'democratic deficit' of regional or global bodies such as the EU and UN¹⁸⁸ resulting in global inequalities of access to participation.¹⁸⁹ It is argued that individuals should be more able to directly influence decision-making structures in such institutions that have increasing influence over their lives.¹⁹⁰ It has also been contended that due to 'blocked' opportunities for participation at the national level social movement actors are increasing their operation at the international level,¹⁹¹ demonstrating the potential for participation beyond the national sphere.

It is therefore important to consider at what level particular structures of participation operate. Individuals may be able to influence decisions which affect them at one level but not at another. Furthermore, the identification of hierarchies of participation is one means to examine power relationships within structures of participation, as is further explored in the norms section below.¹⁹²

¹⁸⁷ Keohane, 2005: 121

¹⁸⁸ Scholte, 2004: 428-9; Held, 1995: 273-275; De Waart, 1995: 59

¹⁸⁹ Benner *et al*, 2004: 195

¹⁹⁰ Scholte, 2004: 420

¹⁹¹ Khagram *et al*, 2002: 19

¹⁹² Chapter 1, section 1.4

1.2: The purpose of participation

In addition to the different ways in which participation occurs, examination of the concept of participation requires consideration of the ends to which it is oriented. As noted, participation is not a definite concept; it may therefore be used to achieve various different purposes. It is important to note this as there may be a tendency to automatically attach positive connotations to a process described as 'participatory'.

1.2.1: *Individual or communal*

One perspective conceives of participation as an individual right which functions to protect individual interests within society, and to regulate the individual's relationships both with government and with the other individuals who make up that society. This approach is fundamentally based in liberal political philosophy, which views participation as a way to assert and protect individual rights: it is a means by which citizens pursue their own interests.¹⁹³ Furthermore, many justifications of the desirability of public participation are made on the basis of participation as an individual right.¹⁹⁴ The function of the participation of the people in a representative democracy is to ensure good government is achieved through the sanction of loss of office. It thus functions to protect the interests of private individuals.¹⁹⁵ Participation is also seen as the only means by which to gain knowledge of individual interests.¹⁹⁶ This position presents an understanding of participation as competitive in character; it is a means by which to regulate different interests. Similarly, representative models of democracy use political participation as a means by which to aggregate individual

¹⁹³ Lauber and Knuth, 2000: 3

¹⁹⁴ Barton, 2002: 87

¹⁹⁵ Pateman, 1970: 19

¹⁹⁶ Lucas, 1976: 143-144

interests rather than to ensure inclusion of and consensus around all interests. This implies participation to be an adversarial rather than collective activity.

The contrasting perspective understands participation as a collective rather than individual activity with an orientation to a common good, rather than to separate interests. Non-secular societies tend to understand participation in this way, as religious belief is viewed as having a hierarchically superior claim over both the individual and the social order.¹⁹⁷ The particular religious belief orders the specific mode and purpose of participation. The function of participation is to order society in line with principles derived from the religious beliefs of that society. This may be seen, for example, in Islamic philosophy, where the religious imperative is hierarchically superior to the political. Thus participation within Islam is oriented to the common goal of developing society in line with Islamic principles, which is of benefit to all members of society.¹⁹⁸ Similarly, the communitarian political perspective sees participation not as a means to facilitate the assertion of individual interests, but as fundamentally oriented to the community and the common good;¹⁹⁹ it thus has a collective rather than competitive purpose. Understandings of participation as a collective activity are also found in some analyses of traditional African social organisation, which emphasize the value of membership of a group and the role of participation within that group as a means by which to ensure social cohesion.²⁰⁰

In addition, some understandings of participation contain elements of both the individualist and communal perspectives. Deliberative understandings of democracy

¹⁹⁷ Moyser, 1991: 9-10

¹⁹⁸ See for example Eisenstadt, 2002: 151, Leaman, 1999: 128-129

¹⁹⁹ Selznick, 1998: 15

²⁰⁰ Marasinghe, 1984: 33; however, see also Cohen, 1993: 13-16 on the existence of both communal and individualistic perspectives within traditional African societies.

view enhanced participation as a means by which to improve the decision-making processes within a society, and consider that harmony can be achieved for all members of society rather than that competition between competing interests is inevitable.²⁰¹ However, the deliberative perspective also emphasises the individual right to choose whether or not to participate as an integral aspect of participation. This perspective thus considers participation as having both individual and collective characteristics. Similarly the Confucian tradition sees participation as having both an individual and a collective role. The individual has a duty to participate in society in a manner conducive to the development of that society oriented to Confucian principles. Yet the individual is not entirely subsumed to the needs of society; through correct participation in this way the individual helps to achieve harmony on both personal and communal levels.²⁰² The emphasis in feminist theories on the acceptance of difference²⁰³ also has both individual and communal aspects. Whilst inclusion of different individual or group interests is fundamental, this has a collective rather than competitive orientation. However, such collectivity is negotiated, diverse and contextual, rather than related to unchanging and over-ruling principles, as in religious societies.

1.2.2: Instrumental or substantive

A further duality in the way that the purpose of participation is understood is whether it is instrumental or substantive, or both. For example, some elements of deliberative theories of democracy see participation as having a substantive role. Such theories to some extent views participation as purely substantive: the participatory and

²⁰¹ Cohen, 1997: 68, 72-75

²⁰² Yao, 2000: 254

²⁰³ Grimshaw, 1986: 96; Cole, 1993: 2

deliberative process itself is of value, regardless of the outcome produced, and the legitimacy of an outcome is achieved via its being produced via such a process.²⁰⁴

However, understandings of participation as instrumental consider participation primarily as a means to achieve certain ends. Firstly, it is contended that the involvement of larger numbers of people will mean that more information is fed into the decision-making process, thus leading to better decisions.²⁰⁵ Greater participation may also bring different perspectives to a debate,²⁰⁶ and participation can therefore be a means of resolving uncertainties and thus reaching more effective decisions.²⁰⁷ Participation is thus understood as a contribution to problem-solving²⁰⁸ and a means to enhance the quality and practical applicability of services, programmes and policies.²⁰⁹

Secondly, it is argued that a decision that is publicly arrived at will be better understood and more acceptable; conversely, that the demand for participation arises when there is discontent with the decisions taken.²¹⁰ Inclusion in a process of decision-making enhances the legitimacy of the final outcome. Participation can therefore help to build confidence in decisions²¹¹ and in processes of decision-making.

Third, participation is viewed as a means to create a more cohesive and unified society; it offers a means to bring diverse and/or excluded groups together, overcome

²⁰⁴ Cohen, 1997: 73; Christiano, 1997: 244-245

²⁰⁵ Pring and Noé, 2002: 22; Lucas, 1976: 139

²⁰⁶ Lucas, 1976: 139-140

²⁰⁷ Steele, 2001: 416

²⁰⁸ Steele, 2001: 417

²⁰⁹ Involve, 2005a: 14; Creasy, 2007: 2

²¹⁰ Lucas, 1976: 141; Pring and Noé, 2002: 22

²¹¹ Steele, 2001: 416

tensions or conflicts, and build relationships to consequently enable different interests to work together.²¹² In this way trust and cohesion within communities will be achieved.²¹³

A good participatory process will engender consensus-building, help reconcile differences, and create a dynamic, inclusive vision for the future that garners a shared sense of ownership. Participatory events are important not only for their outputs, but also because they bring communities together in a positive way, revealing shared values, mutual interests and common goals and helping to enhance social capital.²¹⁴

Deliberative democracy ideology is centred around the premise that harmony within society can be achieved from the plurality of citizen's interests, rather than this inevitably resulting in competition and strife, and that enhanced participation is the means to achieve this.²¹⁵ This understanding of participation is also reflected in Islamic and Confucian philosophy, where norms of political participation are variable, and are legitimised solely by orientation to how far they achieve the end of improving society in line with Islamic or Confucian principles. Representative democracy also views participation as having instrumental value; voting is a means by which to achieve the ends of equality, inclusion and peace within society. Participation is therefore a means to achieve a common good.

Perspectives which consider participation as instrumental therefore imply that a participatory process itself does not have inherent value, as it is a means to an end. This further indicates that other means may be of equal or greater value if they achieve the identified end more effectively. This is in contrast to substantive

²¹² Involve, 2005a: 13; Wengert, 1976: 26-27

²¹³ It should however be noted that Lucas (1976: 157) contends that enhanced opportunities for objection may lead to social discord and partisanship.

²¹⁴ Thompson, 2004: 58

²¹⁵ Bohman and Rehg, 1997: x; Johnson and Gavelin, 2007: 9

understandings of participation which consider the participatory process itself as being of value, irrespective of the outcome.

However, some understandings of the purpose of participation mediate between these two outlooks. Positions which emphasize the benefits accrued to the individual through taking part in a participatory process view participation as instrumental as it is a means by which people engage with and learn about a process, but also indicate that involvement in the process of participation may also have independent value and may be an end in itself, on both the individual and societal levels. These perspectives identify that participation is self-enhancing; “the more the individual citizen participates, the better able he is to do so”.²¹⁶ In addition, understanding participation as substantive implies that it is a means by which people engage in meaningful activity, which affects their own perceptions of their role as agents within society. It is argued that deliberative democracy has a transformative nature, as it enables citizens to adopt an ideal of the common good.²¹⁷ The distinction between instrumental or substantive participation is also reflected in understandings of participation as mechanistic or humanistic. A mechanistic understanding views participation as a practical means to get input on something, whereas a humanistic conception of participation considers its function to be the expansion of people’s horizons and social contacts, and sense of their own power and ability.²¹⁸ A differentiation may therefore be identified between participation as a means to gain information, and participation as a means of empowerment. Further, participation as a source of information may be considered a passive form, whereas participation as empowerment implies activity.

²¹⁶ Pateman, 1970: 25, 31

²¹⁷ Hunt, Day and Kemp, 2001: 3

²¹⁸ Involve, 2005b: 18

1.2.3: Participation as control and empowerment

The purpose of participation is therefore linked to issues of control within societies, as it may provide a means by which to support or to challenge existing power structures. As Kenny identifies, “the essential element is control: who makes decisions, where, and how”.²¹⁹

Firstly, participation can be a means by which people exercise control over those in power. Under democratic theory, both representative and deliberative, participation is understood as a means by which citizens of a state exercise control over those in authority. Whilst in the Western, post-Enlightenment tradition this perspective is firmly rooted in liberal theory, there are echoes of the social contract perspective in a number of other philosophical traditions. Within Islam, the Shari'a does not designate any particular political system but rather emphasizes good governance based on justice, equity and responsibility,²²⁰ thus implying that a poor ruler may legitimately be removed. Similarly, Confucianism operates via the principle that “Heaven created kingship for the people, not the people for the kingship”.²²¹ Pre-industrial societies also demonstrate this principle that the ruler maintains their position by the grace of their people and by their conduct.²²² In societies without concentrated structures of power and authority participation may be a mechanism to achieve compliance with decisions, which cannot be enforced by other means.²²³ This implies the existence to some extent of cross-cultural agreement on participation as a means by which citizens may exercise control over those in authority, and identifies participation as a potential means to enable accountability.

²¹⁹ Kenny, 2000: 18

²²⁰ Baderin, 2003: 157

²²¹ Yao, 2000:168

²²² Schapera, 1956: 211

²²³ Ross, 1988: 84

Furthermore, participation as control has an individual and personal aspect. The level of both perceived and actual control by the individual over decision-making processes can affect both the ability and the motivation to participate. Pateman identifies issues of control in Rousseau's theory of participation; the individual's actual and perceived freedom and control over his own destiny is increased via participation in decision-making.²²⁴ Issues of participation are linked to how far the individual or group's participation is felt to be meaningful; participation is thus a means for the individual to actively exercise control over their world.²²⁵ Lack of participation may therefore not be due to restricted opportunities, but result from cynicism concerning how far such participation would be effective.²²⁶

Similarly, some analyses also consider participation implicit in the concept of empowerment; empowerment should mean that people are able to participate actively in influencing and implementing decisions about their lives regarding political, economic, social and cultural issues.²²⁷ Participation may therefore be a means to challenge and redefine existing power relations.²²⁸ Particularly in the development context, participation is considered a means for the marginalised, deprived and/or excluded to exercise control over decision-making which affects them, and therefore to become more empowered.²²⁹ Participation is consequently an instrument of change which can help to overcome exclusion.²³⁰

²²⁴ Pateman, 1970: 26

²²⁵ Ross, 1988: 74

²²⁶ The issue of motivation is further discussed in Chapter 1, section 1.3

²²⁷ Drydyk, 2005: 247-248

²²⁸ Wengert, 1976: 26

²²⁹ McCaul, 2000: 92

²³⁰ McCaul, 2000: 94

However, participation may also be used as means by which the powerful protect their position. Structures of participation may reflect existing patterns of power within a community and consequently exclude the already marginalised.²³¹ The modes and orientation of participation may be controlled and directed in order to preserve particular power structures. This may clearly be seen in non-democratic regimes, which despite the expansion of democracy on the global level over the last fifty years, still govern a significant proportion of the world and exert considerable influence on understandings of history and politics.²³² Under non-democratic regimes, rulers seek either to limit political participation or to direct it through tightly controlled channels, with the objective of limiting any threat to the regime posed by unregimented participation. Many authoritarian military governments adopted an exclusionary approach to participation in the second half of the twentieth century, and continue to do so, with methods of exclusion including execution, imprisonment or exclusion of political activists. This approach may be seen in, for example, Chile under Pinochet, Iraq under Saddam Hussein, and the current political regime in Burma. Limiting participation to elites is thus of form of social control. Alternatively, patron-client networks, particularly found within the developing world, also operate as a means by which to control participation, both in democratic and non-democratic regimes. The higher status patron is able to control the political behaviour – voting or more informal means of support - of the client in exchange for protection and security in a context of inequality.²³³

In addition, mass participation may also be used as a means of control. Whilst mass participation in communist regimes always exceeded participation in liberal

²³¹ Barton, 2002: 109; Williams, 2004: 562

²³² Brooker, 2000: 1

²³³ Hague, Harrop and Breslin, 1998: 88

democracies, these governments demanded political participation from all citizens as a means of demonstrating support for the regime, and all such participation was controlled and directed according to Party guidance.²³⁴ Inclusion as a participant can therefore itself be a form of control, as bringing the formerly excluded into a process can itself disempower them to challenge the power relations which led to their exclusion, whilst failing to offer genuine empowerment.²³⁵ For example, Banda notes that in the African context indigenous men were included in the redefinition of customary law by the colonising powers in order to secure their cooperation.²³⁶ In the development context, the use of participatory processes can be used as means to demonstrate the success of a scheme and secure donor approval, rather than being oriented to genuine empowerment.²³⁷

Participation may therefore underlie control and power structures or may provide a means to challenge them. There is an inherent ambiguity within participation meaning that it is a contested ground between those who would use it as a means to achieve certain ends and those who emphasise its emancipatory and empowering potential.²³⁸ This ambiguous nature of participation as enabling both empowerment and control means that it “may indeed be a form of ‘subjection’, but it can also provide its subjects with new opportunities for voice, and its consequences are far from pre-determined”.²³⁹

²³⁴ Hague, Harrop and Breslin, 1998: 84

²³⁵ Kothari, 2001: 142-143

²³⁶ Banda, 2003: 8

²³⁷ Williams, 2004: 563

²³⁸ Parfitt, 2004: 555

²³⁹ Williams, 2004: 559

1.2.4: Participation and legitimacy

Finally, an important purpose of participation can be to confer legitimacy on outcomes. Participation may increase the legitimacy and therefore the acceptability of decisions, rendering them more credible particularly in the eyes of those who have been involved in making them.²⁴⁰ As Bodansky identifies “participation can contribute to popular legitimacy by giving stakeholders a sense of ownership in the process”.²⁴¹ For example, in the democratic tradition, the authority to exercise power is rendered legitimate via its foundation in the collective decisions of the members of the society governed by that power.²⁴² In representative democracy this is expressed via the election of officials. In deliberative democracy²⁴³ legitimate decision-making emanates from the public deliberation of citizens;²⁴⁴ “a public sphere of deliberation about matters of mutual concern is essential to the legitimacy of democratic institutions”.²⁴⁵ The deliberative process is therefore required to confer legitimacy on the outcome. Legitimacy within democracies is thus dependent on the political participation of citizens, whatever form that may take.

Participation as legitimacy may also operate in a more indirect manner. For example, Gluckman identifies that in some traditional societies legitimacy is dependent on the ruler providing for the people, and they may oust him if he fails in this.²⁴⁶ Similarly, rulers within Muslim societies must adhere to a particular social and moral code, and their legitimacy is thus determined by the wider Islamic religious community via

²⁴⁰ Barton, 2002: 105; Lee and Abbot, 2003: 85

²⁴¹ Bodansky, 1999: 617, see also Involve, 2005a: 72

²⁴² Cohen, 1996:95

²⁴³ See section 1.1.3 above concerning deliberative forms of democracy

²⁴⁴ Bohman and Rehg, 1997: ix, also Dryzek, 2000: 1, Goodin, 2000: 82

²⁴⁵ Benhabib, 1996: 68

²⁴⁶ Gluckman, 1965: 124, 133

informal rather than institutionalised forms of accountability.²⁴⁷ This implies a right to participate in the political and social structure, albeit indirectly, as people participate in determining whether a particular ruler is legitimate or not. The legitimacy of authority is therefore dependent on participation, as in modern democratic states.²⁴⁸

These two conceptualisations of the relationship between participation and legitimacy reflect Scharpf's theory of input and output legitimacy,²⁴⁹ which further illustrates the importance of participation to legitimacy. Participation in democratic political systems, both representative and direct, reflects input legitimacy, as decisions are legitimised through the participation of the population, either through voting or more direct forms. Decisions are therefore legitimate because there has been appropriate participation in taking them. The right to challenge an ineffective ruler represents output legitimacy, as the ruler's authority is judged according to their effectiveness. Whilst these are two different ways of establishing the legitimacy of decisions, they both indicate a central role for participation, either in the original process of decision-making, or in evaluating the effects of the decision.

Conversely, restricted participation can provoke dissatisfaction on the part of those who have been excluded.²⁵⁰ This may lead to accusations of illegitimacy on the basis of a lack of participation. For example, a lack of participation leads to the democratic deficit critique which has been levelled at regional²⁵¹ and international²⁵² decision-

²⁴⁷ Eisenstadt, 2002: 152-154

²⁴⁸ It should be noted that the legitimacy of the ruler as being dependent on democratic forms of participation is a relatively new phenomenon; there has been a long tradition of more absolute forms of governance throughout Europe and beyond. However, these absolute forms still allowed for the legitimacy of the ruler to be addressed by more indirect forms of participation.

²⁴⁹ Scharpf, 1997

²⁵⁰ Bodansky, 1999: 617

²⁵¹ Bodansky, 1999: 618, Scharpf, 1997: 19

²⁵² See Chapter 5, section 2.1 for discussion of the democratic deficiencies of the UN

making institutions. This has in turn led to complaints that such institutions are not legitimate decision-makers, as they limit or exclude participation. This illustrates how legitimacy can be challenged on participatory grounds.

In addition, the role of participation in enhancing the perceived legitimacy of decisions means that it may be used as a technique to gain political support and legitimisation.²⁵³ Participation via inclusion can be used to legitimate a particular process or specific power relations without offering a means of empowerment. For example, a consultation on a particular issue may be used to legitimate the final decision, even if the results of the consultation have been ignored or the consultation itself is flawed. This contention was implied by Greenpeace against the UK government concerning the consultation on the use of nuclear power.²⁵⁴ The examples given above concerning participation in totalitarian states also show how participation is manipulated to provide legitimacy.²⁵⁵ This demonstrates that due to the relationship between participation and legitimacy, even passive or misrepresented forms of participation can be utilised in order to enhance the authority of a particular process or decision.

It must finally be noted that participation is not the only source of legitimacy. Although a participatory process can confer either genuine or manipulated legitimacy on outcomes, participation is not an inherent requirement for legitimate decision-making, unless of course that process requires certain forms of participation in order to be legitimate. For example, legitimate decision-making can also ensue from the

²⁵³ Wengert, 1976: 26

²⁵⁴ *Greenpeace Limited v. Secretary of State for Trade and Industry* CO/8197/2006 [2007] EWHC 311 (Admin), para. 44

²⁵⁵ See Chapter 1, section 1.1.4 above

independence and expertise of those making the decision, or legitimate decision-making authority can derive from a particular source, such as God, or from the success of the outcome.²⁵⁶ However, if participation is considered instrumental rather than substantive, legitimacy is one of the ends to which it may be oriented.

1.3: The feasibility of participation

Feasible participation is determined by the existence of both opportunities for participation and the ability and motivation to make use of those opportunities. Barriers to participation consequently result in a lack of opportunities and access,²⁵⁷ and result from socio-economic, cultural, resource-based and physical factors.

Opportunities for participation are clearly the first requirement for participation to occur; if such options do not exist, then participation cannot ensue. For example, an individual has no opportunity to participate through voting for a political representative in a state which does not hold elections. The opportunity to participate therefore entails the existence of possibilities for participation. These opportunities take the form of modes of participation as examined above. Furthermore, the existence of such opportunities is affected by participation in other areas, in particular participation in constructing the norms of participation.²⁵⁸ However, opportunities for participation only indicate the potential for participation. If opportunities for participation are to translate into effective participation, the ability and desire to make use of those opportunities are also required.

²⁵⁶ Bodansky, 1999: 612

²⁵⁷ Johnson and Gavelin, 2007: 12

²⁵⁸ See Chapter 1, section 1.4

People are differently placed in terms of both their desire and ability to participate in public life, as both the ability and the desire to participate are affected by socio-economic status. Comparisons both within and across societies show higher levels of participation correlating with higher socio-economic status,²⁵⁹ and the lowest levels of both formal and informal participation among the poorest in society.²⁶⁰ Hague *et al* identify a ‘law of increasing disproportion’: “the higher the level of political authority, the greater the representation for high-status social groups”.²⁶¹ Verba *et al* agree with this analysis of the inequality of participation within democratic systems; that those higher on social and economic hierarchies within a society are better able to participate in public life and thus to influence political decisions,²⁶² as members of higher socio-economic groups are more likely to have both the resources and the motivation to participate.²⁶³

In addition, particular groups may face specific exclusion or marginalisation. As Arnstein identifies, racism and paternalism constitute considerable roadblocks to effective participation.²⁶⁴ Ethnic identity can affect participation, with ongoing inequalities as well as outright discrimination and racial abuse remaining significant barriers.²⁶⁵ For example, participation in UK local government has been criticised as profoundly unequal, primarily representing a “pale, male and stale” perspective, with ethnic minorities remaining “grossly under-represented”.²⁶⁶ This is further reflected in the UK House of Commons, with 17.9 percent of all MPs being women, and 1.8

²⁵⁹ Ross, 1988: 73

²⁶⁰ Johnson and Gavelin, 2007: 12

²⁶¹ Putnam, quoted in Hague, Harrop and Breslin, 1998: 82

²⁶² Verba, Nie and Kim, 1978: 5

²⁶³ Hague, Harrop and Breslin, 1998: 82

²⁶⁴ Arnstein, 1969: 217

²⁶⁵ Johnson and Gavelin, 2007: 14

²⁶⁶ Johnson and Gavelin, 2007: 11

percent being ethnic minorities in 2001.²⁶⁷ Men are more likely than women to participate politically, with the disparity becoming greater as one moves from mass activities such as voting to more specific acts such as occupying office.²⁶⁸ Children, of course, are almost totally excluded.

Exclusion of particular groups from specific forms of participation can operate in both the public and private spheres. Banda notes how power differentials within private social structures such as the family can impact on the ability to participate.²⁶⁹ For example, certain cultural or social norms deem that women should not vote. This may be formalised, such as in Saudi Arabia, or more implicit, where women do not have the resources to travel to the ballot box, or are prevented from gaining education. In the former cases, the opportunity (and therefore ability) to participate is denied, in the latter, restriction of ability impedes participation. Other vulnerable groups may be similarly marginalised in this way, either explicitly or implicitly. For example, black people were formally denied the right to vote in apartheid South Africa, and literacy tests have been used in the US to informally disenfranchise African-Americans. Similarly, the elections in Zimbabwe in 2008 did not formally prevent anyone from voting, but the use of violence and intimidation prevented people from participating in this way.

Consequently, the marginalisation of vulnerable groups affects both formal and informal modes of participation. It should also be noted that informal means of participation may develop in response to the restriction of formal means, in terms of both opportunity and ability. For example, exclusion from formal decision-making

²⁶⁷ Peele, 2004: 204-205

²⁶⁸ Verba, Nie and Kim, 1978: 234-235

²⁶⁹ Banda, 2003: 2

processes may lead to attempts to influence the outcome of those processes by use of public pressure directed through the media or through forms of public disobedience. Nonetheless, marginalised groups can also be excluded from informal participation. The interests and preferences of dominant groups are more highly represented than marginalised communities both in formal structures of participation and in informal modes, such as the media.²⁷⁰

Participation is also affected by both the level and the organisation of resources within a society.²⁷¹ The availability of resources affects both individual ability to participate and institutional provision of opportunities for participation. Costs to institutions include the direct costs of staff time, running events and participant expenses, indirect costs such as the provision of new skills via training, and the potential reputational cost to the institution.²⁷² Costs to individuals or groups vary dependent on the particular participatory activity. For example, voting is relatively cost free, unless the individual has to pay for transport to the polling station. Informal campaigning could be extremely expensive; international organisations fly to meetings around the world, and produce large amounts of campaigning literature.

Non-monetary resources also affect participation. Time pressure affects levels of participation across different social groups, with Harrison and Singer contending that women feel more pressured than men, the young more than the old, and parents more than the childless, which shapes the degree to which these groups engage with the public realm.²⁷³ For example, local government meetings in the UK are open to the

²⁷⁰ Wheatley, 2003: 514

²⁷¹ Ross, 1988: 73

²⁷² Involve, 2005a, 79-81

²⁷³ Harrison and Singer, 2007: 50. Note this is in the UK context

public, but usually take place during working hours. Few people are able to take time off work to attend such meetings. This inevitably restricts participation to particular groups, such as students or retired people. Similarly, time and numbers are the primary problems associated with deliberative models of democracy. “The challenge facing deliberative democrats is thus to find some way of adapting their deliberative ideals to any remotely large-scale society, where it is simply infeasible to arrange face-to-face discussions across the entire community”.²⁷⁴ This demonstrates how practical factors can affect the realization in practice of theoretical forms of participation.

Knowledge and skills constitute additional resources which affect the ability to participate. Participation requires firstly the existence of knowledge that particular opportunities for participation exist. For example, if an individual is unaware that they live in a democracy and have a right to vote then they will not make use of this form of participation. This is a specific form of knowledge related to the processes of participation. Other forms of knowledge also impact on the ability to participate, including subsidiary or constitutive forms of knowledge such as literacy and education. For example, if an individual is unable to read they will not be able to vote in a system which requires putting a mark next to a candidate’s name on a ballot paper. As Creasy identifies, some groups may “be overwhelmed and excluded because they don’t understand the language or structures used”.²⁷⁵

Physical access can also affect the ability to participate. Individuals with physical disabilities may not be able to access a particular building or room, and may therefore

²⁷⁴ Goodin, 2000: 82

²⁷⁵ Creasy 2007: 4

not be able to participate in a meeting held in that location. However, other barriers deriving from physical access may be more subtle. For example, the need to travel to a location with a lack of public transport would implicitly exclude those who do not have access to a private car.

Finally, motivation also affects the ability to participate. Harrison and Singer point to “strong attitudinal barriers to engagement” among lower income working people.²⁷⁶ Verba *et al* also link higher socio-economic status to interest in political participation.²⁷⁷ Motivation to participate can be linked to the extent to which people feel that their participation will make a difference to the outcome. For example, low turnouts in the 2001 and 2005 UK general elections are considered to have been due to a combination of the result being seen as a foregone conclusion, and the difference between the parties as too narrow.²⁷⁸ In consequence, voting was seen to make little difference to the outcome.

The issue of motivation illustrates that the factors identified which affect the feasibility of participation act in conjunction with each other. If an individual or group perceives that they are excluded from opportunities and/or the ability to participate in a certain way, this will affect their motivation to do so. Similar relationships exist between other restrictions on the ability to participate. Time and financial pressures also affect motivation, as participation is not prioritised.

Fundamentally, this analysis must emphasize that opportunities for and the ability to participate are unequal. This results in disproportionate levels of participation from

²⁷⁶ Harrison and Singer, 2007: 54

²⁷⁷ Verba, Nie and Kim, 1978: 291

²⁷⁸ Electoral Commission, 2005: para 4.2

higher socio-economic groups and the “usual suspects”.²⁷⁹ In addition, participation has the potential for reproducing social inequalities if it only gives voice to particular elements within communities and therefore enables them to extend their power and influence.²⁸⁰ Participation spaces are not used in an equal way as power and privilege shape the dynamics of participation.²⁸¹ “Unequal levels of participation, both formal and informal, are a vicious cycle that leads to increased disempowerment and inequality”.²⁸² Current forms of participation affect future structures of participation, as will now be considered.

1.4: The norms of participation

Sections 1.1 to 1.3 above have considered the forms participation may take, the purposes it serves and the practical factors which may enhance or restrict it. However, such analysis has not examined structures of participation concerning how such norms of participation are themselves determined, by whom, and to what purpose.

Examination of the norms of participation consequently entails looking at participation itself from a critical perspective. This aspect of participatory analysis is particularly important because it enables consideration of the power relationships and implicit assumptions which may underlie traditional or accepted forms of participation, and it interrogates how far structures of participation are actually empowering or inclusive.

²⁷⁹ The ‘usual suspects’ are those who habitually participate in various processes; see Involve, 2005b: 35.

²⁸⁰ Drydyk, 2005: 261

²⁸¹ Gaventa, 2002: 7

²⁸² Johnson and Gavelin, 2007: 15

Firstly, analysis of the norms of participation must consider who has constructed particular forms of participation and what interests and power relationships are represented or reproduced. As Gaventa identifies, no spaces for participation are neutral, “but are shaped by the power relations which both enter and surround them”; more attention must therefore be paid to who is creating these participatory spaces and why.²⁸³ A distinction may be drawn between top-down and bottom-up participation. Top-down participation implies determination of participatory norms by those in power, and consequently of participation directed by and oriented to their needs. In contrast, a bottom-up approach to participation considers people as active agents rather than passive clients or subjects of participatory processes.²⁸⁴ These approaches centralise autonomous forms of actions through which people determine their own terms of engagement, rather than merely accepting invitations to participate.²⁸⁵ Similarly, ‘downstream’ and ‘upstream’ approaches have been contrasted, which distinguish between, respectively, forms of participation which are predetermined by those in power, and forms of participation which are open to redefinition as part of the process of participation by the participants involved. The upstream approach is described as an “honest and reflexive mode of listening and exchange”,²⁸⁶ indicating that structures of participation which are open and inclusive, and which allow for ongoing self-definition of participants are considered more genuine.

Consideration of the norms of participation interrogates the process by which participants are included, and the principles on which such inclusion or exclusion is

²⁸³ Gaventa, 2002: 7

²⁸⁴ Kannan and Pillai, 2005: 213

²⁸⁵ Cornwall, 2002: 50

²⁸⁶ Wilsdon and Willis, 2004: 56

based. Williams identifies the dangers of the naturalization of arbitrary spatial divisions in terms of both power structures and potential for exclusion from participation of those who fall outside these boundaries.²⁸⁷ This demonstrates how construction of the geographical norms of participation may function to exclude, perhaps deliberately, certain groups from structures of participation. For example, determination of the boundaries of constituencies may function to the advantage of certain candidates.

The way in which a debate is framed – the lens through which it is viewed²⁸⁸ - affects the norms of participation in decision-making regarding that issue, as “some framings are clearly associated with particular social groups and their values and worldview”, and concerns that do not fall within the traditional framing of an issue may be excluded.²⁸⁹ Therefore, the way in which an issue is framed and the participants who frame it have a fundamental impact on what is under consideration and how it is to be considered. The twenty-first report of the Royal Commission on Environmental Pollution identifies the importance of taking wider social or ethical values into account in decision-making, rather than just focussing on a narrow band of factors regarding a particular issue.²⁹⁰ This indicates the importance of framing the context of a debate, and of determining what range of issues can be taken into account when making a decision. The way in which people participate and the outcome of that participation is affected by the norms and values which frame the debate. Furthermore, as Knop identifies, the various participants may view the same debate in different ways in relation to their own interests and expectations; “participation is

²⁸⁷ Williams, 2004: 561-562

²⁸⁸ Hunt, Day and Kemp, 2001: 3

²⁸⁹ Hunt, Day and Kemp, 2001: 3; Lee and Abbot, 2003: 87

²⁹⁰ Royal Commission on Environmental Pollution, 1998: 101

experienced and processed through an idea of participation".²⁹¹ It is therefore necessary to examine how the same participatory process may be framed differently by different participants in order to examine how that participation is understood and to what ends it is directed.

Consequently, the degree of inclusion of different participants which exists in determining the norms of participation, or the extent to which it is possible for participants to challenge or redefine existing norms, affects the extent to which participation can be considered effective and legitimate. Such 'genuine' participation is considered to require 'front-end' participation in determining what the problems are and what constitutes a legitimate decision making process.²⁹² Kenny also identifies the importance of participation in the diagnosis of the problem to be addressed and the design of policies to address it.²⁹³ This indicates that genuine participation goes beyond inclusion in the assessment of policies, but must also include participation in determination of the terms of a debate, which of necessity involves shaping the forms and purpose of structures of participation. As Hunt *et al* note, failure to allow a reflexive process of framing "will tend to compromise the legitimacy of a consultation, and hence the durability of any decisions, because participants will feel that they have not been given any real place in the decision-making process".²⁹⁴ Furthermore, it is contended that genuine participation requires "organic entities created by the people for collective operations, and shaped and patterned according to their design".²⁹⁵ Construction of the norms of participation though bottom-up

²⁹¹ Knop, 2002: 215

²⁹² Hunt, Day and Kemp, 2001: 12

²⁹³ Kenny, 2000: 8

²⁹⁴ Hunt, Littlewood and Thompson, 2003: 27

²⁹⁵ Ginther, 1992: 73

processes is therefore considered to produce correct and effective structures of participation.

Furthermore, as discussed above, participation can have various purposes, in particular regarding power and control. The construction of the norms of participation has a fundamental impact on what that participation will achieve, and whose interests it will promote. A common criticism of participatory practices is that although stakeholders may be able to influence decision-making, the wider range of options has already been established.²⁹⁶ Alarms have been raised particularly in the development context regarding the ‘rhetoric’ of participation, where those in power seek to retain control rather than to enable genuine grassroots empowerment.²⁹⁷ Limited participation in the construction of the norms of participation limits the emancipatory potential of participation, as “what people are ‘empowered to do’ is to take part in the modern sector of ‘developing’ societies”.²⁹⁸ This reflects not reflexive participation but participation oriented to a pre-determined and unchallenged goal. If the goal of participation is empowerment, then genuine participation in the construction of the norms of participation is essential.²⁹⁹

This analysis indicates that ‘genuine’ participation should be inclusive and open to processes of redefinition. It should be oriented to the determination of an acceptable result, rather than the ratification or legitimation of a pre-determined outcome. Confrontation between individuals and those in power often occurs due to a lack of a truly participatory process; that people are frustrated when they are not given the

²⁹⁶ Drydek, 2005: 263

²⁹⁷ Ginther, 1992: 73

²⁹⁸ Henkel and Stirrat, in Williams, 2004: 563

²⁹⁹ Parfitt, 2004: 539

opportunity to develop and consider alternative courses of action, rather than merely to comment on predetermined plans.³⁰⁰ Participation in the construction of the norms of participation can affect the extent to which a participatory process is considered legitimate; “if any step—determining who participates, how they deliberate, what information will be provided and by whom, how decisions will be made and the influence they will have—is judged to be insufficiently equitable by any of those involved or affected by the deliberation, the whole process tends to fall into disrepute”.³⁰¹ This indicates the importance of participants’ ability to challenge or redefine how a participatory process is conducted. “Public and stakeholder involvement in determining the guiding principles is increasingly recognized as essential for establishing the legitimacy of the overall process”,³⁰² which leads to wider public acceptability of decisions.³⁰³

Furthermore, participation in the definition of the norms of participation is considered to produce more effective structures of participation. Involve³⁰⁴ identify that in order to address problematic aspects of participation the perspective of the participants must be taken into account. These perspectives are critical to defining the true costs and benefits of participation. Inclusion of participants in evaluation regarding structures and processes of participation can enhance other participatory methods.³⁰⁵ Furthermore, such “participatory evaluation of participatory programmes provides “continuing opportunities for people to engage in the decisions and processes which

³⁰⁰ Thompson, 2001: 59

³⁰¹ Hartz-Karp, 2007: 18

³⁰² Hunt, Day and Kemp, 2001: 23

³⁰³ Hunt, Littlewood and Thompson, 2003: 6

³⁰⁴ Involve, 2005a, 16

³⁰⁵ Interact paper, 2001: 5

affect their lives".³⁰⁶ In this way participation itself extends and enhances participation; through participating in a process, people are able to evaluate how a process of participation should be designed and conducted in order to be most effective, inclusive and genuine.

Normative participation is therefore linked to understandings of participation as active or passive. Involvement in the construction of norms of participation implies a fundamentally active form of participation contrasted to that in which participatory norms are already determined and/or not open to challenge. It also emphasizes the voluntary aspect of participation: that it is a choice, rather than people being coerced into participation. Furthermore, participation in constructing the norms of participation may be via formal or informal means; participation outside accepted structures can include either subversion or rejection of predetermined norms, which itself constitutes potentially new forms of participation.³⁰⁷

However, the problem with considering participation in the construction of the norms of participation is that the question is constantly raised as to who has determined a particular participatory process and to what ends, and it is impossible to provide a definitive answer. It is possible that this can be addressed to some extent through emphasizing a continuous process of reflexivity within participation, although this itself would raise the question of who determines what constitutes a reflexive process of participation. Nevertheless, consideration of how participatory norms have been constructed is essential if the power relationships and interests behind participation are to be fully understood.

³⁰⁶ Interact paper, 2001: 10

³⁰⁷ Williams, 2004: 566; Kothari, 2001: 142

Part 2: Participation and human rights

Part 1 has discussed the various ways in which participation can be understood and the factors which influence the degree and type of participation found in a particular context. It has shown that participation can serve different interests and produce various outcomes; that it is by no means an inherently positive force. It is therefore vital to consider the specific ways in which participation should be used in a human rights context, rather than simply assuming that enhanced participation in human rights is of value.

Having discussed the conceptualisation of participation in the abstract, this chapter now applies these understandings of participation to the specific context of human rights. Part 2 will assess which of these various forms of participation is most appropriate for human rights, in relation both to its underlying principles and fundamental purposes. The aim of Part 2 is therefore to identify firstly what is meant by human rights, and consequently to derive what type of participation is most appropriate for human rights. This will then be used in chapters 2 to 4 as a reference point to compare the extent to which the principles and structures of international human rights law manifest these particular types of participation.

2.1: The meaning of human rights

Understandings of the basis, meaning and content of human rights are also hugely variable, and mean different things to different people.³⁰⁸ As Henkin identifies, “‘human rights’ is common parlance, but not all agree on its meaning and

³⁰⁸ Clapham, 2007: 1-4. See Woodiwiss, 2005 for comparative study of understandings of human rights in different contexts.

significance".³⁰⁹ Human rights consequently have different meanings in different contexts, and can be understood from legal, academic or practitioner perspectives. Key debates include consideration of the philosophical basis of human rights³¹⁰ and assess whether the source of human rights stems from positive or natural law and whether they should be considered legal or moral obligations.³¹¹ There is considerable disagreement regarding a definitive list of rights and the extent to which these are universal and/or represent customary law,³¹² ranging from the full scope of rights contained in the UDHR,³¹³ to definitions which focus on basic³¹⁴ or subsistence rights, or civil and political rights,³¹⁵ to narrower understandings based on peremptory (*jus cogens*) norms of international law. Other debates consider the nature of 'rights' in terms of their justiciability,³¹⁶ or as being inherent or conferred, and the relationship between rights and responsibilities. Human rights have also been considered in terms of the obligations deriving from them.³¹⁷ Finally, challenges have been made, and defences mounted, to the universal basis of human rights.³¹⁸

This variety is further reflected in the interview data collected for this study. The question of 'what are human rights' elicited a multiplicity of answers, which demonstrated reflection in practice of the conceptual debates identified regarding the nature of human rights. 'Human rights' was understood as a means to limit

³⁰⁹ Henkin, 2000: 5

³¹⁰ Freeman, 1994, Henkin, 2000: 4-7

³¹¹ Nickel, 2007: 10

³¹² Clapham, 2006: 86

³¹³ see for example Gibney, 2008: 3

³¹⁴ Shue, 1996: 18-34; see also Donnelly, 1989: 37-45

³¹⁵ See Donnelly, 1989, 28-37 on the civil-political/economic-social-cultural dichotomy in human rights, also Arambulo, 1999: 16-20; Woodiwiss, 2005: 121.

³¹⁶ Arambulo, 1999: 83-88

³¹⁷ Skogly, 2006: 57-72; Clapham, 2006; Shue, 1996

³¹⁸ See *inter alia* Mutua, 2002; Woodiwiss, 2003; Cerna, 1994; Penna and Campbell, 1998; Baderin, 2001; Pannikar, 1982

government behaviour,³¹⁹ and as a means to enhance individual freedom.³²⁰ Human rights were perceived as inherent,³²¹ but also contextual.³²² They were considered both as being manifested through international law³²³ and as having a more personal significance.³²⁴ Human rights were also identified as having legal, political and theoretical meanings.³²⁵

Clearly, a detailed examination of all of the various meanings and understandings of human rights is beyond the scope of this project. However, for the purposes of this analysis four key concerns of human rights are identified: universality, empowerment, dignity and justice.

Firstly, although neither the content of current human rights nor the entire concept of human rights is universally accepted, universality remains “a central tenet in human rights discourse”.³²⁶ Human rights define themselves as universal; they are “the rights that one has simply because one is a human being”.³²⁷ If human rights were not universal, they would not be *human* rights.³²⁸ Furthermore, positive international human rights law also confirms universality as a key characteristic of human rights. The first major statement of human rights in international law, the UDHR, by its very name explicitly proclaims itself as a statement of universal principles. This universality is further declared through reference to the rights of “all members of the human family” and “all peoples and all nations” (Preamble); consequently the UDHR

³¹⁹ ID 50, 29/01/08

³²⁰ ID 33, 15/01/08

³²¹ ID 32, 17/01/08

³²² ID 26, 30/10/07

³²³ ID 9, 17/10/07

³²⁴ ID 41, 16/01/08; ID 11, 10/01/08

³²⁵ ID 20, 25/01/08

³²⁶ Banda, 2003: 3

³²⁷ Donnelly, 2003: 10

³²⁸ Panikkar, 1982: 93

“constitutes a manifesto advocating the universality of human rights”.³²⁹ The principle of the universal application of human rights is accentuated in subsequent instruments. The Preambles of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) both refer to “the equal and inalienable rights of all members of the human family”, and use language such as “all peoples”,³³⁰ “every human being”³³¹ and “the right of everyone”³³² to underline the universality of the rights codified within them.³³³ Similar statements of universality, both implicit and explicit, are found in other human rights conventions.³³⁴ Finally, Article 1 of the Vienna Declaration³³⁵ explicitly confirmed that “the universal nature of these rights and freedoms is beyond question... they are the birthright of all human beings”.

In addition, the principles of equality and non-discrimination which underlie the concept of human rights further testify to their intrinsic universality. These principles are reiterated in numerous human rights instruments, including the ICCPR³³⁶ and ICESCR³³⁷ and more specifically the International Convention on the Elimination of

³²⁹ Tomuschat, 2003: 58

³³⁰ ICCPR, Article 1; ICESCR Article 1

³³¹ ICCPR, Article 6

³³² ICESCR, Articles 6-9

³³³ As Tomuschat identifies, exceptions to the universal nature of the rights contained within the ICCPR are related to the substance of the rights concerned, for example Article 13 on the expulsion of aliens, and Article 25 on the political participation of citizens (2003: 59). While such exceptions exist, normative human rights principles are fundamentally universal.

³³⁴ For example, “everyone is entitled to all the rights and freedoms set out [within the UDHR]” (Preambles to the International Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination); “all members of the human family (Preambles to the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Rights of the Child)”, “universal respect for, and observance of, human rights” (Preamble to the International Convention Against Torture); “the universality...of all human rights” (Preamble to the International Covenant on the Rights of People with Disabilities).

³³⁵ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23

³³⁶ Article 2(1)

³³⁷ Article 2(2)

All Forms of Discrimination Against Women (ICEDAW)³³⁸ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³³⁹ This additional emphasis that human rights are to be enjoyed by all, equally and without discrimination, requires human rights to be universal. Furthermore, the inalienability of human rights is additional testament to their inherent universality, as it means that the inescapable fact that human rights are not universally enjoyed in practice does not detract from their innate conceptual universality. This inalienable quality of human rights is underlined within the human rights discourse, with the first principles of the Preambles to the UDHR, the ICCPR and the ICESCR all making reference to “inalienable rights”. As Skogly identifies, human rights exist irrespective of their respect in practice; that “even though the substance of the right is taken away, the right as such remains”.³⁴⁰ Consequently, universality must be considered an inherent characteristic of human rights.

Secondly, human rights are concerned with freedom. The form that this freedom takes, its limits and how it is negotiated are debated, but the central tenet of human rights as an expression of freedom remains. As reflected in Roosevelt’s Four Freedoms speech of 1941,³⁴¹ human rights encompasses both freedom *from* (for example, hunger, poverty, abuse; Roosevelt identified ‘fear’ and ‘want’), and freedom *to* (Roosevelt specifying freedom of speech and religion). Freedom in human rights therefore encompasses both emancipation and empowerment. The capabilities approach to freedom links these two elements of freedom through positing it as the

³³⁸ For example, Articles 1 and 3

³³⁹ Articles 1(1) and 2(1)

³⁴⁰ Skogly, 2001: 48

³⁴¹ Henkin, 2000: 4

capability to fulfil those aspirations the individual has reason to value.³⁴² This approach establishes freedom within human rights as empowerment, through identifying freedom as the power to exert control over one's own life, including the fulfilment of human rights.

Furthermore, situating suffering in the context of human rights is a means of empowerment,³⁴³ because "human rights express not merely aspirations, suggestions, requests, or laudable ideas, but rights-based *demands* for social change"; they therefore empower citizens to act to claim the fulfilment of these standards and to defend their rights against abuse of power.³⁴⁴ As Shue identifies, "a right is the rational basis... for a justified demand".³⁴⁵ Empowerment is therefore the means to effect human rights change.³⁴⁶ In addition, the typical tripartite theory of human rights obligations identifies the obligation to facilitate as part of the obligation to fulfil,³⁴⁷ which entails enabling and empowering people to enjoy human rights. Empowerment of individuals is therefore recognised as part of the state's obligations concerning the protection of human rights. Whilst there remains disagreement over the meaning and application of empowerment, in the final analysis rights are fundamentally concerned with empowerment³⁴⁸ and it must therefore be considered one of the main goals of human rights.

³⁴² Sen, 1999: 18; Kannan and Pillai, 2005: 209

³⁴³ Clapham, 2007: 162

³⁴⁴ Donnelly, 1989: 15; Petersmann, 2001: 10

³⁴⁵ Shue, 1996: 14

³⁴⁶ Kenny, 2000: 19

³⁴⁷ Skogly, 2006, 7; see also E/CN.4/Sub.2/1999/12, 28 June 1998, para 52 (c)

³⁴⁸ Coomaraswamy, 1994: 45

Thirdly, human rights are oriented to the dignity of the human person, “described as the ‘super-value’ for the justification of human rights”.³⁴⁹ Dignity is central to the philosophical foundations of the UDHR as set out in Article 1, which specifically stresses the inherent value of human dignity,³⁵⁰ and it is further referenced in other human rights instruments.³⁵¹ It has also been identified by the General Assembly as an essential reference point for the development of human rights standards.³⁵² Furthermore, the concept of dignity is a recurring theme throughout the human rights discourse,³⁵³ even its more critical elements. This can be seen for example regarding Mutua who, whilst heavily criticising “current official human rights rhetoric”, nonetheless centralises the protection or enhancement of human dignity as the goal of a reformulated human rights.³⁵⁴ This position indicates that acceptance of the concept of human rights entails recognition of the centrality of human dignity to that concept.

Finally, human rights are concerned with justice and accountability. The concept of human rights invokes the principle that states are not free to treat their citizens however they wish, as human rights impose a minimum standard of protection³⁵⁵ on states through the establishment of limits on legitimate state behaviour.³⁵⁶ This concern with justice is further demonstrated by the human rights focus on injustice;³⁵⁷

³⁴⁹ Baderin, 2001: 90

³⁵⁰ Clapham, 2007: 43

³⁵¹ For example, the Preamble to the ICCPR refers to “the inherent dignity...of all members of the human family”, as do the Preambles to the ICAT and the ICPD. Article 1 of the ICPD also determines the purpose of the treaty as being the promotion of respect for the dignity of persons with disabilities. See also Clapham, 2006: 537, at note 14.

³⁵² General Assembly Resolution 41/120, 1986, para 4(b)

³⁵³ Mutua, 2002: 8; see also Clapham, 2006: 533, and for discussion of the concept of dignity in human rights Clapham, 2006: 535-544.

³⁵⁴ Mutua, 2002: 8

³⁵⁵ Shue 1996, Nickel 2007: 3

³⁵⁶ Skogly, 2006: 47

³⁵⁷ Nickel, 2007: 3

human rights are a means to achieve justice by overcoming injustice. It is also reflected in the concept of equality within human rights; that a just system requires equality of protection in order to be fair. Furthermore, human rights reflect the principle that states both are accountable and should be held accountable for their behaviour towards their citizens; that states have a duty of protection of human rights. The Vienna Declaration reiterated that ‘the promotion and protection of human rights is a legitimate concern of the international community’;³⁵⁸ consequently, the way in which a state treats people within its territory is not just a matter for that state alone.³⁵⁹ Justice and accountability are therefore additional fundamental goals of human rights.

2.2: Identifying the type of participation appropriate for human rights

It has been identified that human rights are concerned with four fundamental principles: universality, empowerment, dignity and justice. Centralising these principles in relation to the forms, purpose, feasibility and norms of participation therefore enables evaluation of the type of participation most appropriate for human rights.

2.2.1: Modes of participation required by human rights

As identified in Part 1.1 above, understandings of participation are limited insofar as they tend to focus on political or public participation. Firstly, the concerns of human rights are broad ranging, and, most importantly, deal with both public and private

³⁵⁸ Para. 4

³⁵⁹ McCorquodale, 2004: 487

issues and the ways in which these intersect. Although many approaches to human rights have conventionally focused and continue to focus on their public element, as reflected in the traditional prioritisation of civil and political rights, human rights must also have a private element as enjoyment of human rights is affected by action in the private sphere. This is particularly identified by the feminist critique of conventional approaches to human rights, which argues that human rights are traditionally concerned with public and thus masculine concerns, and therefore ignore the private sphere identified with women. They argue that human rights must take account of this private sphere if they are to achieve the goals of emancipation and empowerment.³⁶⁰ In addition, identification of the importance of social, economic and cultural rights and their inclusion in human rights instruments indicates that participation in human rights must extend beyond the political arena. Consequently, understandings of participation in human rights must consider participation in all of these different arenas of social life. Solely political participation may well not be sufficient to fully achieve the goals of human rights.³⁶¹

Secondly, issues of public and private participation in human rights are concerned both with the ways in which individuals participate, and the actors who participate. As noted, participation in human rights must not just encompass the public and political realm, but also the private and social. Participation in human rights therefore must incorporate the actions of private individuals acting in both private and public ways. Furthermore, human rights are the rights of private individuals, conceived as such to regulate the actions of the state. Participation in human rights must therefore reflect participation by individuals as private actors. If principles and structures of human

³⁶⁰ Byrnes, 1992: 225-6

³⁶¹ Public and private participatory rights are explored in Chapter 2, section 1.1.

rights reflect only state-dominated forms of participation, they will not achieve this goal. Essentially, private individuals must be able to participate in human rights in order for human rights to serve their interests, as is its function.³⁶²

Thirdly, participation in human rights must encompass both the formal and informal arenas. If human rights are to be a means to effectively challenge unjust power structures and abuses, it may well be necessary to participate in ways outside a formal structure of participation. Human rights must therefore protect and enable both formal and informal means of participation. However, as noted in section 1.1.2 above, informal modes of participation cannot guarantee influence over outcomes. Human rights are oriented to the needs of individuals, to their empowerment and dignity. Individuals' formal rights of participation as guaranteed by human rights must therefore be extensive enough to ensure this.³⁶³

Fourthly, participation in human rights must take place on different levels. Human rights are concerned, as identified, with both private and public elements; they regulate relationships primarily between the individual and the state but also impose obligations on the state regarding matters between private individuals (obligation to protect, children's rights etc). Participation in human rights must therefore take place at the level of the individual and the level of the state. Furthermore, participation in human rights at the international level is essential. Human rights represent the principle of the protection of the individual, irrespective of the actions of the national state. If the individual is unable to participate internationally, and participation in

³⁶² The issue of public and private actors' participation in the structures of human rights is considered in Chapter 3, section 1.1, and Chapter 4, section 2.1.

³⁶³ Formal and informal modes of participation in human rights are considered throughout subsequent chapters, and most specifically in Chapter 5, section 2.2.3.

human rights is effectively limited to the national level, the individual continues to rely on the national state for the protection of their rights, and the international element of human rights protection is severely diluted.³⁶⁴ Participation is therefore a condition for the effective exercise of human rights at both the national and international levels.³⁶⁵

Fifthly, participation in human rights entails activity. For human rights to be a way to protect citizens from the actions of the state and/or to hold the state accountable for its actions, active participation by individuals is required. Participation in human rights cannot be a means to hold the state accountable if the state controls avenues of participation and participation is oriented to the ends of the state. Furthermore, the centrality of dignity to human rights also entails an active conception of the individual; that a person is not the instrument or object of the will of others but has the right to make choices about their life.³⁶⁶ Finally, the goal of empowerment further requires active participation in human rights; it requires that this individual take active control over their life, and is enabled to actively pursue and fulfil their rights.

Sixthly, participation in human rights must be both effective and meaningful. This requires that participation in human rights is genuine, rather than tokenistic; that it has a demonstrable effect over outcomes. Again, this conforms to human rights being oriented to the interests and empowerment of individuals. Participation in human rights, particularly through the ability to access human rights and use them as a means of protection and accountability, cannot be effective if it is open to manipulation and control by states. Furthermore, the degree to which participation in human rights is

³⁶⁴ This is particularly examined in Chapter 4, section 2.4 and Chapter 5, section 4.1.

³⁶⁵ De Waart, 1995: 50

³⁶⁶ Clapham, 2006: 544-545

effective is linked to how far it is perceived as meaningful. Effective participation in structures of human rights protection means that human rights is considered as something that can make a difference to the individual; that can enhance their life in a meaningful way. Meaningful participation in human rights also entails that principles of human rights are considered to be representative of and oriented to the concerns of the individual. If they are perceived as being irrelevant, then they become meaningless. Participation in human rights must therefore be active, effective and meaningful if human rights are to become 'real' on a universal basis. As Gaventa observes, rights will only become real if people are truly engaged with the decisions and processes that affect them.³⁶⁷

Finally, the need for participation in human rights to be active, effective and meaningful further requires that it also is to a great extent direct. If human rights law is something in which the state participates directly, and individuals only indirectly through state representation, then those individuals are less likely to have an active and meaningful relationship with international human rights law. Moreover, forms of participation conducted entirely through representation are inherently passive, as human rights law becomes something remote from the individual through being placed in the realm of states. Furthermore, it is necessary for the individual to have a direct relationship with human rights in order to be effectively empowered.

Fundamentally, direct forms of participation bypass representation by the state, and enable access at the international level. This is particularly important because the state is the entity which has the greatest power to violate human rights; it is consequently

³⁶⁷ Gaventa, 2002: 2

vital that individuals are not dependent on representation by the state in order to have their rights protected.

2.2.2: The purpose of participation in human rights

Participation may be understood as fulfilling an individual or communal function. Similarly, human rights is understood as both of these. Human rights are primarily understood as individual rights, directed towards the dignity and empowerment of the individual. However, new categories of collective or peoples' rights, whilst not uncontroversial, indicate a more collective element to human rights, through identifying rights that are exercised community with others. . Furthermore, human rights are aimed at (assumed) common goals: universal protection of human rights, and enhanced peace and security. It is therefore unclear whether human rights prioritises an individual or communal understanding of the purpose of participation; it clearly reflects both meanings. In consequence, participation in human rights must enable both individual and communal forms of participation. Furthermore, human rights has been accused of placing too much emphasis on the rights of the individual to the exclusion of more communal functions. Understanding the purpose of participation in human rights should therefore emphasize its collective elements, in order to present a more comprehensive understanding of the purpose of human rights.

As regards understanding participation as instrumental or substantive, human rights is clearly concerned with both means and end. The goals of human rights enjoyment must not be achieved by methods which violate human rights. This indicates concern with both process and result. This is reflected in General Comment 12 of the Committee on Economic, Social and Cultural Rights (CESCR) which states that the

right to food implies enabling the accessibility of food in ways which *do not violate other human rights* (emphasis added).³⁶⁸ The importance of participation as a process in human rights is further illustrated by the various references to participation as a right of itself,³⁶⁹ as well as a means to achieve other human rights. “Meaningful participation in decisions which affect one’s life is a human rights issue: it is both a means to the enjoyment of human rights and a human rights goal in itself”.³⁷⁰ Participation in human rights is therefore valuable of itself, not just as a means to achieve human rights goals.

Participation in human rights is therefore both a substantive end in itself, and an instrument to achieve better implementation and enjoyment of human rights. Regarding its instrumental role, human rights is clearly concerned with empowerment of individuals rather than with control by those in power. Participation in human rights should therefore be oriented towards greater empowerment of individuals and groups; as a means to enable them to claim their rights. Consequently, the purpose of participation in human rights should be both as a means of empowerment and a means of accountability. Participation in human rights should be directed towards enabling individuals to hold those in power accountable for their obligations regarding human rights. This further conforms with participation as a human rights goal. As Kenny identifies, “the right to participate in decisions which affect one’s life is both an element of human dignity and the key to empowerment”.³⁷¹ Participation is therefore considered a means to achieve the fundamental goals of human rights: empowerment and justice.

³⁶⁸ CESCR General Comment 12, 12 May 1999, para. 8

³⁶⁹ Gaventa, 2002: 3; Involve, 2005a: 74; Kannan and Pillai, 2005: 215

³⁷⁰ Kenny, 2000: 7

³⁷¹ Kenny, 2000: 18

Finally, participation was shown to be one means to achieve legitimacy. This is certainly the case in the human rights context. Challenges to human rights legitimacy have been made on participatory grounds: that certain groups did not participate in its construction and that it continues to represent particular interests to the exclusion of others.³⁷² Increased participation in human rights is therefore potentially a means to enhance its legitimacy and consequent respect.

2.2.3: The feasibility of human rights participation

The universal basis of human rights clearly requires universal opportunities for participation: that these opportunities are available without discrimination on the basis of factors such as gender, race and socio-economic status. Participation in human rights would not reflect human rights principles if it operated in an exclusive way. Furthermore, exclusion is identified as one of the root causes of human rights crises,³⁷³ consequently, both in relation to the principles of human rights and in terms of ensuring more effective protection opportunities for participation in human rights must be universally available. Human rights' basis in empowerment also indicates that there should be a general opportunity to participate as people cannot be empowered without the means to do so. The principles of universality and empowerment within human rights therefore indicate that participation in human rights should be inclusive as regards opportunities for participation.

³⁷² See Chapter 5, section 1.2.

³⁷³ Kenny, 2000: 7

However, human rights present a potential contradiction as regards the ability to participate. The universal basis of human rights implies that all people should be able to participate and that this participation should be enabled and assisted where required in order to facilitate equality of participation as regards both opportunity and ability. However, the way in which human rights obligations have been interpreted takes into account different resources available for the achievement of rights: the concept of progressive realisation.³⁷⁴ This would seem to indicate that human rights ideology recognises that abilities to participate will vary and that whilst the highest level of participation should be achieved this requirement is not absolute but rather conditional and variable. Whilst practically realistic, this does however present a conceptual contradiction. Universal application of human rights and empowerment require universal access to human rights; to use participation as a means to enable empowerment and accountability, as discussed above. Such universal access requires the barriers as identified in part 1 to be universally overcome, but it is unclear how far human rights require this to an absolute standard. It is furthermore unclear how far the concept of progressive realisation should apply to participation, as it is primarily related to obligations deriving from economic, social and cultural rights, whereas many ‘participatory’ rights are civil and political, thus requiring immediate implementation according to a traditional human rights typology. Furthermore, a participatory analysis of human rights questions how such availability of resources for the achievement of all rights including the enabling of participation is determined, and examines who participates in this and how such participation is itself determined³⁷⁵ There is also a potential contradiction between the requirement for universal

³⁷⁴ CESCR General Comment 3, 14/12/90, para 1

³⁷⁵ This project does not further examine States’ obligations regarding the allocation of resources for participation, nor participation in how such resources would be allocated.

participation, and the legitimate limitations on participation found, for example, in relation to the right to vote.³⁷⁶

2.2.4: Determination of the norms of participation in human rights

Participation in human rights, as identified above, is required to be active, effective and meaningful participation. Ang *et al* argue that the concept of active or genuine participation entails the active involvement of individuals in defining the basis, setting and objectives of participation itself, in order to avoid tokenism.³⁷⁷ As identified in section 1.4, inherent in such genuine participation is the requirement of participation in constructing the norms of participation. Therefore, the emphasis on participation being active, effective, genuine and meaningful as discussed above indicates that such participation must encompass determination of the norms of participation.

Furthermore, if participation in human rights is to be empowering, both in terms of enabling people to have the capacity to make decisions and in terms of those decisions effecting genuine change, then those individuals must also participate in the determination of the norms of participation in human rights. Human rights is concerned with the empowerment of the many, rather than the tyranny of the few. It therefore requires that its norms, including norms of participation, are not just developed by and therefore reflect the concerns of those in power but provide a means to include the voices and protect and promote the interests of all individuals, and in particular the disempowered and marginalised. In order for human rights to enable empowerment, the way in which people participate in its definition and application

³⁷⁶ Limitations on participatory rights are further examined in Chapter 2, section 3.1

³⁷⁷ Ang et al, 2006: 232

must be open to challenge and redefinition, rather than being immutable and incontestable. The norms of human rights must be meaningful to those whom it is intended to protect, otherwise human rights runs the risk of being co-opted as a means of control oriented to particular interests. Only such bottom-up participation will bring about real change, as existing power structures are unlikely to volunteer to relinquish sufficient power to bring about such change.³⁷⁸

However, this is a difficult and complex issue. It is easy to say that human rights requires participation in the construction of the norms of participation, that it implies a right to define how and who and to what end participation occurs. Universal participation in the definition of the norms of participation is, however, impossible to achieve. Such norms would constantly be challenged and redefined and therefore there would be no basis upon which to ground legitimate participation. Human rights therefore requires in theory a concept of participation in the norms of participation which is not achievable in practice. This demonstrates an inherent tension concerning participation in human rights; however it is essential to consider this issue, as it is a means to examine underlying power structures. The analysis must therefore focus on the extent to which human rights requires the existence of opportunities to challenge and redefine the norms of participation, as this clearly cannot be absolute.

Concluding remarks

This chapter has recognised that participation is a complex, contextual and contested concept. However, it is possible to explore the various meanings of participation in

³⁷⁸ Kenny, 2000: 18

relation to its modes, purposes, practicalities and norms. Concerning the modes of participation, discussion of private and public forms of participation identified the importance of understanding public and private participation in terms of both actors and spheres of action. Analysis of formal and informal participation showed that whilst informal activities may be hugely influential, only formalised types of participation can provide a guaranteed input into decision-making. Exploration of direct and representative forms identified significant problems with reliance on representative democracy, but also acknowledged problematic elements of more direct forms. The discussion of gradations of participation demonstrated that it may be active or passive, and that it may be manipulated and tokenistic. Finally, consideration of the levels of participation identified the importance of participation beyond the national sphere, particularly in an increasingly globalised world.

The analysis then considered the purposes to which participation may be oriented. It discussed how participation has both communal and individual aspects, and has been considered both as a substantive end in itself, or as a means to achieve other purposes. Participation could be used either as a means to empower or to control, and it was also identified as an important way to confer legitimacy on outcomes. Discussion of the feasibility of participation identified that there are significant barriers to both the opportunity and the ability to participate, including socio-economic status, ethnic or gender identity, educational background and motivation. Finally, analysis of the norms of participation demonstrated how participatory structures are themselves defined by different types of participation, and revealed how different interests exert control through determining norms of participation.

In Part 2, this chapter identified key characteristics of human rights: universality, empowerment, dignity and justice. It applied these fundamental principles to the concept of participation, in order to produce a human rights based typology of participation. This chapter has established that human rights requires active, reflexive and meaningful participation with broad application oriented to enabling individuals both to enjoy their rights and to hold states accountable for failures. The application of the key principles of human rights has resulted in a specific understanding of the type of participation most appropriate for human rights. The task of the following three chapters is to consider how far the principles and structures of human rights reflect this particular concept of participation.

Chapter 2: Participation and principles of human rights law

Chapter 1 identified that participation is a complex, contested and contextual concept, with a multiplicity of potential meanings and understandings.³⁷⁹ It subsequently identified the particular type(s) of participation appropriate for human rights, as derived from the fundamental characteristics of human rights.³⁸⁰ Chapter 2 now begins the substantive analysis of the degree to which this particular concept of participation is manifested in and enabled by the principles and structures of international human rights law. The purpose of this Chapter is to analyse how far the concept of participation reflected in principles of international human rights law corresponds to the type of participation identified as appropriate for human rights. This comparison consequently enables assessment of the degree to which human rights legal principles manifest human rights ideology in the context of participation.³⁸¹

As Redgewell identifies, there is no single international instrument which gives a general right of participation.³⁸² Consequently, various principles of international human rights law concerned with participation will be examined in order to identify what concept of participation human rights law as a whole reflects. These principles may be considered ‘international participatory rights’, and consequently function either directly or implicitly to enable participation. They comprise both specific norms

³⁷⁹ Chapter 1, Part 1

³⁸⁰ Chapter 1, Part 2, Section 2.2

³⁸¹ This Chapter will not explore the implications of this comparison as these will be addressed in Chapter 5.

³⁸² Redgewell, 2002, 189

which protect rights of participation – for example the right to participate in culture, rights of political participation, and rights which protect vulnerable groups' participation – and rights which can enable participation, which include the rights to freedom of expression and education.

The discussion will in Parts 1 to 4 respectively examine these participatory rights in relation to the four elements of participation identified in Chapter 1: the modes, purpose, feasibility and norms of participation. This will enable consideration of what the content of these participatory rights indicates about the meaning of participation displayed by principles of international human rights law. This analysis will facilitate comparison between the type of participation appropriate to human rights and the type reflected in human rights principles.

The analysis will draw upon both 'hard' and 'soft' law,³⁸³ including consideration of the UN Declarations on the right to development and the rights of minorities and indigenous peoples. The intention is not to consider the legal status of participation within human rights, but rather to explore what concept of participation is presented by the principles of international human rights law. Soft law instruments are therefore of value, as they enhance understanding of the normative content of human rights.

³⁸³ Soft law is also considered in Chapter 3

Part 1: Modes of participation as reflected in principles of international human rights law

1.1: Public and private participation: political, cultural and social rights

The protection of public and political forms of participation is clearly reflected in principles of human rights law. The right to participate in the public arena is primarily protected via the various political participatory rights, which govern how and on what basis individuals may participate in political, and therefore public, activities.

The right to vote in elections is the main way in which individuals exercise their rights of political participation. The right to participate via voting in elections is found in the UDHR Article 21(3), the ICCPR Article 25(b), and in the American³⁸⁴ and European systems.³⁸⁵ The African Charter on Human and Peoples' Rights (AfCHPR) does not specify the right to vote in elections but the more vague right to "participate freely in government... through freely chosen representatives".³⁸⁶ The content of the right to vote in elections has received specific development within the Human Rights Committee's (HRC) General Comment 25 (GC 25) which identifies that it must at a minimum satisfy several basic criteria comprising elections by free and universal suffrage, by secret ballot, at periodic intervals, and without discrimination against voters or candidates.³⁸⁷ The right to vote in elections therefore provides for a specific means of public participation.

³⁸⁴ Article 23(b) of the American Convention on Human Rights

³⁸⁵ Article 3 of the First Optional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

³⁸⁶ AfCHPR Article 13

³⁸⁷ HRC General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, paras. 9-11, see also Fox (1992), 552

A broader concept of public participation is indicated by the right to participate in public affairs.³⁸⁸ GC 25 elaborates the content of the right to participate in public affairs in paragraph 5:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. 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.

GC 25 also identifies the rights of freedom of expression, assembly and association as constitutive aspects of the right to participate in public affairs,³⁸⁹ and recognizes the right to vote and to stand in elections as one means to participate in the conduct of public affairs.³⁹⁰ The HRC has stated that “the rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content”.³⁹¹ The right to participate in public affairs therefore potentially provides for a wider range of public participatory activities.³⁹²

Rights which protect public forms of participation are also found within environmental law, which has been described as “the ‘crucible’ in which the international law of public participation has been forged foremost and furthest”.³⁹³ It is therefore of value briefly to examine how environmental law conceives of these rights by way of comparison with international human rights law. The Convention on

³⁸⁸ UDHR, Article 21(a); ICCPR, Article 25(a); AmCHR, Article 23(a); AfCHPR, Article 13(1)

³⁸⁹ Para. 8

³⁹⁰ Paras. 6 and 9

³⁹¹ *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), A/51/40 vol. II, 12 July 1996, 17, para 7.5

³⁹² Also see further discussion in sections 1.2 and 1.3 below of the content and implications of the right to participate in public affairs.

³⁹³ Pring and Noe, 2002: 28

Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) is the only international legal instrument which specifically places participation in the context of rights, and is concerned with a ‘right to participation’. The Convention explicitly protects the right to *public* participation.³⁹⁴ Participatory rights as protected in the Aarhus Convention enable the public to submit, either in writing or in person, any comments, information, analyses or opinions that it considers relevant to the proposed activity.³⁹⁵ The right to public participation is further supported by the rights of access to justice³⁹⁶ and to information.³⁹⁷ However, participation in the Convention is restricted to decision-making concerning particular environmental activities, as detailed in Annex 1,³⁹⁸ or as determined by States parties.³⁹⁹ This does not allow for any wider participation in determining when the public can participate. In addition, it has significant limitations concerning the actions of private entities, whom States parties may only “encourage” to disseminate information,⁴⁰⁰ and who can refuse disclosure on the grounds of commercial confidentiality.⁴⁰¹ Whilst the Aarhus Convention is important because it integrates human rights and environmental norms⁴⁰² in the context of participation, and explicitly links decision-making with access to information and to justice,⁴⁰³ it presents a narrow and restricted concept of public participation.

Private rights of participation are also recognised and protected by international human rights principles. For example, the right to participate in cultural life is found

³⁹⁴ Article 6

³⁹⁵ Article 6(7)

³⁹⁶ Article 9

³⁹⁷ Article 4 and 5

³⁹⁸ Article 6(1) (a)

³⁹⁹ Article 6(1) (b)

⁴⁰⁰ Article 5(6)

⁴⁰¹ Article 4(4) (d)

⁴⁰² Morgera, 2005: 139

⁴⁰³ See also discussion in Chapter 4 on access as a form of participation in human rights.

in a range of human rights treaties.⁴⁰⁴ Although the exact content and scope of this right is unclear, due to the difficulty in defining ‘cultural life’,⁴⁰⁵ state reports and the concluding observations of the CESCR indicate a broad concept of cultural life, which includes visual and performing arts, folk arts, literature, crafts, cultural industries and institutions, such as cinemas, theatres and museums, the protection of cultural heritage, and the situation of minority cultures.⁴⁰⁶ Cultural participation can include particular use of land resources through economic activities such as hunting and fishing,⁴⁰⁷ or animal husbandry,⁴⁰⁸ and also requires inclusion in the sources of cultural expression and communication.⁴⁰⁹ The right to participate in cultural life therefore provides for participation via a range of private, or non-political, activities. Furthermore, the right to religious participation implicit in the right to freedom of religion⁴¹⁰ demonstrates the protection of an additional form of private participation, related to cultural rights of participation.

The right to participate in family life also indicates the recognition and protection of private forms of participation, although this right is more implied than specific within international human rights law. The right to family life is found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴¹¹ and the American Convention on Human Rights (AmCHR)⁴¹² which give men and women of marriageable age the right to marry and found a family. However,

⁴⁰⁴ *inter alia* ICERD Article 5(e)(vi); ICCPR Article 27; ICESCR Article 15; ICEDAW Article 13(c); ICRC Article 31

⁴⁰⁵ Donders, 2008: 2

⁴⁰⁶ Donders, 2008: 5-6

⁴⁰⁷ *Diergaardt et al. v. Namibia* (760/1997), A/55/40 vol. II, 25 July 2000, 140, para. 10.6; see also *Howard v. Canada* (879/1998), A/60/40 vol. II, 26 July 2005, 12, para 12.4

⁴⁰⁸ *Äärelä and Nakkäläjäru v. Finland* (779/1997), A/57/40 vol. II, 24 October 2001, 117, para 7.5

⁴⁰⁹ Smiers, 2008: 2

⁴¹⁰ ICCPR, Article 18; ECHR Article 9; AmCHR, Article 12; AfCHPR, Article 8

⁴¹¹ Article 12

⁴¹² Article 17(2)

whilst Article 10 of the ICESCR refers to the special protection of the family as the “natural and fundamental group unit of society”, it does not indicate a specific right to participate in family life. The AfCHPR, similarly to the ICESCR, provides for special protection for the family as a unit but does not give a specific right to participation in family life.⁴¹³ The ICEDAW⁴¹⁴ and the International Convention on the Rights of the Child (ICRC)⁴¹⁵ imply a general right to participate in family life through guaranteeing the specific rights of women and children to such participation. The right to participate in family life is important as it contains both the right to participate in the private, internal structures of participation within the family unit, and the right to participate in the private decision to create a family unit.⁴¹⁶ The human rights norms of non-discrimination and equality are also applied to the private rights of participation both to create and within the family.⁴¹⁷

It is clear, however, that the public and private elements of participation are not conceived as separate by international human rights law principles. Rights of assembly, association and expression enable both private and public forms of participation, as they support both public and private participatory rights. Baderin identifies that these rights, among others, enable participation in cultural life,⁴¹⁸ Franck that they are “essential preconditions for an open electoral process”⁴¹⁹. This is specifically illustrated in Article 16(1) of the AmCHR which protects freedom of association “for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes”, thus expressly recognizing both the private and public

⁴¹³ Article 18(1)

⁴¹⁴ Article 16

⁴¹⁵ ICRC Articles 7(1) and 9

⁴¹⁶ HRC General Comment 19 refers to the “right to found a family”, 27 July 1990, para. 5

⁴¹⁷ ICEDAW Article 16; see also Article 5 of Protocol 7 to the ECHR; AmCHR Article 17(3) and 17(4)

⁴¹⁸ Baderin, 2003: 214

⁴¹⁹ Franck, 1992: 61

elements of this right.⁴²⁰ Similarly, the right of freedom of religion incorporates both aspects of participation as it may be exercised both in public and in private.⁴²¹ Furthermore, Article 8(2) of the Declaration on the Right to Development (DRD) explicitly links participation with the realisation of all other human rights, thus identifying the importance of participation in both the public and private spheres.

Principles of human rights law recognise that private and public forms of participation interact with and impact upon one another. For example, in centralising the family as the fundamental unit of society⁴²² and emphasizing the importance of the family for personal development and socialisation⁴²³ such private structures of participation are presented as having a wider influence. Private norms of participation may specifically affect public structures: as the CEDAW has identified, “in all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life”.⁴²⁴ In addition, participation in political or public life and decision-making processes “determine the pattern of... daily lives and the future of societies”;⁴²⁵ consequently public participation can also affect private forms. Principles of human rights therefore recognise both the existence of and the mutually constitutive relationship between private and public forms of participation.

⁴²⁰ See also *Wallman v. Austria* (1002/2001), A/59/40 vol. II, 1 April 2004, 183, para 9.4 regarding the right to association as protecting participation in private organisations.

⁴²¹ ICCPR 18(1); ECHR, Article 9(1); AmCHR Article 12(1)

⁴²² ICRC Article 10, ICMW Article 44(1), ICESCR Article 10(1)

⁴²³ CRC/C/24, 8 March 1994, Annex V, para. 2.2

⁴²⁴ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 10

⁴²⁵ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 9

It must be noted that human rights has been accused of prioritising the public over the private,⁴²⁶ which echoes the focus on public forms of participation with theories of participation.⁴²⁷ Whilst this was clearly reflected in the traditional focus on civil and political over economic, social and cultural rights by States and some NGOs,⁴²⁸ principles of human rights law themselves have from the UDHR onwards taken account of private as well as public forms of participation, and, in principle if not in practice, have not prioritised the latter over the former. Furthermore, the lower status accorded to the private sphere has been implicitly recognised as a problem to be addressed:

Public and private spheres of human activity have always been considered distinct, and have been regulated accordingly. Invariably, women have been assigned to the private or domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior. By contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.⁴²⁹

Unfortunately, this General Recommendation does not identify that one solution is the recognition of the equal status of the private sphere; rather, it is concerned with the promotion of participation by women in the public sphere.⁴³⁰ The ICEDAW is, however, essentially concerned with the promotion of the equality with women, and this implies enhanced status for the private participation with which women are traditionally associated.

⁴²⁶ Peterson, 1990: 315; Byrnes, 1992: 213

⁴²⁷ Chapter 1, section 1.1.1

⁴²⁸ Mutua, 2001: 155-157

⁴²⁹ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 8

⁴³⁰ In particular see para. 17

1.2: Rights of formal and informal participation

Formal modes of participation are primarily reflected in political participatory rights, which protect formal participatory activities including voting, standing for election and taking part in public affairs. As detailed above, this latter right includes participation in legislative, executive and administrative matters, and in the formation of policy. In addition, rights which provide for legal participation, that is, the rights of recognition as a person before the law,⁴³¹ or recognition of legal status,⁴³² and to effective remedy,⁴³³ also enable formal means of participation. Both of these principles protect the right to participate in formally constituted legal structures which guarantee the protection of human rights.

Political rights, in particular the right to participate in public affairs, also indicate the potential for recognition and protection of informal modes of participation. There are, however, differing interpretations of the rights to participate in public affairs. The right to participate in *public affairs* is found in Article 25(a) of the ICCPR and Article 23(a) of the AmCHR. In contrast, Article 21(a) of the UDHR and Article 13(1) of the AfCHPR refer to the right to *take part in government*. This implies a more restricted concept of participation, as it implicitly excludes non-governmental political activity such as participation in civil society, the media and protest against the government, and therefore only protects formal modes of participation.

Furthermore, GC 25 reflects a narrow understanding of participation in public affairs as it relates only to public administration and the formulation and implementation of public policy. A more extensive right of participation in public affairs is reflected in

⁴³¹ UDHR Article 6, ICCPR Article 16, AmCHR Article 3

⁴³² AfCHPR Article 5

⁴³³ ICCPR Article 2(3); ICERD Article 6; ECHR Article 13, AmCHR Article 25, AfCHPR Article 7.1

the ICEDAW, which expands the content of the right to specify additional rights to participate in non-governmental organisations⁴³⁴ and to participate on the international level either as government representatives or through the work of international organisations.⁴³⁵ General Recommendation 23 also widens the concept of the right to participate in public affairs, through adding the following to the definition in GC 25:

The concept [of the political and public life of a country] also includes many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life.⁴³⁶

The ICEDAW thus indicates a broader concept of participation in public affairs, reflecting a definition of public political activity which goes beyond formal participation in government institutions and structures to include informal participation in wider civil society.⁴³⁷ This interpretation is also reflected in the International Convention on the Rights of Persons with Disabilities (ICPD), which considers participation in both “non-governmental organizations and associations concerned with the public and political life of the country” and in “organizations of persons with disabilities to represent persons with disabilities” as included in the content of the right of persons with disabilities to participate in public affairs.⁴³⁸ Both the ICEDAW and the ICPD therefore recognise that participation in public affairs encompasses both formal and informal modes of participation.

⁴³⁴ Article 7(c)

⁴³⁵ Article 8

⁴³⁶ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para. 5

⁴³⁷ Drydyk, 2005: 253-254

⁴³⁸ ICPD, Article 29(b)

Constitutive political participatory rights of freedom of expression, assembly and association also protect informal modes of participation. They support and promote participation in the public and political arenas, through providing means for individuals' voices to be heard and for them to have influence over political decision-makers. The rights of freedom of association, assembly and expression therefore imply a right to political participation via modes other than by participation in the formal governmental structures of a state. For example, the right to freedom of expression enables different forms of participation though protecting the right of the individual to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".⁴³⁹ Activities such as banner waving,⁴⁴⁰ issuing a statement in support of a strike,⁴⁴¹ reading out and distributing printed material,⁴⁴² creating a work of art⁴⁴³ and participating in peaceful demonstrations⁴⁴⁴ which are protected under the right of freedom of expression constitute examples of informal modes of participation. Furthermore, the HRC has interpreted the means of expression protected by Article 19 as broad ranging, and not solely limited to political expression:

Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression.⁴⁴⁵

⁴³⁹ ICCPR, Article 19(2); see also ICRC Article 13(1); ICMW Article 13(2)

⁴⁴⁰ *Kivenmaa v. Finland* (412/1990), A/49/40 vol. II, 31 March 1994, 85, para 9.3; see also *Dergachev v. Belarus* (921/2000) A/57/40 vol. II, 2 April 2002, 252, para. 7.2

⁴⁴¹ *Sohn v. Republic of Korea* (518/1992), A/50/40 vol. II, 19 July 1995, 98, para 10.2-10.4

⁴⁴² *Kim v. Republic of Korea* (574/1994), A/54/40 vol. II, 3 November 1998, 1, para 12.4; see also *Laptsevich v. Belarus* (780/1997), A/55/40 vol. II, 20 March 2000, 178, para 2

⁴⁴³ *Shin v. Republic of Korea* (926/2000), A/59/40 vol. II, 16 March 2004, 118, para. 7.2

⁴⁴⁴ *Park v. Republic of Korea* (628/1995), A/54/40 vol. II, 20 October 1998, 85, para 2.4

⁴⁴⁵ *Davidson and McIntyre v. Canada* (359/1989 and 385/1989), A/48/40 vol. II, 31 March 1993, 91, para. 11.3

This right protects informal means of participation in both the public and private arenas, and provides for a wide range of informal participatory activities. It should be noted that the right to assembly does not extend to violent protest,⁴⁴⁶ thus indicating limits on the types of informal participation protected.

1.3: Human rights principles and representative and direct participation

Understandings of participation as direct or representative are most clearly illustrated in the political context.⁴⁴⁷ Examination of political participatory rights is therefore a useful indicator of the extent to which human rights principles conceive of participation as representative or direct.

Firstly, the right to self-determination⁴⁴⁸ potentially implies a radical and expansive understanding of the right to political participation, as it could be interpreted as requiring an absolute right to participate in the determination of a group's political destiny, either within or outside a state, thus implying a right of secession or independence.⁴⁴⁹ This interpretation of the right to self-determination would enable broad ranging rights of participation in public affairs, to the extent of facilitating direct participation in the definition of both public affairs and structures of participation separate to state-defined norms of participation. It furthermore potentially implies a radical reconsideration of inclusion regarding direct forms of participation in political decision-making.⁴⁵⁰

⁴⁴⁶ AmCHR Article 15, ICCPR Article 21

⁴⁴⁷ See Chapter 1, section 1.1.3 on the distinction between representative and direct forms of democracy.

⁴⁴⁸ Common Article 1 of the ICCPR and ICESCR; Un Charter, Article 1(2)

⁴⁴⁹ Myntti, 1996: 14

⁴⁵⁰ Knop, 2002: 13

However, in practice the right to self-determination operates within a specific post-colonial political context and has not been considered to give a general right of secession. There are therefore major uncertainties regarding the application and interpretation of the right to self-determination outside the colonial context,⁴⁵¹ and it cannot be considered to enable such broad and revolutionary direct rights of participation. The participatory aspects of the right to self-determination are considered satisfied in a non-colonial context by the fulfilment of rights of political participation in a non-discriminatory manner.⁴⁵² The CERD considers the internal elements of the right to self-determination to be linked to the right to take part in public affairs without discrimination and the obligation of the government to represent the whole population without distinction.⁴⁵³ The right to self-determination is therefore fulfilled through representation; that a government represents the whole of the people within its territory in a non-discriminatory way.⁴⁵⁴

Secondly, the right to participate in public affairs would seem to indicate more direct forms of participation than the right to vote in elections, which is clearly a representative means to participate. For example, the right to stand in elections as found in the ICCPR⁴⁵⁵ and the AmCHR⁴⁵⁶ is identified by GC 25⁴⁵⁷ as providing a potential means for the individual to directly participate in public affairs.⁴⁵⁸

Furthermore, the elements of the right to participate in public affairs as understood by

⁴⁵¹ Crawford, 2005: 10

⁴⁵² Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 130

⁴⁵³ CERD General Recommendation 21, 23 August 1996, para. 4

⁴⁵⁴ Crawford, 2005: 57

⁴⁵⁵ Article 25(b). In addition, Fox 560-565 identifies case law of the European Commission and Court as indicating that the ECHR provides similar guarantees to those contained in the ICCPR.

⁴⁵⁶ Article 23(b)

⁴⁵⁷ Paras. 6 and 9

⁴⁵⁸ See also *Bwalya v Zambia* (314/1988) CCPR/C/48/D/314/1988, 27 July 1993, para. 6.6 which identifies the right to stand for election as part of the right to participate in public affairs.

both the CEDAW and the HRC seem to envisage direct forms of participation, whether these are limited to participation in public institutions and the formation of public policy, or extended to participation in civil society and on the national level.⁴⁵⁹

However, the exact forms of participation required by the right to participate in public affairs are unclear. In contrast to the right to vote in elections, the content of the right to participate in public affairs remains vague and abstract.⁴⁶⁰ Very little attention is given in GC 25 to the content of the right to participate in public affairs in comparison to that given to the right to vote in elections: it is much less developed and specific. Fundamentally, the right to participate in public affairs is fulfilled through representative forms of participation. The phrase used in the ICCPR Article 25⁴⁶¹ “directly *or* through freely chosen representatives” (emphasis added) indicates that the right to participate in public affairs does not require opportunities for direct participation in particular decision-making processes by individuals but would be satisfied via the right to vote in democratic elections. The HRC has viewed the right to participate in public affairs as being fulfilled through debate and dialogue with representatives, and the right to form associations, rather than through direct influence over decision-making processes.⁴⁶² In *Mikmaq Tribal Society v Canada*, the Committee determined that public affairs are the task of representatives as “article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct

⁴⁵⁹ See Chapter 2, section 1.2 above

⁴⁶⁰ Steiner, 1988: 78

⁴⁶¹ Also AmCHR, Article 23(1)(a)

⁴⁶² *Beydon v France*, (1400/2005) CCPR/C/85/D/1400/2005, 28 November 2005, para. 4.5; *Brun v France* (1453/2006) CCPR/C/88/D/1453/2006, 23 November 2006, para. 6.4

participation by the citizens, far beyond the scope of article 25 (a)",⁴⁶³ consequently indicating that the right to take part in public affairs is fulfilled via representative rather than direct means.

Furthermore, the concept and promotion of a 'right to democracy' indicates that the essential way in which rights of political participation are conceived within international human rights law is via representative structures. Whilst Steiner argues that the ICCPR Article 25 does not prioritise one political tradition over another,⁴⁶⁴ more recent commentary proposes that the right to vote in elections, as an essential element of the right to a democratic system of governance, is developing the status of a universal norm.⁴⁶⁵ Whilst recognising that "the right to political participation leaves room for a wide variety of forms of government", the Inter-American Commission on Human Rights (Inter-American Commission) has emphasized the "fundamental importance of representative democracy as a legitimate mechanism for achieving the realization of and respect for human rights; and as a human right itself" and that it is "therefore of the view that those provisions of the system's human rights instruments that guarantee political rights...must be interpreted and applied so as to give meaningful effect to exercise of representative democracy".⁴⁶⁶ The General Assembly also considers the right to participate in government via elections as essential for the realisation of other human rights.⁴⁶⁷ Furthermore, the ECHR only recognises political participation via the right to vote in elections, making no mention of participation in public affairs. Representative participation via the right to vote in elections is thus

⁴⁶³ *Mikmaq Tribal Society v. Canada* (205/1986), A/47/40, 4 November 1991, 205, para 5.5

⁴⁶⁴ Steiner, 1988: 87

⁴⁶⁵ Fox, 1992: 588; Franck, 1992: 46-91

⁴⁶⁶ *Statehood Solidarity Committee vs. United States*, Case 11.204, Report No. 98/03, para 85-87

⁴⁶⁷ Resolution 46/137, 17 December 1991, para. 3

essentialised as the primary means by which individuals exercise their political participatory rights.

This analysis demonstrates that, although initial examination of the content of political participatory rights indicates the potential for direct and wide ranging forms of participation, in practice these rights predominantly defer to representative means. The right to vote in elections is clearly structured around participation via representation; furthermore, the rights to self-determination and to participate in public affairs are also considered fulfilled via representative means. The right to self-determination is fulfilled by the right to participate in public affairs and the right to participate in public affairs is fulfilled by the right to vote in elections. It should however be noted that although participation in public affairs is satisfied by representative structures of participation, the HRC has indicated that this does not necessarily exclude its fulfilment via more direct forms of democracy.⁴⁶⁸

However, although the basic political participatory rights prioritise representative participation, constitutive political rights are more clearly concerned with direct participation. Freedom of association may lead to direct participation in an organisation such as a trade union or NGO. Within these organisations, modes of participation may then be oriented towards direct or representative structures.⁴⁶⁹ Such activities may consequently promote more direct and active forms of political participation than those oriented to structures of representation.

⁴⁶⁸ A/53/40 Vol. I, 1998, para 135

⁴⁶⁹ See Chapter 5, section 2.2.1 for analysis of the internal decision-making structures of human rights NGOs.

Direct forms of participation are also implied by rights which provide for legal participation as detailed above.⁴⁷⁰ The *travaux préparatoires* of the ICCPR confirm that the right to recognition as a person before the law is intended to ensure the recognition of the legal status and capacity to exercise rights of every individual.⁴⁷¹ This importance of recognition of legal status as a means to exercise rights has also been corroborated by the CERD.⁴⁷² The right to effective remedy requires that victims have access to remedial procedures.⁴⁷³ These rights of legal participation operate on an individual basis and therefore require the individual to have direct access to legal means to challenge rights violations and receive redress. The right to have the capacity to exercise rights and to a remedy cannot be fulfilled through mediated or representative formats; they must be enjoyed directly by the individual.

Finally, the importance of direct forms of participation is recognised by the Committee on the Rights of the Child (CRC), which has stated that

It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions. In the early years of the Convention, NGOs had played a notable role in pioneering participatory approaches with children, but it is in the interests of both Governments and children to have appropriate direct contact.⁴⁷⁴

The CRC therefore prioritizes direct forms of participation over representative structures. Such direct participation is considered important as it is in many cases the only way to ascertain the extent to which children's rights are being protected.⁴⁷⁵ Similarly, the CESCR has identified that participation via voting in elections is "not enough to ensure that those living in poverty enjoy the right to participate in key

⁴⁷⁰ Chapter 2, section 1.2 above

⁴⁷¹ Bossuyt, 1987: 336

⁴⁷² A/59/18, 2004, para. 193

⁴⁷³ Shelton, 2005: 8

⁴⁷⁴ CRC General Comment 5, CRC/GC/2003/5, 27 November 2003, para 12

⁴⁷⁵ CRC General Comment 5, CRC/GC/2003/5, 27 November 2003 para 50

decisions affecting their lives".⁴⁷⁶ It is therefore clear that there is some recognition within human rights principles of the value of and need for direct forms of participation.

1.4: Gradations of participation: active, effective and meaningful

There are numerous references within human rights principles to the nature of the participation required., The value of *active* participation is clearly recognised within Article 2(3) of the DRD, which explicitly identifies that participation is to be 'active, free and meaningful'., By presenting individuals as the subjects rather than objects of development⁴⁷⁷ the right to development reflects an active rather than passive concept of participation., The right to recognition as a person before the law through protecting the capacity to exercise rights of every individual⁴⁷⁸ presents a concept of autonomous individual participation. Similarly, the ICPD emphasizes the importance of active participation in decision-making concerning persons with disabilities, to enable their own individual autonomy and independence.⁴⁷⁹

The right to participate in cultural life also indicates an active rather than passive concept of participation. Thornberry considers the right to take part in culture as having a "dynamic, agency-directed aspect".⁴⁸⁰ Both Smiers and Donders argue for an active interpretation of participation in cultural life; Donders by contrasting activity to access,⁴⁸¹ and Smiers active creation to passive consumption of cultural

⁴⁷⁶ E/C.12/2001/10, 10 May 2000, para 12

⁴⁷⁷ Salomon, 2003: 4

⁴⁷⁸ See Chapter 2, section 1.2 above

⁴⁷⁹ ICPD, Preamble, paras. (n) and (o), see also Article 4 (3)

⁴⁸⁰ Thornberry, 2008: 7

⁴⁸¹ Donders, 2008: 5

expressions.⁴⁸² Individuals living within groups are free to participate or not in the cultural practices of the group and no negative consequences may ensue because of their choice; the cultural autonomy of the individual is guaranteed.⁴⁸³ The right to participate in culture therefore promotes an active conception of participation; moreover, such active participation is voluntary rather than coerced. For example, Article 31 of the ICRC refers to the right of the child to ‘participate freely’ in cultural life. The right to freedom to have or adopt religion is also to be free from coercion.⁴⁸⁴ In addition, a concept of participation as active and voluntary is reflected in the right to freedom of association which requires that such association must be voluntary; no one should be compelled to join an association against their will.⁴⁸⁵ Principles of human rights law therefore present a concept of participation as being active and freely undertaken.

The importance of active participation by children is also specifically identified. The principles of ‘the best interests of the child’,⁴⁸⁶ and ‘the right of the child to be heard’,⁴⁸⁷ present a concept of active participation, as the identification of the child’s interests as separate from those of the parents identifies the child as an autonomous individual. The CRC considers ‘active’ participation as being in the spirit of Article 12,⁴⁸⁸ generally considers “the child as an active participant in the promotion, protection and monitoring of his or her rights”,⁴⁸⁹ and specifically identifies

⁴⁸² Smiers, 2008: 2

⁴⁸³ Stamatopoulou, 2008: 6

⁴⁸⁴ ICCPR, Article 18(2)

⁴⁸⁵ Bossuyt, 1987: 433; AfCHPR, Article 10(2)

⁴⁸⁶ ICRC 3(1)

⁴⁸⁷ ICRC Article 12

⁴⁸⁸ CRC/C/121 11 December 2002, para. 58(a)

⁴⁸⁹ CRC General Comment 5, CRC/GC/2003/5, 27 November 2003, para 12

adolescents as “active rights holders”.⁴⁹⁰ Active rather than passive participation by children is considered more beneficial for the protection of their rights:

Interventions have been found to benefit children most when they are actively involved in assessing needs, devising solutions, shaping strategies and carrying them out rather than being seen as objects for whom decisions are made.⁴⁹¹

In addition, human rights principles consider that participation should be *meaningful* and *effective*. The ICPD emphasizes the importance of “full and effective participation and inclusion in society”.⁴⁹² Similarly, the CRC refers to “meaningful and effective participation”,⁴⁹³ and indicates that this entails that children are “adequately informed on how they can have input into policies that affect them, [and] how their views will be taken into consideration once they have been solicited”.⁴⁹⁴ GC 5 elaborates:

If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to “listen” to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights.⁴⁹⁵

Similarly, minorities “have the right to participate effectively in cultural, religious, social, economic and public life”,⁴⁹⁶ and states are obliged to “ensure the effective participation of members of minority communities in decisions which affect them”.⁴⁹⁷ The conditioning of participation as effective implies a significant role in the formulation and implementation of policy.⁴⁹⁸ Such participation requires that states consult with and seek the consent of these groups prior to the implementation of

⁴⁹⁰ CRC General Comment 4, CRC/GC/2003/4, 1 July 2003, para 7; see also para. 8 which refers to the equal participation of adolescents in the decision making process.

⁴⁹¹ CRC General Comment 3, CRC/GC/2003/3, 17 March 2003, para 12

⁴⁹² Article 3(c)

⁴⁹³ CRC/C/121, 11 December 2002, para. 122

⁴⁹⁴ CRC/C/118, 3 September 2002, para 112

⁴⁹⁵ CRC General Comment 5, CRC/GC/2003/5, 27 November 2003, para 12

⁴⁹⁶ DRM, Article 2(2)

⁴⁹⁷ HRC General Comment 23, CCPR/C/21/Rev.1/Add.5, 08/04/94, para 7; see also DRM Article 2(3)

⁴⁹⁸ Myntii, 1996: 11.

public policies which will affect them.⁴⁹⁹ States are also required to obtain the consent of indigenous peoples before adopting measures that may affect them; the Declaration on the Rights of Indigenous Peoples (DIP) determines that such consent is to be “free, prior and informed”.⁵⁰⁰ This consent consequently must not be manipulated or coerced, and should be accurate and accessible, and provided in a spirit of good faith.⁵⁰¹

Effective and meaningful participation is also identified as important in other areas of international human rights law. The HRC has recognised that political participatory rights should be exercised “meaningfully”.⁵⁰² The term ‘genuine’ is also used in relation to the right to vote in elections,⁵⁰³ and is further qualified by the phrase “guaranteeing the free expression of the will of the electors”.⁵⁰⁴ Similarly, the Inter-American Commission has emphasized that “the reference to “genuine” elections implies the existence of a legal and institutional structure conducive to election results that reflect the will of the voters”.⁵⁰⁵ Genuine participation in elections therefore requires that both the process and result are free from manipulation, coercion and intimidation.⁵⁰⁶ The HRC has also identified that it is implicit in the enjoyment of the right to participate in government through representatives that “those representatives do in fact exercise governmental power and...are accountable for the exercise of that

⁴⁹⁹ E/2002/22 (Supp), 2002, para 782; A/57/18, 2002, para. 304; E/2005/22, 2004, para. 301.

⁵⁰⁰ Article 19

⁵⁰¹ A/HRC/6/15, 15 Nov 2007, para 23

⁵⁰² *Arenz v. Germany* (1138/2002), A/59/40 vol. II, 24 March 2004, 548, para 8.6

⁵⁰³ UDHR, Article 21(3); ICCPR, Article 25(b)

⁵⁰⁴ ICCPR, Article 25(b)

⁵⁰⁵ Inter-American Commission on Human Rights, 1989, Chapter VIII, para 1

⁵⁰⁶ Fox, 1992: 567

power".⁵⁰⁷ Sengupta also argues that 'effective' participation in the right to development requires transparency and accountability.⁵⁰⁸

Finally, the African Charter for Popular Participation in Development and Transformation (Charter of Arusha) notes that meaningful participation requires the protection of all human rights, making explicit reference to freedom of expression, and also identifying the importance of freedom from fear.⁵⁰⁹ Armed conflict is consequently identified as a major barrier to effective participation.⁵¹⁰ This expands the concept of effective participation as being free from coercion and manipulation to consider the wider human rights context in which such participation takes place. Effective and meaningful participation is therefore identified both as necessary for and affected by human rights protection.

1.5: Participatory rights at the national and international levels

Participation at all levels of national society is recognised and protected by human rights principles. For example, Article 5(c) of the ICERD protects the right to take part in public affairs at any level, the right of women to participate in policy formation and hold public office at all levels is protected by Article 7(b) of the ICEDAW, and the importance of child participation at different levels of society has been established.⁵¹¹ The right of minorities to participate at the national, and potentially the regional level is recognised,⁵¹² and the general provision concerning indigenous

⁵⁰⁷ HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 7

⁵⁰⁸ Sengupta, 2000: 12

⁵⁰⁹ Charter of Arusha, para 17

⁵¹⁰ Charter of Arusha, para 18

⁵¹¹ CRC, 29 September 2006, para 18

⁵¹² DRM, Article 2(3), see also Article 2(2)

peoples' participation in the political, economic, social and cultural life of the State⁵¹³ also indicates recognition of the importance of participation at different levels.

Article 29 of the AfCHPR implies the importance of participation at different levels of society through identifying the duties of the individual towards the family, state and the wider African community. Article 32 (1) of the AmCHR similarly recognises duties towards the family, the community and mankind. Whilst these provisions do not give a right of participation at these levels, they do indicate a conceptualisation of the individual as participating on different levels, thus implicitly recognising the importance of the different levels of participation.

However, participatory rights are predominantly conceived as operating on the national level; they are concerned with participation of individuals in relation to a state. Consequently principles of international human rights law fail to protect a right of participation at the international level. Although the ICEDAW Article 8 protects the right of women to participate on the international level, this is only regarding participation through representation of their state, or taking part in the work of international organisations, rather than on an individual basis. Likewise, the ICPD provides for the right of persons with disabilities to participate at the international, national, regional and local levels through “forming and joining organisations of persons with disabilities to represent persons with disabilities”.⁵¹⁴ Whilst these provisions indicate some rights of international participation, this can only take place as via participation in an international organisation, rather than constituting direct individual participation at the international level.

⁵¹³ DIP, Article 5,

⁵¹⁴ ICPD, Article 29(b) (ii)

Few human rights principles therefore recognise or protect individual participation in matters that affect them above the level of the state. However, some elements of human rights do allude to this international participation. The CESCR General Comment 14 refers to “the participation of the population in all health-related decision-making at the community, national and international levels.”⁵¹⁵ This potentially indicates a right of individual participation in decision-making at the international level, although it may well be that the participation of the population at the international level is satisfied by participation by the state. The right of assembly also protects the right to form an NGO through which individuals can potentially participate on the international level. However, this does not constitute an individual right of participation at the international level; as with the provisions in the ICPD, it allows organisational rather than individual international participation. The Special Rapporteur on the Right to Health has, however, underlined the importance of participation above the national level in relation to recipient participation in the design and implementation of foreign donors’ policies of international assistance.⁵¹⁶ This is an explicit recognition of the value of individual participation at the international level.

The restriction of individual participation to the national level conforms to understandings of human rights as a relationship between a state and those within its jurisdiction. However, analysis of the extra-territorial obligations of states could indicate an expansion of this concept of participation. Skogly argues for the existence of clear obligations in relation to extraterritorial assistance and cooperation stemming

⁵¹⁵ CESCR, General Comment 14, E/C.12/2000/4, 11 August 2000, para 11

⁵¹⁶ A/HRC/7/11/Add.2, 5 March 2008, para. 27(c)

from the provisions of various human rights treaties.⁵¹⁷ This implicitly recognises that states have extra-territorial influence over the enjoyment of human rights in other states. Consequently, if individuals have a right to meaningful and effective participation over human rights issues that affect them, they should be able to participate in the decisions made by these other states which affect their human rights. Although this is a logical corollary of extra-territoriality, the literature has thus far focused on obligations of states rather than extra-territorial rights of individuals which would entail a right of participation at the international level.

1.6: Discussion

Chapter 1 identified that the modes of participation appropriate for human rights must be broad ranging; that they should incorporate both public and private, and formal and informal means of participation. Participation in human rights needs to take place on different levels, including the international level, and should be direct, active, effective and meaningful.

Principles of international human rights law reflect a concept of participation as taking place in both the public and private spheres, and furthermore that such participation encompasses a range of activities including political, social, cultural and economic participation. Principles of human rights law therefore manifest the type of participation appropriate to human rights, and further identify the interplay between public and private modes of participation. The way that participation is reflected in human rights law does not prioritise public over private participation, although the

⁵¹⁷ Skogly, 2006: 83-108

different levels of attention given to rights in practice, and patterns of violation, may indicate a greater concern with public participatory rights.

Similarly, principles of human rights law protect both formal and informal modes of participation, although there do exist conflicting interpretations in different areas of human rights law regarding the extent to which political participatory rights encompass informal rather than formal modes of participation. Some formulations of rights of political participation do not include the right to participate in public affairs, and therefore implicitly exclude informal modes of participation from this particular right. However, those instruments which do this – the UDHR and the AfCHPR – both also include constitutive rights of political participation, which do protect informal participation. Furthermore, whilst GC 25 does not provide for an extensive understanding of participation in public affairs, and appears to subsume it to the right to vote, thus prioritising formal modes of participation, the conceptualisation of participation by the CEDAW and within the ICPD support more informal modes of participation. Additionally, the ICCPR itself protects informal rights of participation, via the various constitutive participatory rights. Principles of human rights law therefore present a conflicting concept of informal participation. In particular, the concept and content of the right to participate in public affairs, and its relationship with constitutive political participatory rights, requires greater attention.

Principles of human rights law clearly identify that participation must be active, effective and meaningful, and participation is characterised in this way with regard to a range of human rights issues. This supports Thornberry's argument that that the use of the term "effective" in the Declaration on the Rights of Persons Belonging to

National or Ethnic, Religious and Linguistic Minorities (DRM) has a fundamental effect on how participation should be understood in relation to other human rights: “the adoption by the General Assembly of the word ‘effective’ to condition participation can be transferred to condition the term in analogous instruments which address general rights”.⁵¹⁸ Whilst the rights of marginalised groups may require specific protection due to their particular vulnerable status, this does not require higher standards of participation than those required by other individuals. Consequently, the type of participation found in vulnerable group rights is also appropriate for rights with general application. The type of participation reflected in human rights principles with regard to gradations of participation therefore corresponds to that identified as appropriate for human rights.

However, regarding both the levels at which individuals may participate, and the nature of that participation as direct or representative, participation as reflected in human rights principles diverges from the type of participation appropriate for human rights, which required direct forms of participation at both the national and international levels. Fundamentally, human rights principles do not protect the right of individuals to participate above the national level in any way separate from their state. This is due to representative forms of participation being prioritised over direct forms, particularly in the political sphere. Although human rights principles do recognise the value of direct forms of participation, those rights which would enable direct and definite participation in decision-making by the state are considered fulfilled by representative forms.

⁵¹⁸ Thornberry, 2008: 8

Human rights principles therefore present a contradiction regarding modes of participation. Whilst the value of effective, active and meaningful participation is clearly identified, the ability of participation in human rights to fulfil these criteria is restricted by its being limited firstly to the national level and secondly to fulfilment via representative means. Direct participation provides a greater guarantee of meaningful and effective influence over decision-making at all levels than that which is mediated through representatives. Direct participation also provides greater opportunities for activity than fulfilment of participatory rights through voting for representatives, as people may not take part, or may feel that their vote counts for nothing. Critically, reliance upon representative rather than direct participation limits the ability of human rights to offer protection above the level of the state. Active, effective and meaningful participation in human rights therefore requires direct participation at the international level.⁵¹⁹ However, this form of participation is not reflected in principles of international human rights law.

Part 2: The purpose of participation as manifested in human rights principles

2.1: Individual and communal participation

Human rights primarily operate on an individual basis, through protecting the rights of individuals. Participatory rights are therefore protected on an individual basis, as demonstrated by terms such as “undertake to ensure to all individuals”,⁵²⁰ and “the right of everyone”.⁵²¹ This indicates that human rights principles consider

⁵¹⁹ See Chapter 5, section 2 for a more detailed analysis of the implications of this contradiction.

⁵²⁰ ICCPR, Article 2

⁵²¹ *Inter alia* ICESCR, Articles 6, 7, 8, 11; CERD Article 6

participation as an individual activity oriented to the protection of individual human rights interests.

There also exists recognition within human rights principles of participation as a communal activity oriented towards collective goals. The right to collective participation is explicitly protected via the right of freedom of assembly. As the HRC has identified, this is a right that “may be enjoyed in community with others”.⁵²² In addition, principles which protect the right of individuals to participate in communities demonstrate recognition of participation as a collective activity. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) protects the right of migrant workers and their families to participate in or be consulted on decisions concerning the life and administration of local communities.⁵²³ Similarly, the ICPD identifies the obligation of states to facilitate participation in the community by persons with disabilities,⁵²⁴ and the DIP recognises that participation may be a communal activity, by protecting the rights of indigenous peoples to belong to a community.⁵²⁵ These principles constitute further rights of communal participation. The importance of participation as part of a community is indicated by provisions regarding individual duties; the AfCHPR recognises the importance of participation as part of a community through asserting the duty of the individual towards the national community⁵²⁶ and the

⁵²² HRC General Comment 31, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para 9

⁵²³ ICMW Article 42; note that this only applies to migrants with regular or documented status

⁵²⁴ ICPD, Article 19

⁵²⁵ DIP, Article 9

⁵²⁶ AfCHPR, Article 29(2)

wider African community,⁵²⁷ and the AmCHR recognises the individual duties towards the community and mankind.⁵²⁸

Certain principles of human rights indicate that participation is not conceived as either individual *or* communal, but that it can be oriented to both types of interest. This is reflected in Article 1 of the DRD which demonstrates both individual and collective understandings of participation: that the right to development protects both the right of “every human person” *and* “all peoples” to participate in development. Similarly, the DRM also recognises that the rights it protects may be exercised both individually and communally.⁵²⁹ Waldron identifies that the right to (political) participation implies the right of the individual to play a part in government, along with an equal part played by other individuals,⁵³⁰ thus identifying participation as an individual right exercised in community with others. Similarly, the right to freedom of religion is recognised by the ECHR as a right which may be exercised both on the individual and communal levels.⁵³¹ The concept of participation reflected in children’s rights considers it to be beneficial for the individual, the family, the community, the State and for democratic society,⁵³² further identifying that participation can be oriented to both collective and individual activities.

⁵²⁷ AfCHPR, Articles 29(7) and 29(8)

⁵²⁸ AmCHR, Article 32(1)

⁵²⁹ DRM, Article 3(1)

⁵³⁰ Waldron, 1998: 312

⁵³¹ ECHR Article 9(1); see also AmCHR, Article 12(1)

⁵³² CRC, 29 September 2006, Preamble to the Recommendations

2.2: Instrumental or substantive participation

Certain elements of international human rights law recognise the importance of participation as a substantive end in itself. The clearest example of this is found within article 2(1) of the DRD: “the human person is the central subject of development and should be the *active participant and beneficiary* of the right to development” (emphasis added). This provision identifies development as a process⁵³³ and therefore gives a right to participate in that process. Both the developmental outcome to be achieved and the process by which it is achieved must fall within a participatory human rights framework; consequently participation in the process by which the right is achieved is as important as the realisation of the right itself,⁵³⁴ Similarly, the Charter of Arusha considers that the process of popular participation is itself of value, as well as being an instrument of development.⁵³⁵ It is an end in itself because it is “the fundamental right of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times”.⁵³⁶

The same principle is found in the context of children’s rights. The CRC has identified that the means by which a participatory right is achieved must be via a process which protects rights of participation; “thus, for example, education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her views freely in accordance with article 12 (1) and to participate

⁵³³ Obiora, 1996: 362

⁵³⁴ Sengupta, 2000: 6; Orford, 2005: 138-9

⁵³⁵ Ginther, 1992: 59

⁵³⁶ Charter of Arusha, para 10

in school life".⁵³⁷ Similarly, the CESCR has identified the importance of obligations of both conduct and result concerning the implementation of rights.⁵³⁸

Human rights principles also recognise participation as fulfilling an instrumental role, and a number of outcomes are identified as resulting from it. Firstly, participation is considered a means to overcome conflict. For example, the preamble to the ICEDAW identifies that equal participation of women is required for development, welfare and peace, thus indicating that exclusion or non-participation is a cause of conflict. Democratic participation is also propounded as a means to promote non-aggression.⁵³⁹ Furthermore, one purpose of education is to overcome conflict and promote understanding between nations, ethnic, racial and religious groups.⁵⁴⁰

Secondly, participation is considered essential for the achievement of other human rights. The DRD identifies participation as a means to realise all other human rights, as per Article 8(2), thus implying an instrumental role for participation in human rights enjoyment. Similarly, the free and equal participation of indigenous peoples is identified as a requirement for the effective protection of their human rights.⁵⁴¹ Participation is specifically linked to economic and social development, with the Charter of Arusha promoting popular participation as essential for nation-building and the improvement of economic conditions,⁵⁴² and identifying it as "the centrepiece in the struggle to achieve economic and social justice for all".⁵⁴³ Likewise, the ICPD considers "full participation by persons with disabilities will result in...significant

⁵³⁷ CRC General Comment 1, CRC/GC/2001/1, 17 April 2001, para 8

⁵³⁸ CESCR General Comment 3, 14 December 1990, para. 1

⁵³⁹ Franck, 1992: 88

⁵⁴⁰ CESCR General Comment 13, E/C.12/1999/10, 8 December 1999, para 4

⁵⁴¹ E/CN.4/2003/90, 21 January 2003, para 70

⁵⁴² para. 7

⁵⁴³ para. 38

advances in the human, social and economic development of society and the eradication of poverty.⁵⁴⁴ More specifically, the CESCR General Comment 15 identifies that “the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water”.⁵⁴⁵ Similarly, General Comment 4 identifies public participation as “indispensable” for the realisation of the right to adequate housing.⁵⁴⁶

Political participatory rights are particularly identified as “an essential precondition to the enjoyment of all other rights”.⁵⁴⁷ For example, the CESCR considers that democracy is “a prerequisite for the development of a system of government that promotes full respect for economic, social and cultural rights”,⁵⁴⁸ implying that democratic forms of political participation are necessary for the protection of human rights. The General Assembly has also identified that the right to participate in government is “a crucial factor in the effective enjoyment by all of a wide range of other human rights”.⁵⁴⁹

Finally, participation is identified as a means to achieve better outcomes. The Preamble to the Aarhus Convention posits that improved public participation in decision-making enhances “the quality and implementation of decisions”. The Human Rights Commission has identified that “in a democracy the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to

⁵⁴⁴ ICPD, Preamble

⁵⁴⁵ CESCR GC 15, E/C.12/2002/11, 20 January 2003, para 48

⁵⁴⁶ CESCR General Comment 4, 13 December 1991, para 9

⁵⁴⁷ Fox, 1992: 595

⁵⁴⁸ E/1999/22, 1998: 27, para 130

⁵⁴⁹ GA Res 45/150 (Dec 18, 1990)

come to agreements on appropriate solutions to the social, economic and cultural problems of a society".⁵⁵⁰ The CESCR has stated that "a policy or programme that is formulated without the active and informed participation of those affected is most unlikely to be effective".⁵⁵¹ The participation of indigenous peoples is identified as contributing to more effective development outcomes.⁵⁵² The CRC explicitly identifies participation as producing more effective human rights protection,⁵⁵³ and also identifies that if national strategies or actions plans for children are to be effective, they must be produced in consultation with children.⁵⁵⁴

2.3: The balance between control and empowerment

Several principles of international human rights law present participation as a means of empowerment. Firstly, the participatory aspects of the right to education are oriented towards empowerment, as education is identified as "an empowerment right... the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".⁵⁵⁵ As Baderin observes, "education is the key to mental liberation".⁵⁵⁶ The DIP also links education to empowerment,⁵⁵⁷ as does the ICPD, which identifies the role of education in enabling effective participation.⁵⁵⁸

⁵⁵⁰ E/CN.4/1995/60 (1995), Preamble

⁵⁵¹ E/C.12/2001/10, 10 May 2000, para 12

⁵⁵² A/HRC/6/15, 15 Nov 2007, para 28-32

⁵⁵³ CRC, General Comment 3, CRC/GC/2003/3 17 March 2003, para 12

⁵⁵⁴ CRC General Comment 5, CRC/GC/2003/5, 27 November 2003, para 29

⁵⁵⁵ CESCR General Comment 13, E/C.12/1999/10, 8 December 1999, para. 1

⁵⁵⁶ Baderin, 2003: 210

⁵⁵⁷ DIP, Article 17(2)

⁵⁵⁸ ICPD, Article 24 (1)(c)

Participation in development is also linked to empowerment. Ginther argues that article 13 of the Charter of Arusha promotes popular participation as a means to ensure community empowerment and self-development.⁵⁵⁹ Furthermore, the active concept of participation presented in the DRD as discussed above⁵⁶⁰ identifies participation as a means of empowerment to build confidence and solidarity.⁵⁶¹ Whilst the degree to which participatory development practices achieve the goal of empowerment has been challenged,⁵⁶² the extent to which development projects promote active participation is in practice variable and the emancipatory possibilities of participation as presented by the right to development therefore remain.⁵⁶³

In addition, rights of legal participation⁵⁶⁴ demonstrate participation as empowerment in relation to claiming rights and challenging abuse. Access to justice is identified in the Aarhus Convention as a means to enable other forms of participation and to ensure accountability. This empowers the individual as it enables them to have greater control over both the way in which decisions are taken and the decisions that are taken. Political participation also is considered a means of empowerment; it is the means by which citizens exercise control over the decisions of their government.⁵⁶⁵

Finally, participation is specifically acknowledged as a means for marginalised groups to become empowered. The CEDAW considers that “women's full participation is essential...for their empowerment”.⁵⁶⁶ The Special Rapporteur on Indigenous Peoples

⁵⁵⁹ Ginther, 1992: 59; see also para. 11 of the Preamble to the Charter of Arusha

⁵⁶⁰ Chapter 2, section 1.4 above.

⁵⁶¹ Ginther, 1992: 73; Obiora, 1996, 358

⁵⁶² See generally Cooke and Kothari 2001; for a response see Parfitt, 2004

⁵⁶³ Parfitt, 2004: 555

⁵⁶⁴ Chapter 2, section 1.2 above.

⁵⁶⁵ Fox, 1992: 595

⁵⁶⁶ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 17

has identified that indigenous peoples' participation in determining the forms of development suited to their needs is a means of empowerment.⁵⁶⁷ This is further reflected in the Preamble to the DIP which identifies that indigenous peoples' "control over developments affecting them and their lands" enables them "to promote their development in accordance with their aspirations and needs"; the lack of their exercise of this right being previously identified with "historic injustices". Consequently, participation is considered a form of control as it is a means to overcome exclusion and injustice.

However, certain rights of participation indicate the potential for control rather than empowerment. Private participatory rights such as cultural or religious participation or participation in family life may promote and legitimate particular power structures which may conflict with other forms of participation. For example, the ICCPR⁵⁶⁸ and HRC⁵⁶⁹ implicitly recognise the potential for religious participation to restrict the enjoyment of other rights through their permissible limitations on the right to religion. Similarly, the CRC has observed that traditional practices and attitudes may conflict with the implementation of Article 12 requiring that the views of the child be taken into account in decisions affecting the child.⁵⁷⁰ It has also noted the potential for discrimination against children resulting from their participation in particular religious or other social groups.⁵⁷¹

⁵⁶⁷ A/HRC/6/15, 15 November 2007, para 18(c)

⁵⁶⁸ Article 18(3)

⁵⁶⁹ HRC General Comment 22, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para 8

⁵⁷⁰ CRC/C/111, 28 November 2001, paras. 110 and 179

⁵⁷¹ CRC GC 7, CRC/C/GC/7/Rev.1, 20 September 2006, para. 11(b) (iv)

2.4: Legitimacy and participation in principles of human rights

Certain elements of human rights law specifically identify that participation can contribute to legitimacy. For example, the HRC has

emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.⁵⁷²

This recognises the importance of participation in enhancing legitimacy, through correlating the acceptability of decisions with participation in processes of decision-making by those affected. Similarly, the CESCR has repeatedly identified the need for individuals and groups affected by policies relating to the rights to food, health and water to be included in the development of those plans,⁵⁷³ which implies that failure to ensure such widespread participation will mean that the policies lack legitimacy. In addition, Orford argues that Article 2(3) of the DRD “qualifies the legitimacy of state development policies by reference to participation”.⁵⁷⁴ Participation is therefore considered as a means to enhance the legitimacy of processes and policies concerning the fulfilment of particular rights.

The way in which political participation is conceptualised within principles of human rights law further identifies how participation can enhance legitimacy. In identifying in Article 21(3) that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections”, the UDHR explicitly equates political participation with governmental legitimacy. This is

⁵⁷² *Mahuika et al. v. New Zealand* (547/1993), A/56/40 vol. II, 27 October 2000, 11 para 9.5; also *I. Länsman et al. v. Finland*, (511/1992), CCPR/C/52/D/511/1992, 8 November 1994. paras. 9.6 and 9.8

⁵⁷³ CESCR General Comment 5, 9 December 1994, para 14; General Comment 12, E/C.12/1999/5, 12 May 1999, para 23; General Comment 14, E/C.12/2000/4, 11 August 2000, para 11; General Comment 15, CESCR GC 15, E/C.12/2002/11, 20 January 2003, para 48

⁵⁷⁴ Orford, 2005: 138

further reflected in Fox's argument that political participatory rights promote a concept of popular sovereignty,⁵⁷⁵ and that this is "the most enduring theory of domestic political legitimacy".⁵⁷⁶ Concepts of a right to democracy⁵⁷⁷ further centralise the principle that the legitimacy of governments is dependent on the political participation of citizens.

These elements of international human rights law indicate recognition that participation can contribute to legitimacy. However, the way that this is conceptualised is limited to participation in the application of human rights. The legitimacy of how rights are fulfilled is linked to participation, but the legitimacy of the rights themselves is not. There is no application of the norms reflected in principles of human rights law to the formation of the law itself concerning the relationship between participation and legitimacy. The concept of participation reflected within human rights principles is therefore only concerned with participation as application and excludes participation as definition.

2.5: Discussion

Regarding the purpose of participation, Chapter 1 identified that participation in human rights should incorporate both individual and communal elements, and that participation can be a means to emphasize the communal elements of human rights. Clearly human rights principles are predominantly concerned with the rights of individuals and are oriented to the protection of human rights on an individual basis. This reflects a concept of participation in human rights as directed to the protection of

⁵⁷⁵ Fox, 1992: 543

⁵⁷⁶ Fox, 1992: 551

⁵⁷⁷ Chapter 2, section 1.3

the individual. However, principles of human rights law also reflect participation oriented to collective ends. This is most clearly demonstrated by the ‘third-generation’ group rights: the rights of minorities, indigenous peoples, and the right to development. It is also reflected in the various references to the protection of participation as part of a community: the rights to religious and cultural participation, and the right to association. Furthermore, the language of human rights law can also be interpreted to imply universal and thus communal participation. A participatory analysis of human rights principles therefore does not exclude a collective orientation but rather can be a way to emphasize the collective aspects of human rights.

In addition, Chapter 1 identified that participation is both a means and an end, and that participation is a right of itself, and should not therefore be reduced to a means to achieve human rights goals. Participation is clearly reflected in human rights principles as a means to achieve human rights goals including reduction of conflict and better protection of human rights. It is also viewed as an essential underlying element for the realisation of all human rights. Furthermore, the importance of a participatory process is reflected in some human rights principles. Less clear is the identification of participation as a right of itself. Certain areas of human rights law identify participation as a right. Other areas of human rights law instead reflect ‘participatory rights’ related to specific spheres of life such as political, cultural or social participation, rather than an overarching right to participate in matters that affect the individual. Human rights principles therefore indicate some recognition of a right to participate, but cannot yet be said to have solidified this right as one with comprehensive application. Participation as a right of itself under international human rights law can be considered as emerging; as yet, it remains indeterminate.

Consequently, although some elements of human rights identify participation as an end in itself, overall its instrumental purposes have received greater emphasis. More general recognition of participation as a right in itself would rectify this.

Chapter 1 also specified that participation in human rights should be oriented towards empowerment and accountability. Human rights principles primarily reflect this concept of participation, expressly recognising it as a means to achieve empowerment, and more implicitly as contributing to accountability and legitimacy. However, participatory rights themselves may enable control and restriction of the enjoyment of other rights. Although human rights principles state that the exercise of participatory rights must not incur violations of other human rights, this issue requires more attention in order to resolve these conflicts.

Part 3: Principles of human rights concerning the feasibility of participation

3.1: Opportunities for participation and the ability to participate

As identified in Chapter 1, the feasibility of participation is concerned with both the opportunity and the ability to participate. Some elements of human rights make specific reference to opportunities for participation; for example GC 25 identifies that “the Covenant requires States to...ensure that citizens have an effective opportunity to enjoy the rights it protects”.⁵⁷⁸ Similarly, the ICEDAW refers to the objective of “equality of opportunity” for women.⁵⁷⁹ These provisions therefore recognise the importance of the existence of opportunities for participation.

⁵⁷⁸ HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 1

⁵⁷⁹ Article 4(1)

However, the concept of participation as generally reflected in human rights principles does not clearly distinguish between these two elements of opportunity and ability. There exist numerous principles which indicate the importance of equal access to participation regarding both opportunity and ability. For example, the provisions of the DRD,⁵⁸⁰ DRM⁵⁸¹ and DIP⁵⁸² which refer to a general right to participate imply rights of participation both regarding opportunity and ability. The right to participate as presented in these instruments encompasses both the existence of opportunities for participation and the ability to make use of these opportunities.

Human rights principles recognise the existence of barriers to participation, which constrain both the opportunity and the ability to participate, thus implicitly recognising the importance of ensuring opportunities and abilities for participation. Socio-economic status is recognised as a potential obstacle to participation. CEDAW identifies that both time and financial dependence on men are limiting factors regarding women's participation in public life.⁵⁸³ The HRC identifies poverty as a potential impediment to the exercise of the rights to vote.⁵⁸⁴

There exist numerous principles within both human rights law with general application and within instruments concerned with the rights of particular groups which identify that members of marginalised and/or vulnerable groups may face specific barriers regarding both opportunities for their participation and their ability to

⁵⁸⁰ Article 3(c)

⁵⁸¹ Article 2(3)

⁵⁸² Article 18, which gives a general right of indigenous peoples "to participate in decision-making in matters which would affect their rights".

⁵⁸³ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 11

⁵⁸⁴ HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 12

participate. The specific protection of participation for vulnerable groups clearly illustrates recognition that discrimination against these groups constitutes a barrier to participation; consequently numerous principles have been reiterated to counter this.

For example, Article 8 of the UN Charter protects the equal rights of men and women to participate in its principle and subsidiary organs. Women have specifically protected rights of participation in development, as per CEDAW Art 14 (2(a)) which refers to the specific rights of rural women to participate in development planning and implementation and the DRD Article 8(1) “Effective measures should be undertaken to ensure that women have an active role in the development process”. Women’s rights of political⁵⁸⁵ and legal⁵⁸⁶ participation are protected, and the right of women to participate in cultural⁵⁸⁷ and family⁵⁸⁸ life is emphasized.

Similarly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 reiterates these groups’ participatory rights; for example freedom of expression,⁵⁸⁹ rights of legal participation,⁵⁹⁰ participation in trade unions and other organisations,⁵⁹¹ cultural participation⁵⁹² and access to education,⁵⁹³ which are to be enjoyed on an equal basis with the nationals of the State concerned. Likewise, the CPD is concerned with enabling equal and non-discriminatory participation by persons with disabilities in society.⁵⁹⁴ Article 2(2) of the DRM states that minorities have “the right to participate effectively in cultural,

⁵⁸⁵ See note 51

⁵⁸⁶ See note 92

⁵⁸⁷ ICEDAW Article 13(c)

⁵⁸⁸ ICEDAW Article 16

⁵⁸⁹ Article 13(2)

⁵⁹⁰ Articles 16-20 and 24

⁵⁹¹ Article 26

⁵⁹² Article 43(1)(g)

⁵⁹³ Article 30

⁵⁹⁴ See for example Articles 5, 9, 12, 13, 19, 29

religious, social, economic and public life”, thus supporting the principle of inclusion in mainstream structures of participation. This is further supported by Article 4(1) which identifies rights of legal participation through guaranteeing full equality before the law, and Article 4(5) which guarantees the right of opportunities for participation in economic matters. The DIP underlines also the principle of non-discrimination as reflected in the right of indigenous peoples to “participate fully in the political, economic, social and cultural life of the State”.⁵⁹⁵ The CERD guarantees the rights of everyone to political participation, irrespective of race, colour or national or ethnic origin.⁵⁹⁶

Resource barriers to participation are also recognised within principles of international human rights law. The CPD explicitly recognises disability as a barrier to “participation as equal members of society”.⁵⁹⁷ Persons with disabilities are recognised as facing direct physical barriers to participation as well as more implicit barriers resulting from access to information, communication and facilities and services.⁵⁹⁸ The CRC identifies that children with mental or physical disabilities should be able to participate actively in the community,⁵⁹⁹ thus indicating recognition of disability as a potential barrier to participation. The need for positive action to enable the full participation of persons with disabilities has also been recognised by the CESCR.⁶⁰⁰

⁵⁹⁵ Article 4. The right of indigenous people to participate in economic development is also found in Articles 7 and 15 of the International Labour Organisation Convention 169: Indigenous and Tribal Peoples Convention 1989 (*hereafter ILO 169*).

⁵⁹⁶ Article 5(c) and 5 (d) (viii) and (ix)

⁵⁹⁷ ICPD, Preamble, para (e); Article 1

⁵⁹⁸ ICPD, Article 9

⁵⁹⁹ ICRC, Article 23(1)

⁶⁰⁰ CESCR General Comment 5, 09/12/94, para 9

Issues regarding knowledge, education and literacy are recognised as impacting on the ability to participate. The ICESCR specifically identifies education as a means to “enable all persons to participate effectively in a free society”.⁶⁰¹ Education is identified as necessary to ensure the ability to exercise the right to vote;⁶⁰² CEDAW identifies illiteracy, and lack of knowledge regarding both candidates and procedures, and the impact that these may have on their lives, as factors which impede women’s exercise of their right to vote.⁶⁰³ Illiteracy is also recognised by the HRC as a potential impediment to the exercise of the right to vote, and states are required to take measures to overcome this.⁶⁰⁴ The HRC has further identified that lack of proficiency in the official language is not a legitimate barrier to standing for election,⁶⁰⁵ and also that language barriers must not restrict the ability to vote in elections.⁶⁰⁶ Furthermore, the relationship between motivation and participation is implicitly recognised in the Preamble to the CPD, which recognises “attitudinal barriers” which hinder the “full and effective participation in society” of persons with disabilities.

These provisions indicate that not only does human rights law recognise the existence of a variety of barriers to participation, it places some obligations on states to overcome these obstacles. However, these are primarily negative rather than positive obligations. Fundamentally, states must enable equal opportunities for participation. Furthermore, states’ obligations regarding certain rights are not absolute. Those rights protected under the ICESCR, including the right to education, a key right for enabling

⁶⁰¹ ICESCR, Article 13(1)

⁶⁰² HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 11

⁶⁰³ CEDAW General Recommendation 23, A/52/38/Rev.1, 1997, para 20(a)

⁶⁰⁴ HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 12

⁶⁰⁵ *Ignatane v. Latvia* (884/1999), A/56/40 vol. II, 25 July 200, 191

⁶⁰⁶ HRC, General Comment 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para 12

other forms of participation, are subject to the principle of progressive realisation. This requires that states refrain from discrimination, and ‘take steps’ towards meeting their obligations,⁶⁰⁷ but recognises that states are differently placed in terms of their ability to ensure the enjoyment of these rights. Therefore, whilst states must not directly limit the enjoyment of participatory rights, and must remove barriers stemming from discriminatory practices, the extent to which they are obliged to commit resources to explicitly facilitating participation is unclear.

In addition, political participatory rights, in particular the right to vote, constitute an important exception to the principle of universal access found within human rights theory. Primarily, the right to vote is restricted to citizens, a limitation supported in the CERD Article 1(2). The CMW also extends the right to vote and to participate in public affairs only to those migrant workers who are “documented or in a regular situation in the state of employment”;⁶⁰⁸ these rights of political participation do not extend to migrant workers who are “non Documented or in an irregular situation”.⁶⁰⁹ States are consequently not required to provide opportunities for political participation by non-citizens.

Finally, states are able to suspend the enjoyment of some participatory rights in certain circumstances. The ICCPR permits derogation from most participatory rights “in times of public emergency”⁶¹⁰ including the right to vote and to participate in public affairs, and rights of assembly and association, although it does not permit

⁶⁰⁷ CESCR General Comment 3, 14 December 1990, paras. 1 and 2

⁶⁰⁸ ICMW, Articles 36 and 41

⁶⁰⁹ Article 5(b)

⁶¹⁰ Article 4 (1)

derogation from the right to freedom of religion.⁶¹¹ The ECHR and AmCHR contain similar provisions,⁶¹² although there is no derogation clause in the AfCHPR. The American Convention does not, however, permit derogation from the right to participate in government,⁶¹³ and therefore gives more extensive protection than the ICCPR. Whilst the decision to derogate from these rights is subject to reasonably strict criteria,⁶¹⁴ the decision concerning what constitutes a state of emergency requiring derogation is ultimately taken by the state, and the extent to which the individual can challenge this decision is unclear. Principles of human rights law therefore reflect considerable deference to state determination of opportunities for the enjoyment of participatory rights.

3.2: Discussion

Consideration of the feasibility of participation presents a somewhat contradictory account of participation as reflected in human rights principles. Chapter 1 identified that human rights require universal opportunities for participation, and that these be available on a non-discriminatory basis. The concept of participation reflected in human rights principles clearly conforms to this. Numerous principles of human rights law refer to the prohibition of discrimination concerning the enjoyment of participatory rights, including in relation to the progressive realisation of these rights. Furthermore, human rights principles clearly identify several of the factors identified in Chapter 1 as practical barriers to participation, including socio-economic status, discrimination against particular groups and lack of resources including skills and

⁶¹¹ Article 4 (2)

⁶¹² ECHR, Article 15; AmCHR, Article 27

⁶¹³ Article 27(2)

⁶¹⁴ See generally HRC General Comment 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001

knowledge. This is demonstrated by the development of extensive provisions of human rights law directed at these issues.

However, it is also clear that opportunities for the enjoyment of participatory rights may vary considerably between states. Participatory rights are subject to limitations regarding how far states are required to provide opportunities for and enable the ability to participate. Some participatory rights can be limited in the case of a public emergency and with regard to the states' available resources. Therefore, human rights principles do not present an absolute concept of the feasibility of participation, as the state does not have an absolute obligation to provide opportunities and enable the ability to participate in all cases. Furthermore, the state retains a great deal of control concerning the determination of the scope of its obligations. In consequence, human rights principles do not demonstrate a requirement for universal opportunities for participation.

This seems to contradict the requirement of universality concerning opportunities for participation identified in Chapter 1. However, Chapter 1 also noted that human rights is internally contradictory regarding this issue, requiring universality in principle, but recognising that in practice states have different levels of resources. It is unsurprising that this contradiction is reflected in human rights principles. It would, however, be of value to further consider firstly, the content of state obligations for the facilitation of participation, and secondly, individual participation in determining both the necessity of derogation and states' allocation of their resources concerning the enjoyment of participatory rights.

Part 4: The right to construct the norms of participation

Chapter 1 identified the importance of analysis of normative participation: understanding how participatory norms and structures are determined, and who participates in this and on what basis. Such analysis serves to uncover the power relations and interests which underlie structures of participation. Sections 1 to 3 have examined the types of participation reflected in human rights principles, the ends to which they are oriented and the factors which enable or constrain participation in different forms and by different groups. This Chapter must now examine the extent to which principles of international human rights law recognise and protect means of challenging or redefining concepts, norms and practices of participation, or whether they present an understanding of participation as fixed and unchanging. Whilst this question relates to how rights of participation in international human rights law have been *initially* constructed, that issue will be examined in depth in Chapter 3 which examines law-making. The following discussion will therefore examine how principles of human rights law conceive of participation regarding the determination of who participates, what form that participation takes, and to what ends it is oriented.

4.1: Principles of international human rights law concerned with normative participation

The right to self-determination illustrates the importance of normative participation with regard to participants. ‘Peoples’ have the right to self-determination; however, a people cannot participate in this way until it is first determined who is a ‘people’, and, as Summers identifies, the state is the entity that has the power to make this decision

under international law.⁶¹⁵ Consequently, the state retains an important framing power regarding the nature of the participatory right conferred by the right to self-determination. However, with regard to other forms of participation by indigenous peoples, international human rights principles appear more self-reflexive. Indigenous peoples have the right to determine their own identity or membership,⁶¹⁶ implying the right to participate in the determination of what constitutes a participant of an indigenous group. This indicates a contradiction between the normative determination of participants as reflected in indigenous peoples' rights and the right to self-determination.

Furthermore, the content of some participatory rights presents predetermined and static categories regarding how a 'participant' is determined. For example, the rights to vote and to take part in public affairs are limited to citizens. A citizen is determined by the rules of nationality, in whose construction the state is the primary participant. Whilst a child has the right to *a* nationality,⁶¹⁷ there is no right for any individual to demand a particular nationality which would confer the participatory rights of citizens. Similarly, within the right to family life the definition of what constitutes a family seems to rest with the state.⁶¹⁸ The CMW also indicates the fundamental role of the state in determining who may participate, as per article 42(3) "Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights". Consequently, participation in determining who may participate seems, with the exception of indigenous peoples, to be restricted to the state.

⁶¹⁵ Summers, 2005: 328

⁶¹⁶ ILO 169 Article 1(2); DIP Article 33(1)

⁶¹⁷ ICCPR, Article 24(3), ICRC, Article 7(1)

⁶¹⁸ HRC General Comment 19, 27 July 1990, para 2

Participation in challenging or redefining what form participation can take is also recognised to a greater extent in human rights principles. As Eide identifies, rights of cultural participation give the individual the right to challenge and change particular cultural practices.⁶¹⁹ They can therefore provide the individual with the means to develop alternative participatory structures to those found in traditional culture(s). The right to participate in cultural life thus offers a potential means to assert alternative structures of participation against dominant practices, whether those of a particular cultural group or of a society as a whole. Baderin supports this interpretation of the right to participate in cultural life, arguing that it protects “the right of individuals to lead their own way of life as members of [a] community in distinction from others. It...signifies the right to be different”.⁶²⁰ This individualised concept of the right to cultural participation is also supported by the Reporting Guidelines of the CESCR which refer to “the right of everyone to take part in the cultural life which he or she considers pertinent, and to manifest his or her own culture”.⁶²¹ This understanding of the right to participate in cultural life implies more extensive rights of determining norms of participation as it gives the right to participate in or to challenge cultural practices which create and support particular principles and structures of participation.

The right of ‘everyone’ to take part in cultural life suggests, in a differentiated or multicultural society, that there are ‘cultural’ dimensions to the enjoyment of culture.⁶²² What counts as ‘taking part’ will, beyond a certain minimum platform,

⁶¹⁹ Eide, 2001: 291

⁶²⁰ Baderin, 2003: 214

⁶²¹ E/C.12/1991/1, 17 June 1991: 19; see also McGoldrick, 2007: 453

⁶²² Thornberry 2008: 8-9

vary with the cultural perspectives, values and contexts of the participants,⁶²³ indicating the opportunity for a degree of participation in determining how participation will take place. This understanding of the right to participate in cultural life is reflected in interpretations of the core content of this right as including participation both in the identification of issues to be addressed by policy makers and in the development and implementation of policies and laws,⁶²⁴ thus indicating that this right encompasses participation in determining how the right itself will be protected and to what ends such protection is oriented.

Similarly, the rights of minorities and indigenous peoples illustrate opportunities for the determination of forms of participation. Article 2(1) of the DRM protects the right of minorities to “enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination”. The DIP also emphasizes the rights of indigenous peoples to practice their own culture⁶²⁵ and religion⁶²⁶ and to use their own language,⁶²⁷ and to “participate fully, if they so choose, in the political, economic, social and cultural life of the state”.⁶²⁸ These provisions consequently imply that minorities and indigenous peoples have the right to participate in determining whether they would prefer to participate in the majority and/or minority culture, through emphasizing the right to use their own language and practice their own religion. This conforms with the general provisions of the right to culture which gives the right to either participate in or to challenge the dominant culture. These provisions also

⁶²³ Thornberry 2008: 8-9

⁶²⁴ Fisher *et al*, 1994: 50

⁶²⁵ Article 12

⁶²⁶ Article 13

⁶²⁷ Articles 14 and 15

⁶²⁸ DIP, Article 5

indicate that minorities and indigenous peoples have the right to participate in determining what constitutes their culture, which would include the participatory norms of that culture.

Indigenous peoples have more explicit rights to determine their own norms and structures of participation. Indigenous peoples have the right to maintain distinct political, economic, social and cultural characteristics and legal systems,⁶²⁹ and to determine their own structures of decision-making.⁶³⁰ They have the right to participate in the establishment and implementation of processes to adjudicate their rights regarding lands, territories and resources.⁶³¹ They have the right to “determine the structures and select the membership of their institutions in accordance with their own procedures”.⁶³² States are required to consult and cooperate with indigenous peoples in order to achieve the enjoyment of their rights,⁶³³ indicating a right of participation for indigenous peoples in determining how best to protect their rights, including participatory rights. They have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs.⁶³⁴ The state is obliged to “establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose”.⁶³⁵ These provisions indicate far reaching rights of participation in determining norms and structures of decision-making across a range of social arenas.

⁶²⁹ DIP Article 5

⁶³⁰ DIP Article 18

⁶³¹ DIP, Article 27

⁶³² DIP, Article 33(2)

⁶³³ DIP, Article 38, see also Article 36(2); also ILO 169 Articles 2(1) and 33(2)

⁶³⁴ DIP Article 34

⁶³⁵ ILO 169 Article 6(1)(c)

A somewhat conflicting account of normative participation is presented regarding political rights. Constitutive political participatory rights provide for means to influence decision-making both within and outside established political structures,⁶³⁶ and thus may facilitate opposition to or redefinition of such structures. Constitutive political participatory rights therefore both support conventional forms of participation and enable new methods and challenges. For example, the HRC has indicated that it considers encouragement of non-cooperation with a regular process of participation in order to challenge the legitimacy of that process as consistent with the protection offered by the right of freedom of expression, and potentially of the right of political participation.⁶³⁷ This implies recognition of non-participation in current channels as a means to challenge and potentially redefine the norms of participation. The Inter-American Commission has further identified that there should be popular input into the drafting of laws governing elections,⁶³⁸ again indicating the desirability of upstream forms of participation⁶³⁹ in determining norms of political participation.

However, in the *Miqmak* case the HRC stated that the modalities of political participation are determined by the state.⁶⁴⁰ This indicates that the right to freedom of expression provides for more extensive participation in determining the norms of political participation than Article 25 of the ICCPR. An alternative interpretation is that the HRC supports a passive form of normative participation – rejecting elections

⁶³⁶ As Myntti (1996: 4) identifies, the activities of trade unions and pressure groups may enable political participation by individuals who might otherwise not take part in such activities.

⁶³⁷ Individual Opinion of Sir Nigel Rodley (concurring), *Svetik v. Belarus* (927/2000), A/59/40 vol. II, 8 July 2004, 125

⁶³⁸ Inter-American Commission on Human Rights, 1989, Chapter VIII, para 1; Fox, 1992: 567

⁶³⁹ ‘Upstream’ refers to forms of participation which are open to redefinition as part of the process of participation by the participants involved; see Chapter 1, section 1.4.

⁶⁴⁰ *Mikmaq Tribal Society v. Canada* (205/1986), A/47/40, 4 November 1991, 205, para 5.5

– but not more active participation in determining what participation in public affairs should constitute.

The DRD also presents a conflicting account of how the norms of ‘participation in development’ are to be determined. Article 2(3) identifies that “states have the right and the duty to formulate appropriate national development policies”, thus indicating that individual ‘participation in development’ does not include determination of policy. The same provision, though, also refers to individuals’ “active, free and meaningful participation in development *and* in the fair distribution of the benefits resulting therefrom”. This indicates that ‘participation in development’ is not limited to sharing the benefits of development, but also incorporates determination of how and to what ends development takes place. Orford agrees that the key commitments of the right to development include both the right to participate in and control the direction of development, and to participate in the benefits of development.⁶⁴¹ It is therefore unclear how far ‘participation in development’ includes participation in the determination of the norms of development and of, in turn, participation in development.

4.2: Discussion

Human rights principles acknowledge to some degree the importance of genuine participation and also recognise that participation in the production of norms of participation constitutes an important element of ensuring meaningful participation. Through emphasizing the importance of active, effective and meaningful

⁶⁴¹ Orford, 2005: 146

participation⁶⁴² (as per part 1.4) human rights principles implicitly recognise the importance of participation in constructing the norms of participation.

However, such forms of normative participation are rarely explicit with human rights instruments. The major exception here is the DIP, which clearly provides far-ranging normative participatory rights for indigenous peoples, including the right not only to participate without discrimination in the participatory structures of the state, but also to develop and implement separate participatory norms, including structures of participation regarding the protection of rights. The principle of active, effective and meaningful participation requires that all individuals should enjoy these normative participatory rights, as identified in Chapter 1. Whilst it is unlikely that the rights of indigenous peoples are intended to be more extensive than those with general application, this area would merit further clarification.

Human rights principles also impose limits on the forms and purposes of participation. Primarily, these are in line with the underlying values of human rights; fundamentally, norms of participation must be inclusive and non-discriminatory. For example, whilst the DIP as identified above gives indigenous peoples the most far reaching rights found within human rights principles regarding normative participation, the exercise of these rights must accord with the respect of other human rights.⁶⁴³ This indicates limits on how far norms of participation may be challenged. For example, structures which systematically exclude particular groups from political participation violate the human rights principle of non-discrimination. However, this also risks excluding particular forms of participation and raises questions regarding

⁶⁴² See Chapter 2, section 1.4 above.

⁶⁴³ DIP, Article 46(2)

how appropriate forms of participation are determined. This issue therefore requires further consideration of participation in constructing the principles of human rights law which stipulate these normative restrictions on participation.⁶⁴⁴

Finally, it is clear that the state retains control over some of the norms of participation, particularly those concerning who is a legitimate participant. This conflicts with the type of participation required by human rights in several ways. Firstly, it excludes the individual from certain forms of participation, thus conflicting with the principle of universality. Secondly, it promotes state power and interest rather than individual empowerment. Thirdly, it restricts the ability of the individual to challenge or redefine the norms of their participation, as they may be prevented from participating in structures which would enable this.

Concluding Remarks

The way in which participation is reflected in human rights principles demonstrates the complex nature of participation. Human rights principles recognise various forms and purposes of participation, including normative participation. Conflicts between these different aspects of participation are also manifested in the concept of participation presented by principles of international human rights law.

It is clear that the concept of participation reflected in human rights principles broadly reflects, albeit with some exceptions, the type of participation appropriate to human rights as identified in Chapter 1. This is to be expected, as human rights principles as

⁶⁴⁴ Participation in the construction of human rights law is discussed in Chapter 3.

manifested in international legal instruments could be anticipated to remain consistent with the underlying ideology and inherent characteristics of human rights. The principles of international human rights law recognise and protect rights relating to public and private, and formal and informal modes of participation. There is recognition of the value of effective and meaningful participation, and of normative participation, although the latter would benefit from further development. Participation is considered as both a means and an end, and is primarily oriented to individual empowerment, although there is also some recognition of its collective purposes. There is consequently substantial conformity with the type of participation identified as appropriate for human rights.

However, the exceptions identified to this are significant. The main divergences from the forms of participation required by human rights relate to the focus on representative over direct modes of participation, and the lack of participatory rights beyond the national level. As identified, these discrepancies limit the ability of human rights to offer protection above the level of the state. Because the only form of individual participation at the international level is via representative structures, the individual remains dependent on the state both to protect and to assert their interests.⁶⁴⁵ This is a clear contradiction to the structures of participation required by human rights.

The next analytical task is to determine how far the type of participation required by human rights is manifested in the practice of participation in human rights; essentially applying the type of participation promoted by human rights ideology and generally

⁶⁴⁵ See further analysis in Chapter 5

reflected in human rights legal principles to the structures of participation in human rights law itself. This will now be examined in Chapter 3, regarding participation in the construction of human rights, and Chapter 4, concerning participation through access to human rights.

Chapter 3: Participation in Human Rights Law-Making

As identified in the Introduction, there are two main elements to participation in human rights law: participation in the construction of the law, and participation in and through the application of the law. This Chapter will examine the first of these: participation in human rights law-making. The analysis will investigate the participants in human rights law making: which actors participate, how and on what basis. It will therefore also consider the structures of law-making which enable or constrain this participation. The aim of this discussion is to determine how far the concept of participation reflected by participation in law-making conforms to the type of participation identified as appropriate for human rights in Chapter 1.

Consideration of participation in law-making must first determine what is meant by 'law-making'. The analysis of participation in human rights law-making in this Chapter will therefore draw upon various different elements of this process. These firstly include the traditional foundations of law as identified by Article 38 of the Statute of the International Court of Justice (ICJ): the major sources - treaties, custom and general principles, and subsidiary sources – judicial decisions and the teachings of experts. The analysis in this Chapter will also draw upon participation in processes of law-making regarding both hard law, such as treaties or conventions, and soft law,⁶⁴⁶ which includes General Assembly resolutions, Declarations and treaty body General Comments or Recommendations. Furthermore, it will consider participation

⁶⁴⁶ For discussion of the role of soft law in law-making, see *inter alia* Chinkin, 1989; Shelton, 2000, 1-20; Boyle and Chinkin, 2007: 211-229.

in human rights jurisprudence as a means to participate in human rights law-making. Here the analysis follows the position that the interpretation of the law plays a vital role in the evolution of law; that international law is dynamic, and thus its initial creation cannot be regarded as the end point of its development.⁶⁴⁷

As the focus in this Chapter is on the way different actors participate in law-making, it will centralise participation by NGOs. There are two reasons for a particular focus on NGOs. Firstly, NGOs are themselves major participants in law-making. As identified in the Introduction,⁶⁴⁸ they have had a fundamental effect on the development of new norms and legal principles within a variety of areas of human rights. Secondly, NGO participation is, as will be demonstrated, the main way in which the interests of individuals can be represented in law-making structures, other than through states. NGOs therefore have an essential enabling role concerning indirect individual participation in the construction of international human rights law.

This Chapter will follow the same analytical structure as Chapters 1 and 2, through considering participation in relation to its modes, actors, purpose, feasibility and norms. Part 1 will focus on the ways in which states and NGOs participate in law-making, and how this is related to individual participation. Part 2 will examine the practical factors which affect these actors' participation. Part 3 will consider the ends to which participation in law-making is oriented, and the way in which it both manifests and contributes to particular structures of power and legitimacy. Part 4 will consider the development of the norms of participation in law-making, and the extent to which these can be challenged or redefined. Within each of these sections, the

⁶⁴⁷ McCrorquodale, 2004: 499; see also Schwebel, 1991: 970; Higgins, 1994: 202, Pellet, 2006: 789

⁶⁴⁸ Introduction, Part 4

analysis will firstly examine what concepts of participation are manifested in structures of participation regarding human rights law-making. It will then compare these with the types of participation appropriate to human rights as identified in Chapter 1.⁶⁴⁹

As this Chapter focuses on NGO participation as the means by which individuals participate in law-making, it will of necessity make extensive use of the data collected through the qualitative interviews.⁶⁵⁰ This data will be used to explore both how NGOs participate, and also how they perceive their representative role as the manifestation of individual participation.

Part 1: Modes of participation in human rights law-making

1.1: Public and private actors in law-making: states and NGOs

The structures and processes by which human rights law is constructed reflect, as noted, public forms of participation. Human rights law is primarily developed in international and regional inter-governmental organisations and judicial bodies, all of which are public forums. However, it is clear that both public and private actors, as represented by states and NGOs, participate in human rights law-making.

Firstly, states are the dominant participants in human rights law-making⁶⁵¹ concerning the construction of human rights instruments. As only states can ratify human rights

⁶⁴⁹ Chapter 1, section 2.2

⁶⁵⁰ See Introduction, section 3.2 and Appendix I

⁶⁵¹ Hobe, 2005: 319; Mutua, 2007: 586; Van Boven, 1989: 207

treaties they are to be expected to have the most important role in drafting them.⁶⁵² States are therefore central to human rights law-making structures within the UN. Human rights law-making is mandated to the General Assembly and ECOSOC and their subsidiary bodies, as stated in Articles 13 and 62 respectively of the UN Charter.⁶⁵³ Human rights conventions have so far usually been drafted via the Human Rights Commission, as a subsidiary of ECOSOC, which set up working groups or committees to do this, although there are also examples of human rights treaty drafting by other ECOSOC bodies, such as the Commission on Status of Women,⁶⁵⁴ or via the General Assembly.⁶⁵⁵ The work of the Commission has continued in its new incarnation as the Human Rights Council, a subsidiary body of the General Assembly whose Resolution 60/251 mandates the Human Rights Council to “make recommendations to the General Assembly for the further development of international law in the field of human rights”.⁶⁵⁶ The Working Groups on the Optional Protocol to the ICESCR,⁶⁵⁷ the draft declaration on the rights of indigenous peoples⁶⁵⁸ and the draft convention on enforced disappearances have continued their work under the auspices of the Human Rights Council.⁶⁵⁹ Fundamentally, the main participants in all of these UN law-making bodies are state representatives, and these bodies would neither exist nor function without state participation.

⁶⁵² LeBlanc, 1995: 26

⁶⁵³ Meron, 1986: 272.

⁶⁵⁴ The Commission was responsible for drafting the ICEDAW, although the 3rd Committee of General Assembly was also involved.

⁶⁵⁵ For example, the Disabilities Convention and the Migrant Workers Convention were elaborated through the General Assembly (See Butler, 2007: 179; Meron, 1986: 272).

⁶⁵⁶ General Assembly Resolution 60/251, 15 March 2006, para 5(c)

⁶⁵⁷ Human Rights Council Resolution 1/3, 29 June 2006. Note that the Optional Protocol was adopted by the General Assembly on 10 December 2008 (A/63/435, 28 November 2008).

⁶⁵⁸ Note that the Draft Declaration was adopted by General Assembly Resolution 61/295 on 13 September 2007.

⁶⁵⁹ See <http://www2.ohchr.org/english/bodies/chr/workinggroups.htm>

In addition, customary law-making is in principle dependent on the actions of states, as it is constructed via the general practice of states⁶⁶⁰ which is accepted and observed as law; it is thus determined by action taken as a result of states' sense of legal obligation.⁶⁶¹ It should, though, be noted that the ICJ is argued to also participate in customary law-making, through its interpretative role; Pellet alludes to "an impression of a complex and somehow mysterious alchemy through which the Court enjoys a rather large measure of discretionary power"⁶⁶² over the determination of the content of customary law. It has also been suggested that NGOs contribute to the development of customary law. For example, Treves asserts that "the perception of the public (and therefore of NGOs seen as organised groups thereof) of what is permitted and what is prohibited to states in their relationship with other states influences the perception of governments and ultimately their *opinion juris*".⁶⁶³ This indicates the potential for private actors to influence customary human rights law. Nonetheless, their role remains inferior to that of states, who are the central actors in customary law-making, and without whom customary law could not develop.

There is some opportunity for private actors to participate in other forms of human rights law-making. Firstly, there are some opportunities for participation by private individuals. Article 38 recognises this role in subsection 1 (d) which refers to the "teachings of the most highly qualified publicists". It is clear that academic publications have been taken into account by courts when ruling on issues of international human rights law. For example, the Canadian Supreme Court when

⁶⁶⁰ Danilenko identifies that the practice of international organisations and international tribunals can also contribute to the formation of customary law (1993: 82-83); however, this still reflects public rather than private participation.

⁶⁶¹ Meron, 1989:3, see also Statute of the ICJ, Article 38(1)(b) of ICJ statute; Cassese, 2001: 119

⁶⁶² Pellet, 2006: 749

⁶⁶³ Treves, 2005: 4

considering the issue of the secession of Quebec drew upon work by Antonio Cassese concerning the right of self-determination.⁶⁶⁴ In addition, the treaty bodies participate in human rights law-making through the development of general comments or recommendations, or case law.⁶⁶⁵ The regional Commissions have a similar interpretative role.⁶⁶⁶ As these bodies are composed of individuals acting in a personal capacity, independent of governments,⁶⁶⁷ they constitute a further means for private individuals to influence the development of international human rights law. In addition, Article 38 recognises “judicial decisions” as a source of law. The bodies that make these judicial decisions are also composed of private individuals, acting independently of governments,⁶⁶⁸ and thus reflect similar forms of individual participation.

This indicates a range of opportunities for individuals to participate in human rights law-making on a private basis. However, Article 38 is clear that academic writings and judicial decisions are subsidiary sources of law and therefore accords them less status than treaties or custom, both state-centric sources of law. Furthermore, it must be noted that opportunities for individual participation in law-making are predominantly limited to experts⁶⁶⁹ and are thus neither wide-ranging nor inclusive.

⁶⁶⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 114, 129, 131

⁶⁶⁵ Alfredsson, 2005: 559-565

⁶⁶⁶ AmCHR, Article 41(b) and (e); AfCHPR, Article 45(3)

⁶⁶⁷ ICERD, Article 8(1); ICCPR Article 28(3); ICEDAW, Article 17(1); ICAT, Article 17(1); ICRC, Article 43(2); ICMW, Article 72(1)(b); ICPD, Article 34(3); AmCHR, Article 36(1); AfCHPR, Article 31(2)

⁶⁶⁸ Statute of the ICJ, Article 2; Statute of the Inter-American Court, Article 4(1); Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights, Article 11(1); ECHR Protocol 11, Article 21(2)

⁶⁶⁹ See Chapter 3, section 1.3 below

However, as identified in the Introduction,⁶⁷⁰ NGOs as a group are a major actor in the development of human rights law, and the role of private actors in law-making is therefore predominantly represented by NGO participation. There are a number of ways in which NGOs participate in human rights law-making. Several examples of NGO participation in the development of norms and standards of hard law instruments were given in the Introduction.⁶⁷¹ NGOs also participate in the development of soft law, as is discussed below.⁶⁷²

Some NGOs have specifically identified using cases and litigation as a means to participate in law-making. NGOs use case law⁶⁷³ to develop the law; for example one interviewee described how participation in cases was itself used to “create new grounds for case law”.⁶⁷⁴ Another described how litigation was used as part of a broader campaigning strategy to develop the norms and standards of law.⁶⁷⁵ For example, Interights identified *Hadjatou Mani*⁶⁷⁶ as a test case concerning the right to be free from slavery.⁶⁷⁷ Although slavery is prohibited under international human rights law, this case was instrumental in underlining this prohibition and in identifying actions which constituted slavery.

NGOs also participate in the development of the human rights law through jurisprudence via the submission of *amicus curiae* briefs.⁶⁷⁸ Although *amicus curiae*

⁶⁷⁰ Introduction, Part 4

⁶⁷¹ Introduction, Part 4

⁶⁷² Chapter 3, sections 1.3 and 1.4

⁶⁷³ NGO participation in human rights cases and courts is further discussed in Chapter 4

⁶⁷⁴ ID 20, 25/01/08

⁶⁷⁵ ID 24, 15/11/07

⁶⁷⁶ *Hadjatou Mani v Niger*, ECOWAS Community Court, 7 April 2008

⁶⁷⁷ <http://www.interights.org/niger-slavery>

⁶⁷⁸ See generally Bartholomuez, 2005, and Shelton, 1994 for further information on *amicus curiae*

participation does not enable participation at the same level as parties to a case,⁶⁷⁹ and the submission of *amicus* briefs remains at the discretion of the court,⁶⁸⁰ they nonetheless provide an important means for NGOs to influence judicial decision-making. Essentially, they are a way in which NGOs make particular information and legal interpretations, which may not be made available by the parties, known to the court. NGO participation in this way has, as Shelton identifies,⁶⁸¹ been used by the European Court of Human Rights (European Court) when making decisions. For example, the Court referred to the submission from Amnesty International in its decision on the *Soering* case,⁶⁸² and to the comments submitted by Article 19 in the *Observer and Guardian* case.⁶⁸³ Although without such explicit reference to NGO submissions it is difficult to determine a definite effect of *amicus* participation, comparison of submissions and judgements does indicate some influence, as can be seen in the Advisory Opinions of the Inter-American Court.⁶⁸⁴

The involvement of NGOs in human rights law-making thus demonstrates the interaction between public and private forms of participation. Firstly, NGOs are private actors who participate in the public and political processes of human rights law-making. Secondly, NGOs (private) may work in partnership with governments (public) to develop principles of human rights law. The accepted current norm for drafting international Conventions is by 'open-ended' working groups, where participation is open to both states and non-state actors including IGOs and NGOs.⁶⁸⁵

⁶⁷⁹ Bartholomeuz, 2005: 273

⁶⁸⁰ Bartholomuez, 2005: 276

⁶⁸¹ Shelton, 1994: 636-637

⁶⁸² *Soering v. the United Kingdom*, Application no. 14038/88, Judgement of 7 July 1989, para 102

⁶⁸³ *Observer and Guardian v. the United Kingdom*, Application No. 13585/88, Judgement of 26 November 1991, para 60

⁶⁸⁴ Shelton, 1994: 639-640

⁶⁸⁵ LeBlanc, 1995: 25; Cook, 1996: 191-192

NGOs also participate in working groups at the regional level.⁶⁸⁶ Furthermore, the advantages of collective public-private participation are recognised by both sides. The importance of working with governments was acknowledged by one NGO interviewee: “they’re the people who are dealing with the problem, they’ve got the capacity, or should have the capacity to deal with them and prevent them, and legislate against these things happening, so you’ve got to bring the government in”.⁶⁸⁷ This illustrates recognition of governmental power to actually make law, as well as to apply it on the national level. Another interviewee identified the value of a collaborative rather than combative relationship as enabling greater influence over governments: “any criticisms that you make...are seen as objective...not from the subjective”.⁶⁸⁸ Similarly, the importance of working with the private sector has been recognised, at least to some extent, by the UN; the Secretary-General’s Millennium report re-emphasised the importance of strengthening relationships between the UN and private actors.⁶⁸⁹ This interplay between State and private actors’ participation in law-making is also reflected in the structure of the ILO, which includes both representatives of Member States, and of employers and workers within those states.⁶⁹⁰

It is therefore clear that human rights law-making reflects participation by both public and private actors, and a high level of collaboration between the two. Nonetheless, states clearly retain the greatest power in determining the development of human rights law as they are central to both conventional and customary law-making due to the centrality of the principle of state consent. Whilst NGOs are hugely influential,

⁶⁸⁶ ID 26, 30/10/07

⁶⁸⁷ ID 3, 03/03/07

⁶⁸⁸ ID 26, 30/10/07

⁶⁸⁹ Martens, 2003: 2

⁶⁹⁰ Constitution of the International Labour Organisation, Article 3(1)

they are not inherent participants in law-making comparable to states. Furthermore, as section 1.2 now considers, NGOs' formal rights of participation in law-making are limited.

1.2: Formal and informal modes of participation in law-making

Much of human rights law is ultimately constructed via formal structures of participation. Treaty drafting is formally mandated to a committee or Working Group,⁶⁹¹ and a treaty must be formally ratified by states in order to enter into force. For example, the Ad-Hoc Committee which developed the DRD was established by General Assembly Resolution 56/168.⁶⁹² The Convention then entered into force on 3rd May 2008 once it had been ratified by 20 states, as required by Article 45. Similarly, the process of the construction of most soft law instruments is also formalised, as these are both mandated and accepted by formal resolutions of a UN body. For example, a Human Rights Commission Resolution⁶⁹³ set up the Working Group which drafted the DIP, in accordance with General Assembly Resolution 49/124,⁶⁹⁴ and the DIP was finally adopted by a further General Assembly Resolution.⁶⁹⁵ It is therefore clear that both the process and the outcome of law-making regarding hard and soft law are conditional on formalised structures of participation.

⁶⁹¹ For example, the Working Group on the Optional Protocol to the ICESCR was established by Human Rights Commission Resolution 2002/24, para 9(f).

⁶⁹² General Assembly Resolution 56/168, 19 December 2001; see also ECOSOC Resolution 2002/7, 24 July 2002

⁶⁹³ Human Rights Commission Resolution 1995/32, 3rd March 1995, E/CN.4/RES/1995/32

⁶⁹⁴ General Assembly Resolution 49/214, 17th February 1995, A/RES/49/214

⁶⁹⁵ General Assembly Resolution 61/295, 13 September 2007, A/RES/61/295

The predominant actors in these formal structures of participation are states. States are the only actors who have the formal right to negotiate the content of human rights legal instruments, and who have voting rights in UN bodies and who can thus at the final stage accept or reject human rights legal instruments. Individuals have no formal right to participate in the development of human rights law. Consequently, individual access to formal structures of human rights law-making is through representation by states and NGOs.⁶⁹⁶

NGOs are, however, recognised as vital and influential international actors by the UN⁶⁹⁷ and have some formal rights of participation in UN human rights structures. NGO participation is formalised in Article 71 of the UN Charter⁶⁹⁸ which provides for participation in ECOSOC and subsidiary bodies via a consultative role.⁶⁹⁹ ECOSOC Resolution 1996/31 confirms the need to take account of NGOs and acknowledges such organisations' expertise.⁷⁰⁰ This Resolution governs criteria for establishing consultative relations; the organisation must be concerned with matters within ECOSOC's remit,⁷⁰¹ must conform to ECOSOC aims and purposes,⁷⁰² must be of recognised competence in its field,⁷⁰³ and must have democratic representation and accountability structures.⁷⁰⁴ Participation from developing countries is emphasized.⁷⁰⁵ Decisions on the granting, withdrawal or suspension of consultative status are the

⁶⁹⁶ See Chapter 3, section 1.3 below for greater elaboration of this issue.

⁶⁹⁷ A/53/170, July 10, 1998, para. 3

⁶⁹⁸ 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 appropriate, with national organizations after consultation with the Member of the United Nations concerned.

⁶⁹⁹ For further discussion of NGOs' consultative role see Hartwick, 2001: 222-230

⁷⁰⁰ ECOSOC Resolution 1996/31, 25 July 1996, Preamble

⁷⁰¹ para 1

⁷⁰² para 2

⁷⁰³ para 9

⁷⁰⁴ para 10, 11 and 12

⁷⁰⁵ para 6-8

prerogative of states, acting through ECOSOC.⁷⁰⁶ Consultative status is defined as distinct from participation without vote.⁷⁰⁷ The purpose of NGO participation is twofold; to provide expert opinion and advice, and to enable representation of public opinion.⁷⁰⁸ There are different degrees of consultative status⁷⁰⁹ which govern the ways in which different NGOs may participate. NGOs may propose agenda items,⁷¹⁰ sit as observers in public meetings,⁷¹¹ submit written statements⁷¹² and make oral presentations.⁷¹³ NGOs with accreditation may attend UN conferences and preparatory committees, where they can submit written statements and make oral presentations, but this specifically does not entail a negotiating role.⁷¹⁴

These norms govern NGOs' formal participation in the Human Rights Council (formerly Commission on Human Rights)⁷¹⁵ and the Advisory Committee (formerly the Sub-Commission on the Promotion and Protection of Human Rights),⁷¹⁶ and in UN conferences and preparatory committees.⁷¹⁷ The ECOSOC rights consequently enable NGOs to formally participate in the development of human rights instruments. There are numerous instances of NGO participation in conferences, committees and working groups, as described in the Introduction;⁷¹⁸ recent examples include

⁷⁰⁶ para 15

⁷⁰⁷ para 18

⁷⁰⁸ para 20

⁷⁰⁹ Part 3

⁷¹⁰ para 28

⁷¹¹ para 29

⁷¹² para 30

⁷¹³ para 32

⁷¹⁴ para 50

⁷¹⁵ Regarding the Human Rights Council, General Assembly Resolution 60/251 (15 March 2006, para. 5(h)) acknowledged the role that NGOs play in the promotion and protection of human rights, and confirmed that arrangements for consultation should be based on ECOSOC Res 1996/31 and the previous practice of the Commission on Human Rights.

⁷¹⁶ Human Rights Council Resolution 5/1, 18 June 2007, section III

⁷¹⁷ ECOSOC Resolution 1996/31, 25 July 1996, Part 7

⁷¹⁸ Introduction, Part 4

contributing (as observers)⁷¹⁹ to the Dublin Diplomatic Conference on Cluster Munitions which adopted the Convention on Cluster Munitions in May 2008,⁷²⁰ participation in the Working Group on the draft Declaration on the Rights of Indigenous Peoples, prior to the adoption of the Declaration in September 2007,⁷²¹ and extensive participation including written and oral presentations in the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities,⁷²² which negotiated the CPD, which entered into force in May 2008.

Whilst the system of ECOSOC accreditation therefore allows NGOs some formal rights of participation in law-making, three important limitations must be noted. Firstly, whilst consultative status does allow written and oral contributions to debates, it does not entail a negotiating role or any voting rights concerning the final decisions. NGOs' main formal role is therefore to provide information rather than to negotiate the content of human rights law. States then assume control at the later law-making stages,⁷²³ as one interviewee described: "We may go through periods when for twelve months we've been one of the most active participants in a particular debate, and then when crunch point comes we suddenly find ourselves locked out".⁷²⁴ This is confirmed by Van Boven: "in the final analysis, governments are the decision-makers with regard to the content and adoption of...international human rights

⁷¹⁹ Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Rules of Procedure, CCM/52, 19 May 2008, Rules 2 and 3

⁷²⁰ Pillai, 2008

⁷²¹ For example, the draft report of the working group, 5-16 December 2005, E/CN.4/2005/WG.15/CRP.6 details the various contributions made by NGOs and indigenous organizations to that particular meeting.

⁷²² A/57/357, 29 July to 9 Aug 2002, para 10

⁷²³ Boyle & Chinkin, 2007: 63

⁷²⁴ ID 13, 18/10/07

instruments".⁷²⁵ Consequently, the degree to which formal NGO participation in human rights law-making can be active, genuine and meaningful is restricted, as they have no guaranteed influence over the final outcome of the process.⁷²⁶

Secondly, NGOS are almost entirely excluded from formal participation in UN bodies outside ECOSOC. Although they may attend meetings of the General Assembly as observers and assist in the implementation of resolutions,⁷²⁷ this status is by invitation and very few organisations have observer status with the General Assembly. NGOs also have no formal right to address the Security Council.⁷²⁸ This means that NGOs' formal influence within these law-making bodies is extremely limited.

Thirdly, non-accredited NGOs are excluded from formal participation in human rights law-making. This means that the ECOSOC regime concerning formal NGO participation is doubly exclusive; both in the ways in which NGOs may participate, compared to states, and in making distinctions within the NGO sector itself. However, there have been some exceptions to this. Both accredited and non-accredited NGOs concerned with human rights were able to participate in both the preparatory meetings and as observers in the 1993 World Conference on Human Rights, thus widening participation to include NGOs without consultative status.⁷²⁹ There have also been incidences of participation in Working Groups by interested organisations who are not accredited. Sanders observes that "the Working Group on Indigenous Populations is the most open body in the entire history of the United Nations" as it extends participation to indigenous peoples and their representatives, rather than restricting it

⁷²⁵ Van Boven, 1989: 212

⁷²⁶ See also discussion in Chapter 3, section 1.4 below.

⁷²⁷ Simma, 2002: 1078

⁷²⁸ Butler 2007: 265

⁷²⁹ Lindblom, 2005, 456-7

to accredited NGOs.⁷³⁰ This indicates some potential for circumventing formal requirements to enable broader participation in formal structures.

Nonetheless, NGOs' formal rights of participation are significantly limited in comparison with those of states, especially concerning participation in the formal negotiation of human rights legal instruments. However, human rights law-making is also clearly influenced by informal structures of participation. Reisman considers that "a substantial body of international law has not derived from formal law-making institutions".⁷³¹ Understanding informal modes of law-making is particularly important because NGO influence over law-making in these ways is far more extensive than through formal modes of participation. As Brett identifies "it would be altogether wrong...to measure the NGO contribution in terms of its formal volume".⁷³² Butler agrees: "the right to participate formally in the drafting process is not relevant to determining the degree of influence that NGOs can exercise over treaty formation at the more general level".⁷³³

Informal participation by NGOs enables far greater influence over the development of human rights law than their formal rights of participation. It does this in several ways. Firstly, it allows them to have influence over decision-making structures to which they have no formal access. Informal NGO influence over human rights law can be traced back as far as the nineteenth century, when "there were NGO fingerprints on new international conventions regarding rules of war, intellectual property, admiralty,

⁷³⁰ Sanders, 1994: 12-13. Sanders also notes that the Working Group on Contemporary Forms of Slavery also allows participation from unaccredited NGOs (1994: 13, at note 34).

⁷³¹ Reisman, 2005: 15

⁷³² Brett, 1995: 100

⁷³³ Butler, 2007: 180

prostitution, narcotics, labor, and nature protection".⁷³⁴ This can also be identified concerning the League of Nations, where NGOs were able to informally influence the law-making activities of despite having no formal rights of participation.⁷³⁵ Through the use of informal, personal networks and contacts they are now able to influence most areas of law-making at the UN. Methods here include influencing the content of UN reports on particular issues,⁷³⁶ lobbying during the preparatory and conference stages,⁷³⁷ and one-to-one personal contact with governments.⁷³⁸ The importance of informal, personal networks of contacts was identified by one interviewee particularly in relation to smaller NGOs working with larger organisations including both NGOs and IGOs.⁷³⁹ Similarly, Tolley contends that the International Commission of Jurists was able to participate in the construction of the AfCHPR due to effective influence over key heads of state.⁷⁴⁰ As noted above, NGOs are formally excluded from the final negotiation stages of human rights instruments, but they may retain informal influence through relationships with states who are included in the final stages of the debate.⁷⁴¹ Furthermore, although General Comments are formally developed by members of the relevant Committee, NGOs also have informal input into their construction. For example, the NGO FIAN participated in expert seminars regarding the content of the right to food and its ensuing obligations, which "influenced substantially the drafting of General Comment 12" of the CESCR.⁷⁴² In addition,

⁷³⁴ Charnovitz, 1997: 212

⁷³⁵ Martens, 2003: 10-11

⁷³⁶ ID 50, 29/01/08

⁷³⁷ Friedman et al, 2005: 42-7, see also Lindblom, 2005: 473-4

⁷³⁸ ID 50, 29/01/08; ID 32, 17/01/08

⁷³⁹ ID 3, 03/03/07

⁷⁴⁰ Tolley, 1994: 181

⁷⁴¹ ID 13, 18/10/07; Van Boven, 1989: 211

⁷⁴² Hamm, 2001: 177

many suggestions received by the CESCR from NGOs regarding the content of General Comment 14 on the right to health found their way into the final text.⁷⁴³

Use of informal methods is especially important concerning influence over UN bodies outside ECOSOC. For example, one interviewee described how their organisation used its informal links with the UN secretariat, government missions to the UN and other human rights NGOs to pressure for a particular General Assembly resolution.⁷⁴⁴ There is also some evidence for informal NGO influence over the Security Council; informal meetings between the NGO Working Group on the Security Council and ambassadors or UN officials means that major NGOs who are members of this working group are able to influence policy.⁷⁴⁵ Further informal contact between NGOs and the Security Council includes the Arria formula which, although opposed by some states, has “provided a very valuable and flexible instrument for the Council to obtain information and to hold dialogues with important parties in the international community”.⁷⁴⁶ NGOs also have informal individual relationships with members of the Security Council.⁷⁴⁷ It is therefore clear that informal modes of participation enable NGOs to access a range of law-making structures from which they are formally excluded, and consequently expand their influence over human rights law-making.

Informal participation in law-making can give NGOs greater scope to determine the particular issues under consideration. Informal participation by NGOs contributes to

⁷⁴³ Reidel, 2005: 314

⁷⁴⁴ ID 50, 29/01/08

⁷⁴⁵ <http://www.globalpolicy.org/security/ngowkgrp/statements/current.htm>

⁷⁴⁶ <http://www.globalpolicy.org/security/mtgsetc/arria.html>

⁷⁴⁷ Hill, 2002:27

the “pre-normative process”⁷⁴⁸ of agenda-setting.⁷⁴⁹ A range of informal methods are used. NGOs may proclaim ‘new’ rights,⁷⁵⁰ or highlight particular human rights issues. For example, Korey identifies NGO participation at the Vienna World Conference in 1993 as a major contributing factor to placing the issue of women’s rights on the international agenda.⁷⁵¹ A current example of NGO agenda-setting is the Amnesty International campaign regarding a global moratorium on the death penalty,⁷⁵² which is not currently prohibited under international human rights law.

Similarly, informal participation can mean that NGOs have greater control over the final instrument. Formally, they are excluded from the final negotiation stages, and can therefore have only indirect influence over the end result through their participation at earlier stages of the process. However, some soft law instruments, such as codes of conduct, guidelines and interpretative treaty commentaries, are directly produced by NGOs. For example, NGOs, in conjunction with academic institutions, took the initiative in producing two major statements of principle on economic and social rights: the Limburg Principles⁷⁵³ and the Maastricht Guidelines,⁷⁵⁴ as well as principles on women’s rights and universal jurisdiction.⁷⁵⁵ The Limburg Principles, which were drafted at a 1986 meeting of experts convened by the International Commission of Jurists,⁷⁵⁶ have been circulated in UN documents, cited in UN studies and are occasionally referred to as an authoritative source by the

⁷⁴⁸ Hobe, 2005: 322

⁷⁴⁹ Butler, 2007: 169, 172

⁷⁵⁰ Alston, 1984: 610-611

⁷⁵¹ Korey, 1999: 166

⁷⁵² <http://www.amnesty.org.uk/content.asp?CategoryID=10323>

⁷⁵³ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17, Annex

⁷⁵⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997

⁷⁵⁵ For these and other examples see Boyle and Chinkin, 2007: 89.

⁷⁵⁶ Tolley, 1989: 581

CESCR.⁷⁵⁷ Through producing a soft law document through an informal process in this way NGOs are able to have far greater control of the final text.

As well as enabling NGOs to determine and define the particular issues under consideration, informal modes of participation also allow them to develop alternative structures of participation. For example, networking with other NGOs at UN conferences demonstrates the development of an alternative or parallel public sphere to the formal, state-centric arena.⁷⁵⁸ This enables greater potential for different forms of influence over law-making as it enables NGOs to circumnavigate the state-determined formal norms of their participation, and determine their own modes of operation.⁷⁵⁹

Furthermore, informal types of participation mean that a broader constituency can indirectly participate in law-making. A fundamental way in which NGOs participate informally is to indirectly influence government decisions through the use of public pressure.⁷⁶⁰ This is done by a process of consciousness-raising among the general public via dissemination of information about the issue with the aim of educating and persuading target audiences,⁷⁶¹ and then encouraging these individuals to lobby their representatives in law-making forums. This was particularly identified by interviewees as an important element of campaigning;⁷⁶² “getting our campaigns, objectives into the media, we recognise that that will have some resonance with how

⁷⁵⁷ Van Boven, 1989: 220

⁷⁵⁸ Friedman et al, 2005: 36; Lindblom, 2005: 457

⁷⁵⁹ The importance of informal modes allowing NGOs to determine their own norms of participation is further discussed in Chapter 3, Part 4.

⁷⁶⁰ ID 11, 10/01/08

⁷⁶¹ Butler, 2007: 169

⁷⁶² ID 33, 15/01/08

decision-makers think".⁷⁶³ As well as being an effective campaigning tool, this method means that individuals who have no formal rights of participation can have albeit indirect influence over the development of human rights law.

Fundamentally, informal modes of participation allow NGOs to do two things: increase their access to law-making processes, and allow them to set the agenda for their participation, in terms of both issues and methods. This is further illustrated in the way that the boundaries between formal and informal NGO participation are not always clear. Although there are no formal rules of procedure to provide for it, NGOs are "entitled" to submit draft proposals in their own name at the Working Group level.⁷⁶⁴ Examples of this are found in the drafting process of the ICAT,⁷⁶⁵ and in the submission of a draft text to the Sub-Commission on the Status of Women from the NGO All African Women's Conference for the ICEDAW.⁷⁶⁶ In addition, in 1988 Reed Brody of the International Commission of Jurists co-authored the first draft of the Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances, which was revised by a meeting of experts organised by the International Commission of Jurists, and by the Sub-Commission's working group, before being forwarded to the General Assembly for approval.⁷⁶⁷ It was adopted in 1992.⁷⁶⁸ This indicates how the boundaries between formal and informal NGO participation have blurred, to the extent where certain types of informal NGO participation are accepted as legitimate without being given formal status. It also

⁷⁶³ ID 32, 17/01/08

⁷⁶⁴ Van Boven, 1989: 218

⁷⁶⁵ Burgers and Danelius, 1988: 26; Tolley, 1994: 167

⁷⁶⁶ Connors, 1996: 160

⁷⁶⁷ Tolley, 1994: 171

⁷⁶⁸ General Assembly Resolution 47/133, 18 Dec 1992

constitutes evidence of how NGO participation is changing the norms of participation in law-making.⁷⁶⁹

It is therefore clear that although NGOs' formal rights of participation in law-making are restricted, informal modes of participation are far more extensive. Furthermore, NGO participation in law-making illustrates the interaction between formal and informal modes of participation. Consultative status provides both formal rights of participation and "opens the door"⁷⁷⁰ to other forms of interaction and influence. For example, one interviewee identified that although NGOs' formal rights under ECOSOC are restrictive in terms of participating at the General Assembly, because they only give access to ECOSOC and its subsidiary bodies, ECOSOC rights provide access to the UN building, and that enables NGOs to establish informal relationships with UN staff and/or diplomats, and consequently influence decision-making in the General Assembly.⁷⁷¹ In addition, accredited NGOs are able to conduct parallel events during the meetings of the HR Council.⁷⁷² Willetts further identifies the legitimacy which consultative status confers on NGOs' informal activities; "the NGO activist is seen as having a right to be involved in the process".⁷⁷³ Formal rights are thus used to extend informal participation. Another NGO considered that formal and informal modes of participation by NGOs are in "constant interaction...what we say publicly and formally provides us with the basis upon which we can lobby and advocate informally...the influence comes from the interaction between the two".⁷⁷⁴

⁷⁶⁹ See Chapter 3, Part 4.

⁷⁷⁰ Cook, 1996: 185

⁷⁷¹ ID 50, 29/01/08; see also Willetts, 1996b: 43; Alger 2002: 95

⁷⁷² <http://www2.ohchr.org/english/bodies/hrcouncil/8session/events.htm>

⁷⁷³ Willetts, 1996b: 43; see also Breen, 2005: 105

⁷⁷⁴ ID 13, 18/10/07

This interplay between formal and informal structures of participation in law-making is also illustrated by the role of ‘soft’ law norms. Soft law instruments can be considered informal, as they do not impose legally binding obligations.⁷⁷⁵ However, they affect the development of human rights law in two ways. Firstly, soft law principles can impact on the development of international treaties or customary law. In some cases, the development of soft law principles is the precursor to the drafting of a treaty which then gives those norms binding status.⁷⁷⁶ Alternatively, soft law principles can solidify into binding customary law if they are reflected as such in state practice and *opinio juris*⁷⁷⁷. Soft law may therefore be evidence of hard law.⁷⁷⁸ The UDHR is an example of this, although many of the principles within the UDHR have also been developed into treaty norms. In addition, soft law principles may be treated as a source of law for judicial decisions, for example the ICJ may use General Assembly resolutions as evidence of state practice when determining the existence of a customary norm. Consequently, there is not a clear distinction between hard and soft international law; the two are rather interwoven.⁷⁷⁹

Secondly, soft law principles may reflect or develop a degree of normative agreement in the international community. As Boyle and Chinkin identify in relation to the comments, reports and recommendations of the treaty bodies, whilst these are not formally binding, “their constant repetition creates a consensus”.⁷⁸⁰ Soft law is

⁷⁷⁵ Cassese, 2001: 161; Boyle and Chinkin, 2007: 212

⁷⁷⁶ For example, the Declaration on the Rights of the Child (General Assembly Resolution 1386, 20 November 1959) preceded the ICRC, and the Declaration on the Elimination of Discrimination Against Women (General Assembly Resolution 2263, 7 November 1967) preceded the ICEDW.

⁷⁷⁷ Chinkin, 1989: 857

⁷⁷⁸ Boyle and Chinkin, 2007: 211

⁷⁷⁹ Shelton, 2000: 449

⁷⁸⁰ Boyle and Chinkin, 2007: 156

informative and educational.⁷⁸¹ It consequently both develops and disseminates human rights norms, irrespective of their legal status.

1.3: Representative and direct: individual participation through NGOs

There are some opportunities for direct individual participation in human rights law-making. Firstly, there are examples of particular individuals having a direct impact on the formation of particular legal principles; the term ‘genocide’ and the impetus behind the Genocide Convention are attributed to an individual lawyer, Raphael Lemkin, who performed a “lobbying miracle” to gain acceptance of the convention,⁷⁸² although such examples are exceptional rather than usual. In general, individual participation is via expert participation in the committees and/or working groups which draft human rights instruments. The contribution of such individuals can have an important impact on human rights norms. For example, the Hague, Oslo and Lund Recommendations on the education, linguistic and political rights of minorities were drafted by groups of individual experts, and, although they have not been formally adopted by states, have been widely translated and are in active use in the work of the High Commissioner on National Minorities.⁷⁸³ As noted in section 1.1, the writings of jurists and academics are a source of law, and members of treaty bodies can have direct influence over the development of soft law instruments. Nonetheless, jurists, academics and treaty body members are all clearly experts on international human rights law. Individuals can also participate in the work of the International Law Commission on an independent basis, rather than as representatives of

⁷⁸¹ Chinkin, 1989: 862

⁷⁸² Korey, 1999: 154

⁷⁸³ Alfredsson, 2005: 569

governments;⁷⁸⁴ however, such participation is restricted to experts; “persons of recognised competence in international law”.⁷⁸⁵ Finally, the state representatives who dominate UN law-making processes⁷⁸⁶ demonstrate direct individual participation; this is not, however, on an individual basis as they are participating as organs of their state. Similarly, individuals who participate as NGO representatives display direct forms of participation, but not on an individual basis, as they are promoting the concerns of the organisation.

In addition, there are examples of individuals who would be specifically affected by the particular instrument having direct influence over the construction of the respective legal principles. McCorquodale identifies that “the role of groups of people, as ‘peoples’, was crucial in the legal development of the right of self-determination”, contrary to the wishes of powerful colonial states”.⁷⁸⁷ Representatives of indigenous peoples participated fully in the working group which developed the DIP;⁷⁸⁸ constituting “one case where the victims developed the standards by which they want to be governed”.⁷⁸⁹ Law-making through the ILO also provides an example where those affected by the law are able to participate in its construction, as representatives of both employers and workers, as well as Member states, have voting rights and participate in the General Conference which develops Conventions and Recommendations.⁷⁹⁰ Whilst these constitute important examples of direct non-expert individual participation in human rights law-making, it must be emphasized that they are exceptions.

⁷⁸⁴ A/CN.4/325, 1979, para. 4

⁷⁸⁵ Statute of the ILC, Article 2(1)

⁷⁸⁶ See section 1.1. above

⁷⁸⁷ McCorquodale, 2004: 492

⁷⁸⁸ McCorquodale, 2004: 493

⁷⁸⁹ Mutua, 2007: 598

⁷⁹⁰ Constitution of the ILO, Articles 3(1) and 4(1)

Therefore, most forms of individual participation are specific rather than general, and experts are selected and invited. This does not constitute an open means for any individual to directly participate in the law-making process, as direct individual participation in human rights law-making is almost entirely restricted to individual experts: academics, jurists or Committee members. Consequently, Mutua argues that the victims of human rights abuse “rarely own the standards relevant to their plight”, because “standard setting in human rights is an elite-driven and not victim-centred process”.⁷⁹¹ This contention has merit; the structures and processes of international human rights law-making are prohibitively remote from most of those individuals whom the law is designed to protect, and rely on expert knowledge rather than the experience of the victim when constructing the law.

The non-expert, non-elite individual, participation in human rights law-making is thus primarily via representation by states, and the actions of NGOs. A state will in theory represent the interests and concerns of those within its jurisdiction in law-making forums.⁷⁹² However, as Tolley identifies “diplomats who negotiate international law only indirectly represent the people...private citizens who seek protection need some mechanism to influence diplomats who give top priority to maintaining state sovereignty”.⁷⁹³ NGOs are therefore an essential means for the interests of individuals to be represented in international law-making processes, and this is part of the rationale for granting them formal rights of participation via ECOSOC accreditation.⁷⁹⁴

⁷⁹¹ Mutua, 2007: 578

⁷⁹² See further discussion in Chapter 5, section 2.1.

⁷⁹³ Tolley, 1994: 112

⁷⁹⁴ ECOSOC Resolution 1996/31, para 20; Van Boven, 1989: 209

NGOs may also provide a means to enable more direct participation in law-making for victims of abuse. NGOs can be a forum to enable the perspectives of victims can be directly heard by law-making bodies; for example, one interviewee described how their organisation had taken victims of abuse to speak at the General Assembly regarding the particular issue that affected them.⁷⁹⁵ Another described how their NGO worked with victims of abuse in order to feed their voices into the language of a particular convention.⁷⁹⁶ Individuals may also be able to participate in law-making through bringing cases, litigation and individual petitions. Most NGOs who worked on the development of law through jurisprudence recognised the importance of direct participation by the individual(s) affected in determining the priorities of the case and how it should be conducted,⁷⁹⁷ and one interviewee considered that this enabled the greatest level of participation in law-making by affected groups.⁷⁹⁸ NGOs therefore enable beneficiaries to directly feed into different law-making processes.

However, in general NGOs participate on behalf of their various constituents rather than enabling such direct participation, as the NGO is the primary participant in the various law-making forums to which they have access, rather than their utilising access to facilitate participation by individuals. They consequently have an extensive representative role. A number of questions have been raised concerning the degree to which NGOs are, or can be, truly representative of any and all of their constituents.⁷⁹⁹ NGO representativeness regarding human rights law-making is part of this broader issue, which questions the extent to which NGOs' members, staff and beneficiaries

⁷⁹⁵ ID 50, 29/01/08

⁷⁹⁶ ID 20, 25/01/08

⁷⁹⁷ *inter alia* ID 9, 17/10/07; ID 33, 15/01/08; ID 25, 03/12/07

⁷⁹⁸ ID 9, 17/10/07

⁷⁹⁹ See Chapter 5, section 2.2.1.

are able or welcome to participate in the formation of policy, which then determines how the NGO participates in law-making. These issues are considered in depth in Chapter 5.

1.4: Gradations: active, effective and meaningful participation in law-making

As section 1.3 has identified, direct individual participation in human rights law-making is limited, and individuals predominantly participate in human rights law through structures of representation, being represented either by their state or by NGOs. The extent to which individual participation in human rights law-making is active, effective and meaningful is therefore to a great extent dependent on the activity and efficacy⁸⁰⁰ of state and NGO participation.

Firstly, whilst state participation in law-making is generally more active, effective and meaningful than NGO or individual participation, due to the centrality of states' power and interest within the system, there are still distinctions to be identified. There are discrepancies between states concerning the degree to which their participation in active, effective and meaningful regarding both treaty and customary law. Participation in treaty-making by certain states may be more heavily influenced by the position of other, more powerful states. Smaller states may have difficulty in attending conferences and committees due to a lack of resources or expertise.⁸⁰¹ Their participation in treaty drafting would clearly therefore be less active and effective than that of larger, richer states who are better able to assert their interests over the development of human rights law.

⁸⁰⁰ Chapter 5 explores the efficacy of NGO participation in depth.

⁸⁰¹ This is further discussed in Chapter 3, section 2.1

Secondly, customary law-making arguably reflects passive state participation. It has been asserted that states' participation as regards the creation of customary law can be considered as less intentional than the more purposeful participation in the construction of treaty law; customary international law being viewed as a side effect of state practice oriented to particular economic or political interests rather than a deliberate process.⁸⁰² States are then bound by something that they did not necessarily intend to construct.⁸⁰³ In addition, to be exempt from customary international law, a state must actively oppose a particular principle. Passivity is regarded as acquiescence.⁸⁰⁴ Charney makes a similar argument in relation to the construction of general principles of law. If all major domestic legal systems employ a similar principle, then it may be considered a general principle of international law, and ICJ practice with regard to the determination of such general principles does not require proof that a state has actively accepted a principle as such, not that domestic practice has been actively intended to develop a general principle of international law.⁸⁰⁵

In consequence, states may not participate equally or actively in the construction of international human rights law. This translates into less active and effective participation by those individuals whom the state represents, as the state participates in law-making on behalf of its citizens.

⁸⁰² Cassese, 2001: 119

⁸⁰³ It should be noted that there is disagreement on this point; Danilenko (1993: 79) argues that as a rule, states "are well aware of the possible broad law-making implications of their conduct". See also Charney, 1993: 537

⁸⁰⁴ Hannikainen, 1988: 239

⁸⁰⁵ Charney, 1993: 535-536

Thirdly, the extent to which NGO participation in law-making reflects active, effective and meaningful forms of participation varies in relation to formal and informal participation, and hard or soft law. The importance of 'active' NGO participation in law-making is recognised in General Assembly Resolution 57/229, although it does not specify what such active participation would entail.⁸⁰⁶ However, Brett distinguishes between active and passive NGO participation in law-making: passive participation being to provide information which may or may not be used by government delegations or experts, whereas active participation comprises taking part in the drafting of resolutions and standards.⁸⁰⁷ If the General Assembly followed this interpretation, it would imply a far more extensive role for NGOs than is reflected in their current formal ECOSOC rights of consultation, where NGOs are excluded from the final drafting stages.

As noted above, formal NGO participation, particularly in the development of hard law, is profoundly restricted. The lack of a negotiating role means that NGOs' formal participation is fundamentally limited to information provision, thus reflecting passive rather than active participation. Furthermore, reference has been made to NGOs considering that they are not allowed to participate "meaningfully".⁸⁰⁸ This implies that meaningful NGO participation at the UN would entail an expansion of their role, probably to incorporate formal negotiating rights over the content of human rights instruments. It is certainly questionable how far NGOs participation can be effective and meaningful when they are formally excluded from the final structures of decision-making. Whilst they clearly have considerable influence over human rights law-making through informal modes of participation, they do not have guaranteed

⁸⁰⁶ General Assembly Resolution 57/229, 18 December 2002, Preamble

⁸⁰⁷ Brett, 1995: 100

⁸⁰⁸ A/57/387, 9 September 2002, para 139(c)

influence over the end document in the same ways as states, who have formal rights enabling definite participation regarding the acceptance or rejection of the final instrument.

However, NGOs can be much more involved in the development of soft law; as noted, some soft law instruments have been entirely produced by non-state actors. As Shelton identifies, “soft law allows for more active participation of non-state actors [permitting them] a role that is possible only rarely in traditional law-making processes”.⁸⁰⁹ NGOs have much more control over and are included to a greater degree in these forms of participation in law-making, and their participation in this way is therefore far more active, effective and meaningful than their formal participation in hard law.

Furthermore, whilst individual participation in human rights law-making is affected by the degree to which NGO participation is active, effective and meaningful, it is also affected by the type, extent and influence of individual participation encouraged and enabled by NGOs. In consequence, the internal structures of NGO participation affect the degree to which they enable active, effective and meaningful participation by individuals in law-making. As section 1.3 above identified, opportunities for direct participation in law-making are limited, and participation is therefore usually mediated through NGOs. In order to be actively involved in law-making via NGOs, individuals must be actively involved in the work of the NGO.

⁸⁰⁹ Shelton, 2000: 13

Some of the ways in which individuals indirectly influence law-making via the work of NGOs reflect passive forms of participation. For example, one interviewee described how the case work that their organisation conducted fed into both the strengthening of existing legal instruments or the development of new ones, and specifically identified this as a means by which those individuals indirectly affected policy making within the organisation.⁸¹⁰ The individual may or may not be aware that their experience is being used in this way, but they are still contributing to the development of law. If using cases in this way, NGOs may consciously seek particular cases on specific issues in order to use as part of a pre-determined policy to strengthen or develop an aspect of human rights law;⁸¹¹ the practice of “strategic litigation”.⁸¹² One interviewee identified the perspective of potential victims in feeding into the organisation’s position on a particular issue; that they were concerned with it “because people will be victims of it, and communities will be victims”.⁸¹³ This again indicates a more indirect or passive role for victims’ perspectives to influence NGO participation in law-making. The NGO determines how the victim’s experience will be used; whilst this is at least indirect participation by the victim, it may not be active.

In addition, there are different NGO accounts of the value of active and effective internal participation. The INGO Accountability Charter fails to develop an active or effective account of beneficiaries’ participation, stating only that

⁸¹⁰ ID 10, 13/12/07

⁸¹¹ Examples of this are given in ID 10, 13/12/07 and ID 24, 15/11/07.

⁸¹² ID 25, 03/12/07; ID 26, 30/10/07

⁸¹³ ID 12, 18/02/08

We will listen to stakeholders' suggestions on how we can improve our work and will encourage inputs by people whose interests may be directly affected. We will also make it easy for the public to comment on our programmes and policies.⁸¹⁴

There is no clear guarantee given that inputs, comments and suggestions will have any effective influence over NGO activities, and no opportunity for public and/or beneficiary participation other than commenting on pre-determined policies. The Charter therefore does little to ensure active and meaningful participation by individuals in the internal structures of NGOs.

However, the interview data indicated greater recognition from the NGO sector regarding the value of active, effective and meaningful participation by individuals. The key test for participation was identified as requiring it to be 'active, free and meaningful', but that what this means in practice was considered necessarily contextual.⁸¹⁵ Another stated that "we are actively planning into our work... the active participation ('agency') of people in those decisions which could affect their rights".⁸¹⁶ This indicates at least some NGO recognition of the importance of a particular form of participation, but less specification of what this entails in practice. One interviewee identified that effective, genuine and meaningful participation requires that the views of people affected by a process have to be fed into that process.⁸¹⁷ This was specifically applied to participation in law-making by another interviewee "I'd like to have the [people] themselves have some input into what they would like their rights to be, and campaigning for them themselves".⁸¹⁸

⁸¹⁴ INGO Accountability Charter, 2005: 6, <http://www.ingoaccountabilitycharter.org/download/ingo-accountability-charter-eng.pdf>

⁸¹⁵ ID 17, 04/09/07

⁸¹⁶ ID 49, 08/02/08

⁸¹⁷ ID 24, 15/11/07

⁸¹⁸ ID 3, 03/03/07

1.5: Interaction between the different levels of human rights law-making

International human rights law-making takes place by definition on the international level, being made through UN processes and by states in their relationships with each other. However, human rights law-making also takes place at the regional and local levels. The three regional human rights structures – the European, Inter-American and African – all construct principles of human rights law through the development of treaties, custom and case law. These different levels make use of each other's jurisprudence when interpreting human rights principles. For example, as Pellet notes, the ICJ made reference to the practice of the HRC in the *Wall* case,⁸¹⁹ and the Inter-American Court of Human Rights (Inter-American Court) has made reference to the jurisprudence of the ICJ⁸²⁰ and the European Court⁸²¹ in its decisions.

In addition, practice at the local level, including the development of human rights legislation in national legal systems, can potentially affect international standards through being the source of general principles of international law. These 'general principles' identified as a source of law in Article 38 are generally accepted, and have been treated by the ICJ, as meaning principles common to the major legal systems of the world.⁸²² It is clear that interaction between these different levels can affect the construction of human rights law, and therefore that participation at one level can affect how human rights law is constructed and/or interpreted at another.

⁸¹⁹ Pellet, 2006: 788; see also *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*, ICJ Advisory Opinion Of 9 July 2004, para. 109

⁸²⁰ see for example, *Godínez-Cruz v. Honduras*, Judgment of January 20, 1989 (*Merits*) Series C No. 5, para 133

⁸²¹ See for example *Loayza-Tamayo v. Peru*, Judgment of June 3, 1999 (Interpretation of the Judgment of Reparations and Costs), Series C No.53 paras. 13 and 14

⁸²² De Wet, 2004: 80, 88-89

NGOs make use of these different levels when participating in law-making, as recognised by the Secretary General of the UN.⁸²³ As Charnovitz identifies, NGO participation in law-making must of necessity seek to go beyond the national level, as “the international causes of NGOs can only be achieved by intergovernmental cooperation”.⁸²⁴ One interview identified their NGO as contributing to law-making at local, national, regional and international levels, through both the development of new laws and intervention in legal cases.⁸²⁵ For example, one NGO interviewed was working on putting international legal norms into effect through the development of legislation at the federal, state and local levels.⁸²⁶ NGO participation in law-making thus takes account of and works with the different levels at which human rights law is constructed, which enables both direct and informal participation by NGOs at these levels.

NGOs also recognise and make use of different levels of law-making when exerting informal influence over these processes. For example, NGOs make use of small group and/or bilateral relationships to exert influence over government behaviour. NGO influence over the most powerful, and therefore influential, states is of fundamental importance.⁸²⁷ For example, NGOs may exert influence over government A, who then puts pressure on government B regarding support for a particular human rights instrument.⁸²⁸ One interviewee described how their organisation lobbied the Council of Europe regarding a certain issue, who then were able to exert pressure on a

⁸²³ A/57/387, 9 September 2002, para 133

⁸²⁴ Charnovitz, 2005: 549

⁸²⁵ ID49, 08/02/08

⁸²⁶ ID 3, 03/03/07

⁸²⁷ Korey, 1999: 174

⁸²⁸ ID 50, 29/01/08

particular country to make a change in the law prior to accession to the EU.⁸²⁹ This is also seen regarding UN law-making. NGOs, with the exception of the Red Cross,⁸³⁰ cannot participate officially in sessions of the General Assembly; consequently, one route to influence the text of a General Assembly resolution is through preliminary work in ECOSOC or at conferences.⁸³¹ They may also informally lobby states in order to influence their participation in the General Assembly.

Furthermore, NGO participation in law-making at the local level provides a potential means for individuals to influence the regional or international law-making processes. For example, one interviewee described how their organisation's partnership with a local NGO enabled the local group to have greater authority in influencing the development of law by the government,⁸³² another how their role in the organisation involved "making the links between the local, national level work and the international level work".⁸³³ Larger NGOs working in partnership with grassroots groups can provide a link between different levels of participation in law-making, and enable indirect forms of participation by smaller groups at the international level. For example, the various European 'umbrella' groups such as the European Disability Forum, the European Anti-Poverty Network and the European Network Against Racism provide a link between national organisations and the level of the EU, and consequently may provide a means for individuals and smaller groups to have influence at the higher levels of law-making within the European system.

⁸²⁹ ID 24, 15/11/07

⁸³⁰ The International Committee of the Red Cross has observer status with the General Assembly, as granted by Resolution 45/6, 16 October 1990.

⁸³¹ Willetts, 1996b: 53

⁸³² ID 3, 03/03/07

⁸³³ ID 35,22/01/08

However, the construction and implementation of law at the local level must be considered a two-way process. Firstly, a larger NGO working with local groups can help to enhance such groups' capacity to influence the development of law and can provide them with solidarity or protection when the issues promoted were not widely accepted within the community.⁸³⁴ Secondly, through working with local groups an NGO is able to learn about how best to promote certain norms within a particular context.⁸³⁵ Consequently, NGO participation in law-making is not just concerned with the development of standards at the international level, but also involves how those norms can be translated into local legislation. This indicates an important role for individuals in translating the meaning of international standards into acceptable human rights law at the local level.

Fundamentally, however, the role of individuals in law-making is limited to the interpretation and dissemination of human rights norms at this local level, rather than their initial development at the international level. Human rights law-making is therefore primarily a top-down process, with individuals' only opportunity for influence over international standards being via NGO or state representation.

1.6: Discussion

Modes of participation in human rights law-making present a clear contradiction to the forms of participation identified in Chapter 1 as appropriate for human rights. This required that participation in human rights centralised the role of the individual, and furthermore that their participation was active, meaningful and effective. In the

⁸³⁴ ID 3, 03/03/07; ID 26, 30/10/07

⁸³⁵ ID 4, 05/11/07; ID 26, 30/10/0

context of law-making, this would require direct and active involvement by the individual in the development of the law. Instead, the role of the state is clearly dominant and centralised, particularly regarding formal rights of participation in law-making. Private forms of participation are predominantly represented by the NGO sector, whose formal rights of participation are considerably more restricted than those of states. There is little opportunity for direct participation by individuals in human rights law-making, unless those individuals are experts or jurists, and individuals have no formal rights of participation. Individual participation is therefore usually mediated through the actions of states or NGOs.

The degree to which both NGOs and states are an adequate means for individuals to participate in law-making is clearly variable, depending on the state or NGO concerned. However, it does not appear that individuals are able to participate via these other entities in human rights to the degree identified as appropriate in Chapter 1. Participation mediated via NGOs is entirely dependent on the internal structure of individual NGOs and how much priority they accord to the inclusion of the voices of both members and beneficiaries. Equally, individual influence over state participation in law-making forums is dependent on the degree to which the state is receptive to public opinion.⁸³⁶

Analysis of informal modes of participation by NGOs presents a more inclusive and extensive account of participation in human rights law-making. It is clear that human rights law is created by both formal and informal processes⁸³⁷ and through the interaction between these. Furthermore, although NGOs' formal rights of

⁸³⁶ This issue is further developed in Chapter 5, section 2.1

⁸³⁷ Reisman, 2005: 20

participation are constrained, they have been able to develop informal structures to overcome these restrictions to some extent. This in turn affects individuals' participation in law-making mediated by NGOs. Whilst structures of participation in human rights law-making are not as extensive or inclusive as are appropriate to human rights, the existence of these informal structures is encouraging.

Understanding law as emanating from both soft law and jurisprudence also allows the consideration of a wider range of actors and broader modes of participation. As Röben identifies "the increasing importance of non-conventional [non-treaty] international law goes hand in hand with the cosmos of actors that participate in the process of making international law.⁸³⁸ Consequently, broadening the scope of what counts as human rights law in turn presents a more expansive and participatory account of human rights law-making, closer to the type of participation identified as appropriate in Chapter 1.

Participation in law-making has been identified as occurring at different levels: the local, regional and international. NGOs are able to participate informally, and to some extent formally, in law-making at these different levels, and to enable participation by individuals by providing a link from one level to another. However, this usually concerns the interpretation and application of international standards at the local level. Whilst there are some ways in which local or regional standards can influence international human rights law, in general human rights law-making is a top-down process. It is constructed at the international or regional levels, usually without direct input from those whom it will affect, and is then put into force at the national level.

⁸³⁸ Röben, 2005: 511

Consequently, participation by individuals at all levels, and particularly at the international level as identified as appropriate for participation in human rights in Chapter 1,⁸³⁹ is absent.

Finally, it must be emphasized that while NGOs' have important informal influence over human rights law-making, their role is fundamentally limited by their exclusion from the final drafting stages; they consequently remain reliant on states to make appropriate decisions regarding the definite content of human rights law. Furthermore, NGOs' informal influence over human rights law-making is also limited by practical factors, as will now be addressed.

Part 2: The feasibility of participation in law-making: resource constraints

Part 1 has identified that individuals have little opportunity for direct participation in human rights law-making, and therefore that they primarily participate through representation by states and NGOs. Part 1 compared the ways in which both states and NGOs participate, and examined some of the structural constraints on, particularly, NGO participation, in terms of their formal rights. This section will now consider the practical barriers to participation which affect both states and NGOs, and thus, indirectly, also impact on individual participation in human rights law-making.

2.1: Practical barriers to participation in law-making

Firstly, economic resources clearly affect participation in law-making, both by NGOs and states. Most NGO interviewees identified funding as an issue which affected

⁸³⁹ Chapter 1, section 2.2.1

NGO participation, both in general and in relation to law-making activities;⁸⁴⁰ “every NGO you talk to will say inadequate resources”.⁸⁴¹ This affects NGO participation in law-making, as international lobbying and networking require huge resources for travel, organisation and communication.⁸⁴² This is especially illustrated regarding participation in law-making at the UN; few NGOs are able to afford to attend UN meetings in Geneva or New York, especially those from the global South.⁸⁴³ One interviewee identified how resource levels particularly affect informal participation by small NGOs: “if they can’t afford to have a permanent presence in New York and Geneva, then they’re more restricted because they just fly in and fly out, and that means they don’t have the informal network to the same extent [as larger organisations] of the Secretariat and the governments”.⁸⁴⁴ Larger and richer NGOs who can afford to maintain a permanent office in Geneva or New York have more consistent access to the UN and State decision-makers, illustrating disparities of participation. This problem was recognised and to some extent addressed by General Assembly Resolution 57/229 which established a voluntary fund to support the participation of NGOs and experts in the work of the Ad-Hoc Committee on the drafting of the Disabilities Convention,⁸⁴⁵ and there have been calls for a general Trust Fund to be established to assist NGOs from developing countries to directly participate at the UN,⁸⁴⁶ although this Fund is yet to be created. It should however be noted that General Assembly Resolution 50/156⁸⁴⁷ decided that the United Nations

⁸⁴⁰ ID 3, 03/03/07; ID 9, 17/10/07; ID 26, 30/10/07; ID 31, 06/02/08

⁸⁴¹ ID 13, 18/10/07; see also Steiner, 1991: 78

⁸⁴² Mutua, 2007: 605

⁸⁴³ Mutua, 2007: 594

⁸⁴⁴ ID 50, 29/01/08; see also Longford, 1996: 230-231

⁸⁴⁵ General Assembly Resolution 57/229, 18 December 2002, para. 14

⁸⁴⁶ Lovald and Jenie, 2005: 4, Stiftung, 2006

⁸⁴⁷ General Assembly Resolution 50/156, 21 December 1995, para. 1

Fund for Indigenous Populations should be used to enable participation by indigenous groups in the Working Group which drafted the DIP.

A similar situation is reflected regarding state participation in law-making, with developing countries claiming not to have the trained personnel and financial resources to enable participation on a level with developed states in law-making forums.⁸⁴⁸ This is demonstrated by cases where NGOs with greater available knowledge and resources have provided experts for the delegations of developing states,⁸⁴⁹ or have been contracted to conduct negotiations on behalf of smaller states.⁸⁵⁰ Furthermore, it is contended that states from the global North dominate UN human rights law-making bodies.⁸⁵¹ Although most Working Groups are fairly inclusive in terms of potential participation, it is likely that larger and/or richer states would have the time and resources to participate more effectively in these forums.

The way in which NGOs are funded also affects their ability to develop human rights legal principles regarding specific issues. Many NGO funders provide money for specific projects, rather than 'core' funding which the organisation may use as it chooses. This means that the organisation may not be able to pursue particular issues that they consider important as they are unable to do this work if funders are not interested in it.⁸⁵² For some NGOs this means that they might be asked by donors to change the focus of a project;⁸⁵³ others only seek funding from donors who match

⁸⁴⁸ LeBlanc, 1995: 34

⁸⁴⁹ Butler, 2007: 181

⁸⁵⁰ Lindblom, 2005: 477

⁸⁵¹ Mutua, 2007: 606

⁸⁵² ID 24, 15/11/07

⁸⁵³ ID 26, 30/10/07

their own objectives.⁸⁵⁴ For example, Hudock argues that Southern NGOs are subject to external control from Northern resource providers due to the funding relationship.⁸⁵⁵ In consequence, the lack of core rather than specific funding may reduce NGOs' ability to develop legal principles regarding particular issues. Although an NGO may identify an issue that it considers important, it may be unable to develop it if no funding is available to fund research and campaigning activities related to that particular issue.

The size of the organisation also affects NGOs' ability to participate in law-making, particularly in relation to informal lobbying. Interviewees observed that larger NGOs have wider formal and informal networks which they can use to gain specific knowledge of a country or issue context, and thereby conduct more effective lobbying.⁸⁵⁶ Tolley also argues that large NGOs have the resources to pursue single policy issues on their own; smaller NGOs are more likely to form NGO coalitions in order to aggregate their influence.⁸⁵⁷ This may restrict the ability of smaller NGOs to pursue those issues that they think most important, and allow for greater influence over the law-making agenda by larger NGOs. However, one interviewee also considered that some small NGOs were able to be more flexible and immediate in terms of responding to debates as they did not have to refer to their head office before making a statement of position.⁸⁵⁸

In addition, communication resources and new communication technologies affect NGO participation in law-making. The internet is particularly useful for enhancing

⁸⁵⁴ ID 35, 22/01/08

⁸⁵⁵ Hudock, 1999: 5, 17-18

⁸⁵⁶ ID 50, 29/01/08; ID 32, 17/01/08

⁸⁵⁷ Tolley, 1994: 109

⁸⁵⁸ ID 13, 18/10/07

and coordinating NGO lobbying regarding the development of human rights standards, as it enables NGOs to communicate quickly and cheaply with individuals, other NGOs and governments, to access information and so forth. Such technological factors have particularly affected the growth and impact of Third World NGOs,⁸⁵⁹ as well as those in more developed countries. For example, an NGO without a permanent presence at the UN would be dependent on formal and informal reports of Working Group meetings, which would be primarily distributed via the internet. Interviewees also identified communication resources as a problem when working in certain areas both for NGO participation and individual participation. For example, one interviewee observed that in certain parts of Africa, having access to the internet was not an option, and often there was also limited access to the telephone.⁸⁶⁰ Participation in law-making structures which depends on access to these forms of communication will therefore be restricted and unequal.

Timescale factors also affect the development of human rights law, as UN law-making is a lengthy process. One interviewee considered that “if you want to have a new treaty in an area of human rights law its generally going to take a minimum of 5 years and probably 10”.⁸⁶¹ For example, the original proposal for a Convention on the Rights of the Child was submitted to the Human Rights Commission in 1978;⁸⁶² the final text of the Convention was adopted in 1989.⁸⁶³ Similarly, the two Covenants took 18 years between initial drafting and completion, and the Optional Protocol to the ICESCR 16 years. The most extreme example of this is the development of the

⁸⁵⁹ Korey, 1999: 171

⁸⁶⁰ ID 26, 30/10/07

⁸⁶¹ ID 50, 29/01/08

⁸⁶² LeBlanc, 1995: 16

⁸⁶³ General Assembly Resolution 44/25, 20 November 1989

ICC, with the concept being originally mooted in 1948, and the Rome Statute finally adopted in 1998.⁸⁶⁴

The timescale affects participation by both NGOs and states. Timescale issues were considered by NGO interviewees as constituting a challenge to participation in law-making,⁸⁶⁵ as the nature of law-making at the UN entails supporting documents, debates and decisions regarding the continuation of the law-making process.⁸⁶⁶ It may also be hard to maintain momentum on a campaign that lasts for several years, if not decades. One interviewee observed the need to take a long term perspective, implying that NGOs may become frustrated and disengaged due to the length of time required to achieve anything at the UN.⁸⁶⁷ The interplay between time and funding factors also affects NGO participation. Projects may stall for a while because one set of funding has finished and a new set is not yet in place.⁸⁶⁸

For states, the law-making timescale may mean a change of government and consequently diplomatic representation at the UN. This may mean the position of the government can change regarding the content of the proposed law, and/or the new representative may not have the requisite knowledge regarding the negotiations. Again, there is interaction between timescale and the economic resources required to fully participate in a UN law-making process.

Knowledge is a further issue affecting the ability to participate in law-making. Firstly, knowledge of the UN system affects the ability of NGOs to make use of that system

⁸⁶⁴ Mutua, 2007: 567

⁸⁶⁵ ID 47, 20/12/07

⁸⁶⁶ ID 50, 29/01/08

⁸⁶⁷ ID 50, 29/01/08

⁸⁶⁸ ID 31, 06/02/08

both formally and informally. As Longford identifies, knowledge of UN procedures is essential for effective participation by NGOs.⁸⁶⁹ This problem is recognised by the ISHR, whose work is specifically directed to enabling other organisations to make use of the UN human rights system through the provision of information about UN human rights structures. In addition to knowledge of the systems, NGOs require knowledge of abuse in order to make the case for the development of law. This consequently requires resources for research. One interviewee considered that although NGOs do work cooperatively regarding the sharing of research and knowledge resources, some organisations are more protective of such resources due to the competition for funding.⁸⁷⁰

Finally, the specific political and cultural context can affect NGOs' ability to participate, and their ability to represent the concerns of others in law-making processes. One interviewee considered that the country where their organisation worked was seen as less "attractive" and a more "difficult" place to work than other countries in the region, due to the particular political situation, and that this led to a lack of NGO participation in addressing the specific human rights concerns.⁸⁷¹ This clearly affects the development of legal principles to deal with those issues because NGOs are such an important means to represent grassroots concerns in law-making processes.

⁸⁶⁹ Longford, 1996: 232

⁸⁷⁰ ID 3, 03/03/07; see also Scott, 2001: 213

⁸⁷¹ ID4, 05/11/07

2.2: Discussion

It is clear that the ability to participate in law-making is, for both states and NGOs, affected by resources issues which affect the ability to take advantage of the opportunities available. Factors affecting the ability to participate in law-making include financial and communication resources, knowledge base and timescale. NGOs' ability to participate can also be affected by their size, and by obligations to donors concerning the specific content of campaigns and programmes.

Consequently, the importance of informal methods of participation by NGOs can result in exclusion. Use of informal methods means the degree of influence that an NGO has over human rights decision-making is very much dependent on the resources and status of the NGO, and could lead to the exclusion of smaller NGOs and consequently of the constituencies whom those NGOs represent. This could also affect individual participation through representation by a state. Smaller states are less able to participate in law-making than larger and richer states, and this, as with NGOs, may result in the indirect exclusion of the interests of their citizens from human rights law-making forums. This clearly contradicts the type of participation identified in Chapter 1, which required inclusive opportunities for participation.

Although there are references within international law concerning equitable participation by both states and NGOs, it is not clear that states have any obligations to enable more inclusive forms of participation, or to direct resources to facilitating participation by individuals, NGOs or other states. This may be encouraged, but is not required.

Practical barriers to participation in law-making therefore illustrate the contradiction identified in Chapter 1: In principle, human rights requires inclusive and universal opportunities for participation, which, as regards law-making, would require the development of more direct forms of individual participation in law-making, and/or policies which enable more equitable participation by those NGOs and states with less access to financial, time and knowledge resources. However, human rights law does not oblige the allocation of resources to facilitate the ability to participate in this way. Practical barriers therefore constitute a significant barrier to the realisation of the forms of participation required by human rights.

Part 3: The purpose of participation in human rights law-making

Sections 1 and 2 have considered the ways in which states and NGOs participate in human rights law-making and the structural and practical factors which affect this participation. This section will now examine the ends to which participation in law-making is oriented and will analyse the ways in which participation in law-making both reflects and contributes to wider structures of power and legitimacy.

3.1: Orientation to individual and communal ends

There is a tension within human rights law-making between participation oriented to particular or collective interests. Firstly, international law-making is essentially a communal activity, as it is constructed by interactions between states, IGOs and NGOs. Human rights treaties, if they are to be successfully adopted, must reflect

common ground and be acceptable to diverse state interests.⁸⁷² Customary human rights law also stems from the collectivity of state practice and *opinio juris*. Furthermore, human rights law is inherently collective, as human rights are supposed to represent common interests. This communal aspect of the development of human rights was emphasized by one interviewee “they are probably the only thing that humankind has built that has an ownership, a collective ownership”.⁸⁷³

However, individualistic elements can also be identified within human rights law-making. States participate on an individual basis, and the promotion of individual state concerns can be seen in the negotiation regarding various human rights instruments. Mutua points to various modes of state obstruction within human rights law-making processes, including refusal to participate, delaying tactics including the blocking of consensus and the use of reservations to modify the final obligations incumbent on the state.⁸⁷⁴ Examples of instruments subject to these processes of state obstruction deriving from self-interest include the Optional Protocol to the CAT⁸⁷⁵ and the DIP.⁸⁷⁶ The persistent objector rule in customary law also implies that an individual state may except itself from a customary legal regime regarding human rights. In addition, states use reservations to human rights treaties to construct individual exceptions to or reinterpretations of human rights principles.⁸⁷⁷ Whilst human rights law is initially constructed through a collective process and is in principle oriented to communal ends, the specific meaning of human rights principles

⁸⁷² Mutua, 2007: 571

⁸⁷³ ID 35, 22/01/08

⁸⁷⁴ Mutua, 2007: 570-571

⁸⁷⁵ Mutua, 2007: 570

⁸⁷⁶ Mutua, 2007: 563

⁸⁷⁷ The issue of reservations is further explored in Chapter 4, section 2.1.

in different contexts allows for and can be oriented to more individual ends, at the level of individual states.

This tension between collective and individual interests unavoidably results in compromise. For example, Victoria Tauli-Corpuz, the Chairperson of the UN Permanent Forum on Indigenous Issues, refers to compromises between state and indigenous peoples concerning the issues of self-determination and territorial integrity as contributing to the length of time taken to complete the DIP.⁸⁷⁸ Compromise may not best serve the interests of those whom the law is intended to protect; such was the controversy resulting from the requirement that the ICCPR and ICESCR included an individual complaints mechanism that this was withdrawn from the final drafts, in order that negotiations could proceed.⁸⁷⁹ Whilst there is an Optional Protocol to the ICCPR providing for this procedure, the separation of the two means that states can accept the principle of these rights without being subject to a direct form of accountability for individuals.⁸⁸⁰ In addition, the Optional Protocol to the ICESCR has only just been adopted⁸⁸¹ and is not yet in force. This meant that individuals were for decades denied a vital accountability mechanism concerning the abuse of their rights, due to the needs for compromise with state interests.

3.2: Instrumental purposes of participation in law-making

Participation in law-making is primarily instrumental, rather than substantive. Mutua argues that NGO participation is not concerned with process, but with the outcome of

⁸⁷⁸ <http://www.twinside.org.sg/title2/resurgence/206/cover1.doc>

⁸⁷⁹ McGoldrick, 1991: 121

⁸⁸⁰ This issue is further discussed in Chapter 4.

⁸⁸¹ A/63/465, 28 November 2008

influence over the creation of human rights standards.⁸⁸² Thus NGO participation in law-making is not a goal in itself, but purely a means to influence the content of human rights law. Similarly, state participation in law-making is oriented to the construction of legal principles which comply with states' interests, rather than being a substantive end.

However, regarding individual participation within NGOs, some interviewees identified that public participation in the work of the NGO was an end in itself, as well as a means to campaign for more effective human rights; for example, "its not just a question of effectiveness, its also a question of...the role of ordinary people".⁸⁸³ This was echoed by another interviewee: "the process of what you do is as important as the outcomes... if we are empowering others as effectively as we might do".⁸⁸⁴ This indicates that participation in law-making as mediated through an NGO had a more substantive end for such participants, as such participation by individuals in the international system was considered of value, irrespective of how far that participation actually influenced the content of a particular legal norm.

A number of other instrumental purposes of participation in law making may be identified regarding both participation by NGOs and participation enabled or mediated by NGOs. Firstly, participation in law-making is a means to gather information. NGOs' level of expertise and their capacity to support the work of the UN is acknowledged in Resolution 1996/31; "consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organisations having special competence in

⁸⁸² Mutua, 2007: 595

⁸⁸³ ID 33, 15/01/08

⁸⁸⁴ ID 24, 15/11/07

the subjects for which consultative arrangements are made".⁸⁸⁵ This demonstrates that the rationale for allowing NGO participation is to be able to make use of their expertise, and implicitly recognises the contribution that their knowledge can make to law-making. NGOs are closer to the victims and generally have a higher level of expertise than states,⁸⁸⁶ and consequently their participation in standard-setting provides much of the information on which to base more accurate legal principles. For example, NGO participation in the drafting of the CRC was considered of value as they generally had more experience in the field of children's rights than the government delegates.⁸⁸⁷ Similarly, participation by indigenous groups in the drafting of the DIP "allowed indigenous voices to contribute valuable information and unique perspectives that helped member States gain some normative clarity about the kind of instrument required".⁸⁸⁸ This demonstrates that NGO participation is considered a means to enhance the quality of legal instruments.

Participation as providing more and better knowledge of a situation is also seen regarding participation within NGOs. Participation through inclusion of beneficiaries was identified as an information-gathering tool "they know what their most pressing needs...are, hence they also know best what they need from us".⁸⁸⁹ A more inclusive approach was seen to give access to "inside knowledge".⁸⁹⁰ Consequently, participation by victims/beneficiaries was identified as resulting in better outcomes which "will match their interests rather than what we think their interests are".⁸⁹¹ The inclusion of constituents in decision-making within NGOs is therefore in part oriented

⁸⁸⁵ ECOSOC Resolution 1996/31, 25 July 1996, para 20; see also Preamble

⁸⁸⁶ Mutua, 2007: 602

⁸⁸⁷ Longford, 1996: 224

⁸⁸⁸ International Service for Human Rights, 2007: 84

⁸⁸⁹ ID 41, 16/01/08

⁸⁹⁰ ID 31, 06/02/08

⁸⁹¹ ID 47, 20/12/07; see also ID 35, 22/01/08

to collecting better information on which to base the development of new or improved standards of human rights.

In addition, wider participation in law-making is considered to result in more effective and acceptable law. Charney identifies that participation by the subjects of the law in the law-making process makes it more likely that they will comply with the law as it reflects their interests.⁸⁹² Participation is also linked to ownership over, and therefore commitment to, outcomes regarding both external and internal NGO participation. Referring to the participation of NGOs in Preparatory Committees, such “open and consultative” processes were considered to “inspire far greater ownership of the outcome”.⁸⁹³ This is also reflected in the internal structures of NGOs. Imposition of policy was seen as more likely to fail than inclusion of beneficiaries in policy development;⁸⁹⁴ “if you lead people in directions that they do not fully support then you will find in the long term that the motivation towards and sustainability of those programmes will probably be weak”.⁸⁹⁵ Victims’ participation was identified as resulting in a sense of ownership over a process,⁸⁹⁶ and that having this sense of ownership gave people a stake in the outcome: “if it comes from them, then they’re going to protect it and look after it”.⁸⁹⁷ Participation as ownership was thus considered to translate into responsibility⁸⁹⁸, rather than letting “outsiders ‘fix their problem’”.⁸⁹⁹ Victims’ participation was consequently identified as resulting in more sustainable outcomes;⁹⁰⁰ “when we go into a region we don’t expect we’re going to be in that

⁸⁹² Charney, 1993: 533

⁸⁹³ Eurostep et al, 2006: para 4

⁸⁹⁴ ID 3, 03/03/07

⁸⁹⁵ ID 11, 10/01/08

⁸⁹⁶ ID 47, 20/12/07; ID 10, 13/12/07

⁸⁹⁷ ID 4, 05/11/07

⁸⁹⁸ ID 10, 13/12/07; ID 11, 10/01/08, ID 26, 30/10/07

⁸⁹⁹ ID 41, 16/01/08

⁹⁰⁰ ID 47, 20/10/07; ID 4, 05/11/07

region for ever... what we want to leave behind is a strong enough organisation to continue the work".⁹⁰¹ As applied to human rights law-making, this indicates that participation in the construction of norms results in greater support for and compliance with those norms.

Finally, NGO participation in human rights law-making contributes to the general status of NGOs in the international system. NGO participation provides a challenge to state-centric norms of law-making, and enhances the legitimacy of NGOs as international actors. NGO participation in law-making therefore has effects beyond the purposes identified above: the provision of information and increased support for the human rights principles that result from a particular process. Continued and expanded NGO participation should therefore also be considered as a means to enhance NGOs' general status in the international system.

3.3: Control and empowerment: the centrality of state interest

Structures of participation in law-making processes are oriented towards both empowerment and control, and there is a struggle within them as to which end participation is directed. Law-making is therefore an area where power and influence over human rights is contested, as control over the normative content of human rights principles has far-reaching consequences. By exercising control over the content of human rights, states retain control over the obligations for which they will be accountable regarding the protection of human rights.

⁹⁰¹ ID 31, 06/02/08

To a great extent, international law, including human rights law, is the law of states, and reflects their interests. Hard and soft law instruments are agreements between states; state practice and *opinio juris* contributes to the construction of customary law. Furthermore, it is asserted that “traditionally, customary law has been made by a few interested states for all”,⁹⁰² revealing the power structures within a hierarchy of states. Reliance on state practice regarding the formation of customary law presents a distorted, exclusive and self-interested concept of human rights legal principles.⁹⁰³ Similarly, participation in the construction of *jus cogens* norms reveals how the development of law may be used to assert particular interests. Whilst the nature of these principles is defined in Article 53 of the Vienna Convention on the Law of Treaties the process by which they are developed remains unclear. This lack of clarity regarding the normative procedures by which norms of *jus cogens* are identified may result in appropriation of the concept for partial or political ends.⁹⁰⁴ Participation in the development of peremptory norms is furthermore dependent on support from the most important members of the world community.⁹⁰⁵ Participation in the construction of these norms is therefore potentially unequal and may serve particular interests. Participation in law-making is thus both an assertion of and a means to perpetuate and enhance broader structures of state power and control.

NGO participation in human rights law-making provides a counterbalance to state control, as one interviewee identified: “just thinking what would happen if the UN

⁹⁰² Charney, 1993, 538

⁹⁰³ McCorquodale, 2004: 498

⁹⁰⁴ Danilenko, 1993: 214; 217

⁹⁰⁵ As Cassese (2001: 141) rightly identifies, it is unlikely that any State, even a Great Power, could oppose the formation of a norm of *jus cogens* if this were supported by the majority of States. However, a new norm would not develop unless it was supported by major States, as it would not be considered to be recognised as a peremptory norm by the international community of States as a whole, as per the Vienna Convention on the Law of Treaties, Article 53.

worked...without NGOs, and I think it would be a disaster...we would basically see processes where the state interest is...the defining interest in most things".⁹⁰⁶ For example, the Bangkok NGO Declaration on Human Rights appeared to reduce the impact of Asian states' declaration regarding the cultural relativism of human rights.⁹⁰⁷ Charnovitz argues that NGO participation is particularly necessary to offset the parochial attitude of larger states, who often are less interested in the development of international law than small states.⁹⁰⁸ The growing power of NGOs in law-making has been considered a threat by some states, as identified in Martens and Paul's critique of the Cardoso panel report on civil society and the UN,⁹⁰⁹ which argues that the report's "genesis lay not in a generous UN commitment to strengthen the NGO role but rather in growing concern by governments that NGOs were now too strong, too numerous and too challenging to the status quo".⁹¹⁰ This recognizes that participation in law-making is a means to assert or challenge structures of power and control.

In addition, beneficiary participation in law-making was linked to empowerment by interviewees.⁹¹¹ Capacity-raising was seen as a means to empower people to make their own decisions regarding how human rights law should be developed.⁹¹² Conversely, lack of inclusion could result in disempowerment; one interviewee identified that victims of abuse could feel a lack of control over their case when it is used by NGOs to promote a particular issue.⁹¹³ Participation in law-making was

⁹⁰⁶ ID 20, 25/01/08

⁹⁰⁷ McCorquodale, 2004: 494

⁹⁰⁸ Charnovitz, 2005: 551

⁹⁰⁹ A/58/817, 11 June 2004

⁹¹⁰ Martens and Paul, 2004: 1

⁹¹¹ ID 47, 20/12/07

⁹¹² ID 26, 30/10/07

⁹¹³ ID 25, 03/12/07

therefore specifically identified as a potential means of empowerment for those whom the law would protect, although present structures of participation in law-making do little to empower individuals, as they are primarily excluded from the processes.

3.4: Participation and legitimacy in human rights law-making

The role of participation as a contributing factor to the legitimacy of human rights law is reflected in the debates concerning the universality of human rights law. Relativist perspectives explicitly identify non-participation in the development of human rights principles as constituting a challenge to the legitimacy of human rights. They do this through the contention that human rights principles do not represent universal principles due to the lack of involvement of non-Western states in the drafting process of human rights instruments, in particular the UDHR, resulting in a pro-Western bias within human rights.⁹¹⁴ They argue that there are in existence today more than three times the number of autonomous countries than voted for the UDHR,⁹¹⁵ again implying that the human rights principles contained within the UDHR are either illegitimate or should not apply due to exclusion from process. This issue was also reflected in the interview data. One interviewee identified that in their particular context human rights law itself was regarded with suspicion as a Western imposition oriented to self-interest.⁹¹⁶ This was located in the context of the power relationship between developed and developing countries.⁹¹⁷ In essence human rights are posited as illegitimate because certain cultures or societies did not participate in the determination of those principles. Thus participation in the process of the definition of

⁹¹⁴ Mutua, 2007: 553-555

⁹¹⁵ O'Sullivan, 2000: 48

⁹¹⁶ ID3FU, 28/01/08

⁹¹⁷ ID3FU, 28/01/08

human rights principles is explicitly identified as required for human rights to be considered legitimate.

However, defendants of the universality of human rights also utilise participation as a means to confirm the legitimacy of human rights principles. For example, it is contended that whilst certain states may not have been involved in the drafting process of human rights instruments, their consequent ratification indicates acceptance of the norms expressed within these documents.⁹¹⁸ Bianchi argues that there was wide participation in the negotiations resulting in the adoption of the two Covenants and consequently these instruments “represent the contribution of different political, ideological and religious systems”.⁹¹⁹ Waltz agrees that “a wide range of participants outside the Western bloc made significant contributions... and they were aware at the time of the significance of their words and deeds”.⁹²⁰ These positions thus use participation to defend the legitimacy of human rights. This demonstrates that both critiques and defences of human rights identify the importance of participation in law-making for the legitimacy of the resultant law.

It should be noted, though, that these debates consider legitimacy to be dependent on the participation of states, and to a lesser extent of NGOs. Direct individual participation is not recognised as required for legal principles of human rights to be legitimate. Although Mutua argues that the treaty bodies recognise the legitimacy that inclusion of different interests confers on human rights standards,⁹²¹ there is little explicit evidence that NGOs, and individuals, are included in law-making processes in

⁹¹⁸ Tomuschat, 2003: 63-65

⁹¹⁹ Bianchi, 1997: 202.

⁹²⁰ Waltz, 2001: 50

⁹²¹ Mutua, 2007: 591

order to enhance the legitimacy of the resultant law. Rather, as discussed above, their participation is oriented to providing information that enables the production of more effective law that is more appropriate to its purpose, and more acceptable to those on whom it will impact. Human rights law is regarded as legitimate international law irrespective of whether those individuals whom it will affect participate in its construction. The relationship between participation and legitimacy is therefore primarily concerned with state participation as conferring legitimacy on the construction of law. This conforms to the dominant norm of state-centric participation in human rights law-making.

3.5: Discussion

Chapter 1 identified that participation in human rights must be oriented to the empowerment of individuals. Participation in law-making is clearly an arena where power and control are contested. Control over the construction of human rights norms has fundamental effects for individuals and states; it defines the legal rights to which individuals are entitled and the obligations incumbent on states. Structures of participation in human rights law-making therefore present a major contradiction. Although the NGO participation does provide some counterbalance to state power and interest in law-making forums, states are clearly the dominant actor and consequently retain a huge amount of control over the content of human rights law. Whilst participation in human rights law-making remains dominated by states, it is unlikely to enable the level of individual empowerment required. Some degree of individual empowerment may be identified through participation in NGOs, but the general

exclusion of direct individual influence from participation and the centralisation of states demonstrate that this is fundamentally limited.

In addition, there is a conflict within human rights law-making structures concerning whether this form of participation is directed to communal or individual ends. Clearly, the construction of human rights law does reflect some form of collective decision-making. Nonetheless, there is also a definite orientation to individual state interests. This is a clear contradiction to the form of participation identified in Chapter 1, as the purpose of human rights is to reflect and serve the common interests of humanity. The way in which states can pursue their own interests through participation in human rights law-making clearly restricts the ability of the resultant law to fully reflect collective interests.

Furthermore, Chapter 1 determined that the concept of human rights requires participation oriented to both means and end. Regarding both state and NGO participation, there is little indication that participation in law-making is considered a goal in itself; rather, it is a tool for more effective and legitimate law-making. Participation in law-making reflects previously identified instrumental purposes of participation. It is a means to gather additional and better knowledge about a situation, and therefore a means to ensure more effective outcomes. However, the indirect forms of individual participation enabled by participation within NGOs do display a greater orientation to a substantive purpose. There is consequently some recognition of the value of individual participation in law-making, but this does not extend to participation in the law-making structures themselves, as individuals are generally excluded from participation in these procedures.

Finally, participation in law-making is also identified as contributing to the legitimacy of law; equally, exclusive forms of human rights law-making, whether actual or perceived, have led to challenges to the legitimacy of human rights. However, there has been little recognition of individual participation as a contributing factor to the legitimacy of human rights; rather, participation is considered in terms only of states.

Part 4: Determination of the norms of law-making: the formal-informal distinction

Structures of participation regarding the construction of norms of participation in law-making must now be examined. Analysis of norms of participation in law-making requires consideration of how, by whom and with what purpose particular principles have been developed and whether they can be challenged or redefined. This is particularly illustrated through a comparison of formal and informal norms of participation in law-making. As there is little to suggest that individuals participate in the development of the norms of law-making, this analysis will focus on NGO participation as the vehicle for the inclusion of individuals.

4.1: Participation in the construction of the norms of law-making

As section 1.2 above discussed, NGOs participate in law-making in both formal and informal ways. A distinction may be drawn between normative participation regarding formal and informal modes of participation in law-making. Formal norms of NGO participation in law-making were initially laid out in Article 71 of the UN Charter. There is evidence of NGO influence over the determination of these formal

norms of participation. For example, participation by representatives of over 1200 NGOs at the founding conference of the UN in San Francisco in 1945 played a significant role in the inclusion of Article 71,⁹²² which resulted in ECOSOC Resolution 1996/31 which in turn provides for NGOs formal rights of participation in developing human rights law. As Breen identifies “NGO input into the drafting of the Charter resulted in the carving of a role for NGOs themselves in standardsetting in the field of human rights law”.⁹²³ A more recent example of such normative participation is the role of NGOs in determining the role for NGOs in the negotiation of the OP to the ICESCR.⁹²⁴ At a more general level, NGO participation in the drafting of the Bill of Rights can be viewed as a means to enable further NGO participation by informal means in law-making (and other activities) as it protects the rights of freedom of association and expression which enable NGOs to participate, both formally and informally. It is therefore clear that NGO participation in law-making can and does extend to some influence over the development of formal norms regarding law-making, including how and when NGOs will participate in law-making.

Nonetheless, formal participation by NGOs is primarily subject to state control, as the granting, suspension and withdrawal of consultative status, as well as the interpretation of norms and decisions relating to it are the prerogative of Member States exercised through the Economic and Social Council and its Committee on Non-Governmental Organisations.⁹²⁵ NGOs have no legal claim to consultative status.⁹²⁶ Particularly regarding the accreditation of human rights NGOs, this structure has been considered as “the fox guarding the hen house”; NGOs who criticize a particular

⁹²² Alger, 2002: 93

⁹²³ Breen, 2005: 101

⁹²⁴ ID 20, 25/01/08

⁹²⁵ ECOSOC Resolution 1996/31, para 15

⁹²⁶ Simma, 2002: 1074

state's human rights record are unlikely to receive a favourable consideration of their application by that state.⁹²⁷ This indicates considerable state control over formal modes of participation in law-making by NGOs.

However, as Bianchi identifies, although states are able to control formal NGO participation in law-making arenas, because NGOs achieve consultative status through state consent, states have more limited control over the actions of NGOs once they have achieved this status.⁹²⁸ McCorquodale agrees: "much [NGO] activity... is only possible because states allow it to happen, but not all of it is controlled by, or controllable by, states".⁹²⁹ This indicates that although NGOs may have limited opportunity to shape the norms of formal participation in law-making, they have more flexibility regarding their modes of participation under consultative status. This is contradicted to some extent by Aston, who argues that whilst NGOs with consultative status must abide "by the rules of the game", efforts by states on the NGO Committee to have consultative status suspended or removed on the grounds of misbehaviour is often a pretext for muzzling critical voices.⁹³⁰ It seems that NGOs are able to redefine to some extent how they will formally participate, but this is at the same time dependent on which particular interests such participation is challenging. For example, one interviewee identified that challenges to NGO participation at the UN depended on which states were being criticised by NGOs and that now there is more focus on Western democratic states some of those states are in turn questioning NGOs' legitimacy as participants.⁹³¹

⁹²⁷ Aston, 2001: 950; see also Simma, 2002: 1074

⁹²⁸ Bianchi, 1997: 191-2

⁹²⁹ McCorquodale, 2004: 496

⁹³⁰ Aston, 2001: 956; see also Otto, 1996: 116

⁹³¹ ID 50, 29/01/08

Whilst NGO participation in determining formal participation in law-making is restricted, examination of informal participation in law-making reflects a broader and more inclusive account of normative participation. The importance of determining informal modes of participation in law-making is identified by Berman:

We need to think of international law as a global interplay of plural voices, many of which are not associated with the state, and... we need to focus on how norms articulated by a wide variety of communities end up having important impact in actual practice, regardless of the degree of coercive power those communities wield.⁹³²

This promotes a creative and open-ended concept of participation in determining the norms of law-making, implying space for redefinition and expansion of these norms. As McCoquodale comments, “the participation of non-state actors in the international legal system may not be the traditional method of international law-making, but it is now an accepted method”.⁹³³

As identified by Cook, “to be effective at the UN, NGOs must be opportunists, able to seize on the unexpected and make use of an unforeseen event”.⁹³⁴ The modes of participation utilised by NGOs to overcome the limitations of their formal position and the primary role of states in law-making have been described as “inventive, creative, active and ingenious”.⁹³⁵ NGO participation at international conferences is claimed to have “introduced a new dynamic of participatory democracy to the international community and to the shaping of international law”.⁹³⁶ The wide range of informal modes of participation both used and developed by NGOs in order to participate in human rights law-making demonstrates the ability to reconstruct these

⁹³² Berman, 2007: 308

⁹³³ McCorquodale, 2004: 496

⁹³⁴ Cook, 1996: 184

⁹³⁵ Reidel, 2005: 317

⁹³⁶ Otto, 1996: 120

norms in response to the needs of the particular situation. As Charnovitz argues “NGOs will find a way to achieve influence in whatever formalities are used to pursue world public order”.⁹³⁷

The use of informal means of participation may provide NGOs with greater flexibility than participation via formal rights. Whilst formal methods of participation are primarily defined primarily by states, informal means are developed by NGOs themselves, and can therefore potentially be more suited to achieving the objectives of NGOs. Informal structures may be less restrictive than formal ones as NGOs are more able to change tactic in relation to the political climate, as was seen in the 1980s when NGOs began to specifically and politically target states which had violated their human rights obligations. NGOs are not obliged to respect formal decision-making resulting from a process from which they are typically excluded, and can therefore use informal methods to promote more comprehensive standards which are not reliant on compromise.⁹³⁸ For example, NGOs can argue that states are morally if not legally bound to respect more extensive human rights than those contained in the legal instruments to which those states are party.⁹³⁹

Furthermore, informal participation contributes to the development of an alternative public sphere, which may present a different and potentially more inclusive model of human rights norm construction, including the norms of participation in human rights. Informal modes of participation are more inclusive than formal participation requiring

⁹³⁷ Charnovitz, 2005: 544

⁹³⁸ Spiro, 2002: 166

⁹³⁹ see also discussion in Chapter 4, section 2.2.3

accreditation by ECOSOC, as any NGO can participate in this way.⁹⁴⁰ This alternative sphere is important as it creates new and/or different structures of participation and legitimate constructions of meaning that are not dependent on state acceptance. This indicates the potential for NGOs to both expand and redefine the arena in which NGO influence over human rights law-making occurs.

4.2: Discussion

Chapter 1 identified the importance of participation in constructing the norms of participation, in order for such participation to be genuine and effective. Consideration of participation in the construction of norms of human rights law-making presents a complex and contested account. This is to be expected, as there is no overall control over the “haphazard...almost anarchic”⁹⁴¹ process of international law-making. A variety of different actors contribute at different levels and in different ways. This provides potential space for innovation and redefinition of the norms of participation in law-making, which is in line with the type of participation required by human rights. However, there remains considerable state control over the norms of participation in law-making, particularly regarding formal participation by NGOs. This then influences the extent to which individual participation mediated through NGOs can be effective. In addition, the degree to which individuals can affect the norms of NGO participation, as discussed in section 1.3 above, is subject to the particular structures of participation within NGOs.

⁹⁴⁰ Informal NGO participation can however be restricted by resources; see Chapter 3, section 2.1, and Chapter 5, section 2.2.3

⁹⁴¹ Alston, 1984: 607. See also LeBlanc, 1995: 1-15

Nonetheless, it is clear that participation in determining informal types of participation in law-making is broader and more reflexive than participation in the construction of formal modes. States clearly retain a great deal of power and influence over which NGOs may participate formally, and what such participation entails. However, regarding informal participation, NGOs are able to determine how and why they will participate in law-making to a much greater extent. This relationship between formal and informal sources of law is identified by Berman, who views international law-making as a “messy world, where official, quasi-official, and unofficial norms are pursued by multiple communities controlling various means of coercive and persuasive authority”.⁹⁴²

It is also clear that participation in law-making itself affects both formal and informal modes of participation in law-making. Where participation is determined by legal principles, input into those principles consequently affects the type and extent of participation allowed by those principles. This is illustrated by NGOs’ influence over the development of Article 71, and over the revisions to Resolution 1996/31. Thus, as legal norms of participation themselves affect further development of the norms of participation in law-making, structures of inclusion or exclusion can be perpetuated. However, this also demonstrates the difficulty of assessing participation in the construction of norms of participation as identified in Chapter 1; that there can be no final determination of how the initial norms regarding a specific process were constructed, as there is always a further structure which governs the development of the norms under consideration.

⁹⁴² Berman, 2007: 303

Concluding remarks

This Chapter has examined structures of participation in human rights law-making, and has compared them to the types of participation appropriate to human rights as identified in Chapter 1. Again the complexity of participation in human rights is demonstrated, with no clear account being discernable and various contradictions emerging dependent on which aspect of participation is examined. Clearly states retain a great deal of power and influence over the development of human rights norms; equally clear is the important if not fundamental informal role played by NGOs. Individual participation in human rights law-making is however extremely limited unless mediated by states or NGOs. This aspect of participation in law-making presents the clearest divergence from the type of participation identified in Chapter 1 as appropriate for human rights. Individuals have little control or influence over the development of standards which are, in principle, oriented to their protection.

Chapter 4 will now investigate the extent to which this pattern is replicated regarding access to human rights protection, or whether this aspect of human rights reflects greater participation by individuals.

Chapter 4: Participation through Access to Human Rights Protection Mechanisms

Introduction: the elements of access

The previous Chapter examined participation in the definition of human rights law through investigating participation in human rights law-making. This Chapter will now explore participation in the application of human rights law through considering access to human rights complaints mechanisms. Whilst there are numerous ways in which individuals could participate in the application of human rights law, access to complaints mechanisms reflects the clearest direct form of such individual participation. This Chapter will therefore focus on whether and to what extent individuals can participate in human rights law through accessing the structures which have been set up for the protection of their rights. In contrast to Chapter 3 which concentrated on NGO participation, this Chapter centres on participation by individuals. NGO participation is considered, but only insofar as it enables individual participation.

Access to, and therefore participation in, the protection mechanisms provided by international human rights law as examined here has three elements. It requires that the individual firstly be subject to the law, secondly be aware of the law and the rights to which they are entitled, and finally be able to bring a complaint regarding violation to an appropriate body. Consequently, individual access to human rights protection mechanisms firstly requires the existence of human rights obligations both regarding the right that has been violated, and held by the entity responsible. Access is

dependent on the establishment and applicability of human rights obligations in a particular situation. Both the applicability of protection afforded by human rights obligations to individuals and groups, and participation in determining whether these obligations are applicable or not, must therefore be examined.

In addition, for an individual to bring a complaint, the existence of individual complaints mechanisms is obviously required. This Chapter will therefore examine the various mechanisms for individual complaint within both the UN and regional structures, the restrictions on access to these procedures, and participation in determining the powers and scope of these particular protection mechanisms. As noted, this analysis focuses on individual access to human rights, as a form of individual participation in human rights. It will not, therefore, consider in any depth the Charter procedures⁹⁴³ for holding states accountable, nor state reports to the treaty bodies, as these do not offer an individualised means of complaint,⁹⁴⁴ although they are a form of access to human rights procedures.

Finally, this Chapter is concerned with the role of access to information in enabling participation in human rights through both determining the applicability of obligations and in accessing protection mechanisms. In order to participate in human rights procedures, individuals and groups require access to information concerning their rights and consequent state obligations, the legal structures that protect them and the complaints mechanisms than can be accessed in response to abuse of these rights. Access to information as discussed in this Chapter therefore entails consideration of

⁹⁴³ The Charter processes encompass the work of the country or thematic Rapporteurs, the Universal Periodic Review, and the 1503 and 1235 procedures.

⁹⁴⁴ All of the Charter Procedures are directed towards general situations of systematic or widespread abuse rather than violations at the individual level, although the mandated experts can receive and act on individual complaints. The individual is the source of information rather than an active complainant in the process.

participation via the acquisition and dissemination of information specifically regarding human rights.

It must be noted that the issue of compliance will not be considered. This analysis of participation through access to human rights structures examines the existence of obligations and the ability to access protection mechanisms. Whilst the issue of compliance is fundamental for such access to be effective,⁹⁴⁵ it is also irrelevant without these two elements first being present. Neither does this Chapter examine the implementation of human rights. The concern of this Chapter is the degree to which individuals are able to participate in human rights through access to complaints procedures, rather than how far human rights are enjoyed by individuals, although this is also an element of participation in human rights. Furthermore, this Chapter will only consider treaty-based obligations, and will therefore not examine human rights obligations deriving from customary law. Although customary law would in theory create universal obligations, in practice there remains considerable debate over the scope and content of customary human rights obligations.⁹⁴⁶ The only forums in which states could be held to account regarding customary obligations are via the Charter procedures, which, as noted, will not be considered as they do not offer access to justice on an individual basis, or the ICJ, to which individuals do not have access.

This Chapter follows the analytical structure of Chapters 1 to 3, examining participation through access to human rights in relation to the modes, purposes, feasibility and norms of participation. Section 1 considers the purpose of access to individual complaints mechanisms and examines why these are such an important form of participation in human rights. Sections 2 and 3 analyse respectively how the

⁹⁴⁵ See note 948 below

⁹⁴⁶ See Chapter 1, section 2.1; also Clapham, 2006: 86

structure of international human rights obligations and mechanisms constitute legal barriers to participation, and how lack of access to information and resources present practical barriers. Finally, section 4 examines participation in determining how and by whom human rights mechanisms are constructed, and consequently how the norms of participation through access to these structures are determined. This analysis will facilitate comparison between the aspects of participation reflected by access to human rights mechanisms, and the type of participation appropriate for human rights identified in Chapter 1.⁹⁴⁷

Part 1: The purpose of individual access to complaints procedures

This Chapter considers individual participation in human rights through focussing on access to individual complaints mechanisms. This section examines the purpose of this form of participation, considering why it is important for individuals to be able to access human rights structures, and what the effects of this type of participation can be.

1.1: Substantive and instrumental purposes of individual complaint

Participation through access to human rights structures can be considered an end in itself. Access to complaints mechanisms can be a meaningful form of participation in human rights, even if the case is not decided in the individual's favour, or, as is usual, there is little or no compliance with decisions.⁹⁴⁸ This is because, as noted in section 2 below,⁹⁴⁹ being able to participate in human rights through accessing human rights

⁹⁴⁷ See Chapter 1, section 2.2.

⁹⁴⁸ Butler; 2007: 132-134; Bayefsky, 2001: 33-35

⁹⁴⁹ Chapter 4, section 2.3.

complaints mechanisms is a means for individuals to actively engage with human rights, through the action of claiming them. Individuals therefore become more aware both of their rights, and of themselves as active rights-holders, through participating in a human rights structure.

Access to individual complaints mechanisms also serves a range of instrumental purposes. Firstly, and obviously, an individual complaint mechanism is a means to implement the rights contained in the relevant treaty. This is confirmed in the Preamble to the Optional Protocol to the ICCPR, which states that

“in order further to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate for the Human Rights Committee... to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant”.

The importance of a complaints mechanism as a means of implementation has also been identified by NGOs calling for this process to be developed regarding the CRC.⁹⁵⁰ Individual complaints mechanisms are a form of implementation because they are a means for individuals to hold governments to account for their action or inactions concerning the protection of human rights.

Secondly, these structures are a means to improve understanding of the content of human rights and subsequent state obligations. The development of jurisprudence enhances understanding for states and individuals, and enables the body hearing the complaint to engage more fully with complex issues.⁹⁵¹ Individual complaints therefore “play an important role in the interpretation of treaty provisions”,⁹⁵² and are

⁹⁵⁰ A/HRC/8/NGO/6, 26 May 2008, 2

⁹⁵¹ A/Conf.157/PC/62/Add.5, 26 March 1993, Annex II para 34

⁹⁵² Niemi and Scheinin, 2002: 48

considered more important in this respect than treaty bodies' general comments or examination of state reports.⁹⁵³

In addition to this informative role concerning the interpretation of particular rights, the existence of an individual complaints mechanism is a means to more widely promote the general concept of the rights contained within the respective convention. Discussion during the development of the Optional Protocols to the ICESCR and the ICEDAW both highlighted an individual complaints mechanism as a means to enhance the status of the Convention, particularly in comparison with those instruments which already provided for individual complaint.⁹⁵⁴ In relation to the Optional Protocol to the ICEDAW, it was thought that "the elaboration of an optional protocol would be a sign of the importance that the international community accorded to equality between the sexes and might therefore influence attitudes".⁹⁵⁵ Individual complaints mechanisms, through confirming the status of particular rights, are intended to enhance their respect.

Complaints mechanisms can also enhance human rights enjoyment at a more general level. All accountability structures, including individual complaint, arguably have a preventative role, through deterring future violations.⁹⁵⁶ The knowledge that they may be held to account for non-fulfilment of human rights obligations may contribute to greater state respect of human rights. The CESCR has identified this with respect to an Optional Protocol to the Convention: "the mere possibility that complaints may be brought in an international forum should encourage governments to ensure that more

⁹⁵³ A/Conf.157/PC/62/Add.5, 26 March 1993, Annex II para 31

⁹⁵⁴ E/CN.6/1997/5, 18 February 1997, para. 17 (ICEDAW); A/Conf.157/PC/62/Add.5, 26 March 1993, Annex II para 42-48 (ICESCR)

⁹⁵⁵ E/CN.6/1997/5, 18 February 1997, para 14

⁹⁵⁶ Ratner and Abrams, 2001: 155

effective local remedies are available”.⁹⁵⁷ Arambulo agrees that “influencing national legislation and policy positively is the function most effectively served by an individual complaint procedure”.⁹⁵⁸ The CESCR also propounded that “the possibility of an adverse finding by an international committee would give economic and social rights a salience in terms of the political concerns of governments that those rights very largely lack at present”.⁹⁵⁹ Similarly, the rationale for the development of an Optional Protocol to the ICEDAW included strengthening the promotion and protection of women’s rights,⁹⁶⁰ and the positive impact which this instrument would have on State compliance with human rights principles,⁹⁶¹ because “internationally enforceable law [is] a powerful incentive for governments to live up to [their] obligations”.⁹⁶² Arguments concerning the development of an individual complaints mechanism for the ICRC also contend that

The introduction of a communications procedure would both encourage States to develop appropriate remedies for breaches of children’s rights at national level, and provide an external mechanism for children and their representatives to appeal to when national remedies do not exist or are ineffective.⁹⁶³

The importance of litigation was identified by one interviewee: “governments respond to being sued in a way that they do not respond to training”.⁹⁶⁴ Another identified how bringing cases at the international level affected states’ national behaviour “the fact that we’ve been taking cases to... the international system has created conditions...to put pressure on governments at the national level, so they don’t get these cases at the

⁹⁵⁷ A/Conf.157/PC/62/Add.5, 26 March 1993, Annex II, para 35

⁹⁵⁸ Arambulo, 1999: 179

⁹⁵⁹ A/Conf.157/PC/62/Add.5, 26 March 1993, Annex II, para 37

⁹⁶⁰ E/CN.6/1996/10, 10 January 1996, para 34

⁹⁶¹ E/CN.6/1996/10, 10 January 1996, para 42

⁹⁶² E/CN.6/1996/10, 10 January 1996, para 54

⁹⁶³ A/HRC/8/NGO/6, 26 May 2008, 2

⁹⁶⁴ ID 9, 17/10/07

international level".⁹⁶⁵ A clear purpose of individual complaint is therefore to improve respect for and enjoyment of human rights.

Finally, an individual complaints procedure is a means to give human rights practical realisation. The CESCR has identified the value of access via an individual complaint procedure as it means that "the real problems confronting individuals and groups come alive in a way that can never be the case in the context of the abstract discussions that arise in the setting of the reporting procedure".⁹⁶⁶ As asserted by the OHCHR

It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person's real-life situation, the standards contained in international human rights treaties find their most direct application.⁹⁶⁷

Part of the importance of access to individual complaints mechanisms therefore lies in their ability to forge a connection between conceptual human rights norms at the international level and practical experience at the individual level.

1.2: The purpose of individual complaint: Communal or individual interests?

Clearly, participation through access to individual complaints mechanisms reflects an orientation to individual interests. The main purpose of individual complaint is to achieve a remedy for the individual whose right(s) have been violated. The pursuit of accountability can also help victims achieve a sense of justice and closure.⁹⁶⁸

⁹⁶⁵ ID 35, 22/01/08

⁹⁶⁶ A/CONF.157/PC/62/Add.5, 26 March 1993, Annex 2, para. 33,

⁹⁶⁷ Office of the United Nations High Commissioner for Human Rights, 2007

⁹⁶⁸ Ratner and Abrams, 2001: 155

However, individual forms of complaint can potentially have an impact beyond the securing of remedy on an individual level. Section 1.1 identified that complaints mechanisms may serve a preventative role, can promote the rights in question, may encourage greater respect by states, and can contribute to the development of the content of the rights. These clearly have effects at the level of the community. The preventative potential of these structures has a wider effect than securing remedy or justice for one individual, as it may enhance general protection of human rights within states, in terms of both legal structures and political will, which is of benefit to a wider community. Through contributing to wider understandings and implementation of human rights, individual cases can have broader effects. Examination of individual complaints can focus attention on widespread patterns of abuse. This is illustrated through the discussions on the Optional Protocol to the ICEDAW, which identified that an individual complaints mechanism was a means to identify systematic cases of discrimination that might not be evident from state reports.⁹⁶⁹ An individual case could thus be the means to identify and address abuse which affect wider groups or communities.

It is of value to briefly note the existence of human rights accountability mechanisms which allow for collective forms of complaint. These include the Special Procedures, which although they allow for individual communications are oriented to the identification of patterns of gross violations, rather than abuse on the individual level. The ILO provides for collective complaint procedures, where claims can only be brought on behalf of a group,⁹⁷⁰ as does the European Social Charter.⁹⁷¹ The inquiry

⁹⁶⁹ E/CN.6/1997/5, 18 February 1997, para 21

⁹⁷⁰ ILO Constitution Articles 24-26; Arambulo, 1999: 181

⁹⁷¹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995

procedures contained in various human rights treaties and Optional Protocols⁹⁷² also indicate concern with more collective forms of complaint. Whilst these structures do not directly represent forms of individual complaint, they nonetheless are to some extent oriented to individual interests: those of the individuals who make up the group on whose behalf the complaint is brought.

It is therefore clear that although individual complaints mechanisms are in principle oriented to the interests of the individual concerned, such forms of participation in human rights can have a wider effect and can serve more communal ends. An individual case may have effects beyond the achievement of redress for a particular individual in terms of change in state practice. In addition, whilst collective complaints mechanisms are not directly oriented to individualised remedy, they can be of benefit to individuals. This indicates that participation in human rights through access to accountability mechanisms, whether individual or collective, cannot be judged solely to be oriented to either individual or communal ends; rather, it serves both purposes.

1.3: Individual complaint as a form of power and control

Participation through access to human rights structures is intrinsically concerned with issues of power and control. The existence of both human rights obligations and complaints structures provide a means for individuals to assert control over the actions of their state regarding human rights protection; equally the absence of structures enhances states' power to be free from such restrictions on their behaviour.

⁹⁷² ICAT, Article 20; Optional Protocol to the ICEDAW, Article 8; Optional Protocol to the ICESCR, Article 11 (not yet in force)

Discussions concerning the elaboration of the Optional Protocol to the ICCPR identified that the purpose of the Covenant was to protect the individual against abuse of power by the state; consequently there was a need for right of petition.⁹⁷³ One interviewee considered how this relationship between power and access to human rights was restrictive “[if] the power structure of the society is really unequal, does not even allow them to know they have rights, much less to have access to the instruments that are there really to be accessible to them, but that they don’t really have access to”.⁹⁷⁴ This identifies the role of power and inequality in constricting knowledge of obligations and structures of access, and also indicates that this affects the ability to make use of these. Clearly, the existence both of obligations and of structures of access to justice are an assertion of individual power, and a statement of the limits of state control. This is reflected in the UNHCHR’s description of the Optional Protocol to the ICESCR as

an important platform to expose abuses that are often linked to poverty, discrimination and neglect, and that victims frequently endure in silence and helplessness. It will provide a way for individuals, who may otherwise be isolated and powerless, to make the international community aware of their situation.⁹⁷⁵

The fundamental basis of human rights is that states’ treatment of those within their control is subject to certain limitations. In order for this to be effective, the individual must be able to hold the state to account regarding their actions. The absence of structures of accountability therefore allows state impunity and serves states’ rather than individuals’ interests.

Furthermore, access to human rights information is a means of empowerment for individuals, as it enables access to complaints mechanisms. Information allows

⁹⁷³ McGoldrick, 1991: 122

⁹⁷⁴ ID 35, 22/01/08

⁹⁷⁵ United Nations Press Release, 18 June 2008

people to scrutinise the actions of a government and is the basis for proper, informed debate of those actions;⁹⁷⁶ it “empowers communities to battle the circumstances in which they find themselves and helps balance the unequal power dynamic between them and their governments”.⁹⁷⁷ Consequently, access to information, as part of freedom of expression, is contended to be a ‘cornerstone’ or ‘empowerment’ right; one that enables other rights.⁹⁷⁸ This is clearly seen concerning the role of information in empowering individuals to claim their rights through complaining about abuse. One interviewee identified the empowering potential of information provision “I worked with an activist, who had no knowledge of the law, and he went to one of our trainings and suddenly he could see that he could use the law and it wasn’t a closed shop to him”.⁹⁷⁹

However, whilst access to human rights structures is a means of individual empowerment, equally denial or restriction of access is a means of assertion of state power. Issues of state power are clearly identifiable in the context of complaints mechanisms, with states trying to assert control over these structures in order to avoid or limit accountability for their actions. The orientation to state power can be seen as concerning those states which have not accepted any of the UN individual complaints mechanisms - Brazil, India, Egypt and Iran - all of which have either expressly stated or are thought to have declined to participate in these structures due to a desire to preserve state sovereignty and the pre-eminence of domestic jurisdiction.⁹⁸⁰ Alternatively, states may seek to influence the operation of certain structures. Although individual members of human rights accountability structures are

⁹⁷⁶ Article 19, 1999: 7

⁹⁷⁷ Callamard, 2006: 8

⁹⁷⁸ Callamard, 2006: 7

⁹⁷⁹ ID 24, 15/11/07

⁹⁸⁰ Niemi and Scheini, 2002: 45-48

independent experts rather than state representatives, as Odinkalu notes regarding the African Commission on Human and Peoples' Rights (African Commission) “In practice, as with other international institutions and mechanisms, the process of nomination and election to the Commission minimizes the likelihood of the body being composed of persons who may be substantially or rigorously impervious to state pressure”.⁹⁸¹ It is clear that states have recognised human rights mechanisms as sites of contestation of power, and are seeking to maintain their interests through participation in these structures.

1.4: Discussion

It is clear that individual complaint structures are oriented to a range of purposes. Whilst their central concern is to provide a means for individuals to hold states accountable for their actions, they also serve other instrumental and collective ends. Some of these purposes of individual complaint as a form of participation in international human rights law are common to all forms of participation, as identified in Chapter 1: provision of information concerning the nature of rights, enhanced implementation of rights and the promotion of rights. Participation through access to human rights structures is clearly oriented to both individual and communal ends. This conforms with the purpose of participation in human rights as identified in Chapter 1.

Access to human rights structures is a substantive end in itself, as well having these instrumental effects. Consequently, this form of participation is itself of value,

⁹⁸¹ Odinkalu, 1998: 366

irrespective of the outcome. Having knowledge, and having the ability to bring a complaint, enables the individual to participate meaningfully in human rights. Irrespective of the success of the complaint, this demonstrates the growing role of the individual in a system still dominated by states. This is of vital importance because, as identified in Chapter 1, a major goal of human rights is protection of the individual from the actions of the state: this conforms to the type of participation identified in Chapter 1.

Finally, human rights are “a defence against despotism in the exercise of government power”.⁹⁸² In order for human rights to fulfil this role, it is necessary to have structures which enable individual to hold states to account for their behaviour. It is clear that access to complaints mechanisms is a means of and is oriented to individual empowerment, and in this way this type of participation fulfils the criteria established in Chapter 1. However, the degree to which states retain control over access to human rights structures limits this emancipatory potential. Access to human rights structures is therefore an area where the limits of both state and individual power are contested. For access to human rights procedures to be truly and universally empowering, individuals require enhanced opportunities for determining whether they may have access to these structures.

Part 2: Participation in human rights protection mechanisms: actors and modes

Having considered why access to individual complaint is an important form of participation in international human rights law, this section will now examine how far

⁹⁸² Burgers & Danelius, 1988: 5

individuals are actually able to participate in this way, through consideration of the legal structures which enable or constrict such participation.

2.1: Public and private actors: the dominance of state participation

As noted in Chapter 1, access to human rights protection mechanisms is an inherently public form of participation, because these structures are public procedures undertaken in public forums. However, it is clear that there is a huge discrepancy between the degree of access available to public and private actors; between states, and individuals and/or NGOs.

Participation by the state dominates structures of access to human rights. Firstly, it is of value to contrast the difference in options available to states and individuals regarding access to human rights accountability mechanisms. States are able to bring complaints in all forums which consider violations of human rights. States can bring cases before the ICJ⁹⁸³ and all of the regional human rights commissions⁹⁸⁴ and courts,⁹⁸⁵ and can refer cases to the Prosecutor of the ICC.⁹⁸⁶ Most human rights conventions provide for an inter-state complaint mechanism,⁹⁸⁷ even if these are rarely, if ever, used.⁹⁸⁸ State representatives can also raise issues of concern within the Human Rights Council, which may lead to the creation or continuation of Special Procedures.

⁹⁸³ ICJ Statute, Article 34(1)

⁹⁸⁴ AmCHR, Article 45, AfCHPR, Article 47, ECHR, Article 24. Note that the European Commission has now been replaced by the European Court (Protocol 11 to the ECHR).

⁹⁸⁵ AmCHR Article 61(1); Protocol to AfCHPR, Article 5(1); ECHR, Article 44

⁹⁸⁶ Rome Statute, Article 14 (1)

⁹⁸⁷ ICERD Article 11; ICCPR, Article 41; ICEDAW, Article 29; ICAT, Article 21; ICMW, Article 76. There is also provision for an inter-state complaint mechanism in Article 10 of the Optional Protocol to the ICESCR (not yet in force).

⁹⁸⁸ See discussion in Chapter 4, section 2.3.

In contrast, private individuals are only able to bring a complaint to some of these bodies. Individual complaints to treaty bodies are either provided for in an Optional Protocol, as with the ICCPR, ICEDAW and the ICPD, or within the treaty itself, as with the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ICAT),⁹⁸⁹ the ICERD⁹⁹⁰ and the ICMW.⁹⁹¹ The CRC and the CESCR⁹⁹² are therefore the only bodies before which an individual complaint cannot potentially be brought. However, as is further discussed below, the availability of individual complaints procedures to the treaty bodies is conditional on state consent, and individuals cannot participate in determining whether they may have access. Regarding the Charter procedures, private individuals have no means of participation in the deliberations of the Human Rights Council, and limited scope for input into the work of Special Rapporteurs, or the 1235 and 1503 procedures. Individual participation is limited to the submission of a communication;⁹⁹³ there is no guarantee of response or that their particular situation will be investigated.

Concerning judicial mechanisms, the regional structures are fairly inclusive, with individuals having direct access to all regional commissions⁹⁹⁴ and courts,⁹⁹⁵ with the exception of the Inter-American Court,⁹⁹⁶ although in practice an unresolved complaint to the Inter-American Commission will always be brought before the

⁹⁸⁹ Article 22

⁹⁹⁰ Article 14

⁹⁹¹ Article 77

⁹⁹² Although the Optional Protocol to the ICESCR has been adopted by the General Assembly (A/63/465, 28 November 2008) it is yet enter into force.

⁹⁹³ Butler, 2007: 115-116

⁹⁹⁴ AmCHR, Article 44, AfCHPR, Article 55, ECHR Article 25(1).

⁹⁹⁵ Protocol to AfCHPR, Article 5(3); Protocol 11 to the ECHR, Article 34

⁹⁹⁶ AmCHR, Article 61(1)

Court.⁹⁹⁷ It should however be noted that individual access to these bodies is geographically limited, as these structures do not have jurisdiction beyond a specific area or group of states. In consequence, there are significant regional disparities concerning access to individual complaints mechanisms, as neither Arabic nor Asian states are participants in a regional structure which allows individual complaint.⁹⁹⁸ Private individuals are unable to bring a case before the international courts whose jurisdiction is not restricted to particular regions.⁹⁹⁹ Only states may be parties within ICJ proceedings,¹⁰⁰⁰ and only states or the Prosecutor may refer a case to the ICC.¹⁰⁰¹ Individual access to international judicial structures is therefore far more limited than that of states, although with respect to the regional structures, state access is also limited by the geographical restriction.

There is some scope for NGO participation in human rights protection mechanisms which individuals cannot access, which represents an expansion of participation by private actors. They have close relationships with Special Rapporteurs, and accredited NGOs have some rights of participation in the Human Rights Council.¹⁰⁰² They are able to participate in treaty body monitoring processes through the submission of parallel reports,¹⁰⁰³ or states may consult with NGOs when preparing their reports for the treaty bodies, although not all states do this, and the degree to which NGOs are included in the process is variable.¹⁰⁰⁴ This provides a potential means for the

⁹⁹⁷ Butler, 2007: 105

⁹⁹⁸ The Arab Charter does not allow for individual complaint.

⁹⁹⁹ The jurisdiction of the ICC and ICJ is however limited by state consent; see note 1020 below

¹⁰⁰⁰ ICJ Statute, Article 34(1)

¹⁰⁰¹ Rome Statute, Articles 14 and 15

¹⁰⁰² GA Resolution 60/251, 15 March 2006, para. 11 confirmed that NGO participation in the Human Rights Council would be based on the ways in which they participated in the Human Rights Commission.

¹⁰⁰³ Clapham, 2000: 175-187 discusses NGOs' use of parallel reports to the HRC and the CAT; Bayefsky, 2001: 46-49 considers shadow reports to the CRC and the CEDAW.

¹⁰⁰⁴ Niemi and Scheinin, 2002: 8-19

concerns of individuals to be brought before these bodies, even if the state concerned has not consented to an individual complaints procedure. It should however be noted that the treaty bodies can only monitor the behaviour of states who have ratified the relevant treaty and thus these procedures are also limited by state consent. It should also be emphasized that NGO participation in reporting procedures before the treaty bodies does not constitute or enable individual complaint.

Concerning judicial mechanisms, NGOs are not able to bring a case concerning violations of human rights before either the ICJ¹⁰⁰⁵ or ICC, nor before the Inter-American Court.¹⁰⁰⁶ NGOs may institute proceedings before the European Court,¹⁰⁰⁷ and NGOs with observer status may bring a case to the African Court on Human and Peoples' Rights (African Court).¹⁰⁰⁸ However, this does not represent an expansion of individual access as individuals are also able to make complaints to these bodies. NGOs may also participate in judicial proceedings through the submission of *amicus* briefs,¹⁰⁰⁹ but this does not constitute a means by which individual access is enhanced.

There is therefore a huge imbalance between the options available to public and private entities concerning participation in bodies which consider complaints of violations of human rights. States clearly have far more extensive access than private individuals, and NGOs' potential to extend or enhance individual access is limited. This is particularly demonstrated in international (rather than regional) judicial mechanisms, to which only states have access. This further underlines the inability of

¹⁰⁰⁵ ICJ Statute, Article 34(1)

¹⁰⁰⁶ AmCHR, Article 61(1)

¹⁰⁰⁷ Protocol 11 to the ECHR, Article 34

¹⁰⁰⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Article 5(3)

¹⁰⁰⁹ See Chapter 3, section 1.1.

individuals to make a complaint concerning violations of customary obligations, as the ICJ is the only international forum which could consider such claims.

As noted, access to human rights protection mechanisms requires both the existence of obligations and access to complaints procedures concerning the particular right that has been abused. The determination of the existence of both of these elements again predominantly reflects forms of participation dominated by states.

Participation by public and private entities in the construction of international human rights law which determines the content of obligations, including the development of new standards, was discussed in the previous Chapter. However, following the creation of principles of human rights law, the state concerned must have accepted human rights obligations deriving from ratification of the relevant treaty in order for these obligations to be applicable to the individuals and groups within its jurisdiction. As Sachleben identifies “prior to observing human rights obligations states must recognise obligations”.¹⁰¹⁰ The importance of state ratification is obvious, and has been identified by the GA:

“[i]t is of paramount importance for the promotion of human rights and fundamental freedoms that member States undertake specific obligations through accession to or ratification of international instruments in this Field”.¹⁰¹¹

The importance of state ratification was also demonstrated by the establishment of a Working Group on the Encouragement of Universal Acceptance of Human Rights in 1979 with a mandate to request from states information regarding difficulties

¹⁰¹⁰ Sachleben, 2006: 161

¹⁰¹¹ GA Res. 32/130, 18 December 1977, para. 1(g)

preventing ratification, and to consider assistance from the UN to enable ratification.¹⁰¹²

Furthermore, individual states are able to modify the obligations undertaken when a treaty is ratified through the submission of reservations, provided these do not conflict with the object and purpose of the treaty.¹⁰¹³ The determination of the acceptability of reservations furthermore rests with states. As Schmidt notes, “in the final analysis, it must be for each State party to decide whether a certain reservation meets that test”.¹⁰¹⁴ However, the HRC has stated that certain provisions of the ICCPR may not be the subject of reservations, including those which represent customary law and/or norms of *jus cogens*.¹⁰¹⁵ The HRC also contends that it is inappropriate for states to determine whether reservations are compatible concerning human rights treaties, and that therefore this task should fall to the Committee.¹⁰¹⁶ Whilst the HRC’s reasoning here is sound, other treaty bodies have failed to make such an assertion,¹⁰¹⁷ and concerning other human rights treaties the determination of the compatibility of reservations remains with state parties. In the regional systems, the European Court does seem to agree with the HRC, as indicated in *Belilos v. Switzerland*, when it asserted that “the silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment [of the compatibility of reservations]”.¹⁰¹⁸ The American and African systems, however,

¹⁰¹² E/CN.4/1350, 3 October 1979, 42-43

¹⁰¹³ Vienna Convention on the Law of Treaties A19(c); see also HRC General Comment 24, CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 6

¹⁰¹⁴ Schmidt, 1997: 21. See also ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951

¹⁰¹⁵ HRC General Comment 24, CCPR/C/21/Rev.1/Add.6, 4 November 1994, paras. 8-11

¹⁰¹⁶ HRC General Comment 24, CCPR/C/21/Rev.1/Add.6, 4 November 1994, paras. 17 and 18

¹⁰¹⁷ For example, despite the large number of reservations to the ICEDAW, the CEDAW General Recommendations 4 (1987) and 20 (1992) demonstrate deference to state parties concerning determination of compatibility with the object and purpose of the treaty.

¹⁰¹⁸ *Belilos v. Switzerland*, Application no. 10328/83, Judgement of 29 April 1988 para 47.

defer to the provisions of the Vienna Convention on the Law of Treaties.¹⁰¹⁹ In general, therefore, both the existence and the extent of human rights obligations for a particular state remain predominantly dependent on participation by the state concerned.

Similarly to the applicability of obligations, access to complaints mechanisms is primarily determined through decision-making by states, and, fundamentally, is subject to the principle of state consent. States participate both in the construction of complaints mechanisms, and in determining whether they are subject to them. As detailed above, individual complaints to treaty bodies are either provided for in an Optional Protocol, or within the treaty itself. As discussed in Chapter 3, states have a major role in the development of human rights legal instruments, and therefore in constructing the protection mechanisms contained within them. Furthermore, in order for the individual to have access to these mechanisms, the state concerned must both have ratified the treaty containing the right which is alleged to have been violated, and also either ratified the relevant Optional Protocol or made a declaration under the relevant article of the treaty that it accepts the competence of the Committee to accept individual communications. Consequently, both the development and applicability of UN individual complaint procedures predominantly reflects forms of participation as represented by the dominant role of the state, and the centrality of state consent.

Judicial individual complaints mechanisms are also formed through treaty making processes, and their jurisdiction is subject to state consent. Although individuals cannot bring complaints before the ICJ and ICC, it should be noted that the

¹⁰¹⁹ Marks, 1997: 54, 60

jurisdiction of these bodies is also dependent on state consent.¹⁰²⁰ The regional bodies do offer a slightly more nuanced situation. As Butler notes, there is an element of compulsory jurisdiction within all of the regional systems. All contracting parties of the ECHR must accept the jurisdiction of the court, the Inter-American Commission may hear complaints concerning the violation by any Organisation of American States (OAS) state of the rights contained in the Declaration on the Rights and Duties of Man, and the African Commission can receive petitions concerning violations by state parties to the AfCHPR without their express consent.¹⁰²¹ However, this is still fundamentally subsumed to the principle of state consent. States must still become parties to the ECHR or the AfCHPR for the European Court or the African Commission respectively to have jurisdiction. Whilst the Inter-American Commission's powers do go further than this, ultimately states must have first chosen to become members of the OAS in order for it to have jurisdiction. Furthermore, the jurisdiction of both the IACtHR and the African Court requires express consent by states.¹⁰²² Therefore, the jurisdiction of the regional systems is still ultimately dependent on state consent, and does not extend to violations by states who are not members of the relevant regional organisation.

Participation by private individuals in determining both the content and applicability of obligations, and the existence of complaints mechanisms, is minimal. As Chapter 3 concluded, direct individual participation in law-making, and therefore in the content of obligations, is limited, and therefore is manifested through the actions of NGOs. Similar forms of participation are found in relation to the applicability of obligations.

¹⁰²⁰ Statute of the ICJ, Article 35(1), see also Article 36; Rome Statute of the ICC, Article 12

¹⁰²¹ Butler, 2007: 104-105

¹⁰²² AmCHR, Article 62. The jurisdiction of the African Court is subject to ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights.

Little pressure can be brought by individuals on governments to ratify human rights instruments. However, participation enabled and led by NGOs has influenced acceptance of human rights obligations. Examples of this include the Coalition for the International Criminal Court, whose focus has moved from influencing the content of the Rome Statute to lobbying states to ratify it,¹⁰²³ and a specific NGO campaign concerning US ratification of the ICRC.¹⁰²⁴ NGOs also sit on the Steering Committee of the Global Campaign for Ratification of the Convention on Rights of Migrants.¹⁰²⁵ Indirect NGO influence can be seen in the establishment of the Working Group on the Encouragement of the Acceptance of Universal Human Rights Instruments, which resulted from a statement submitted from NGOs to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹⁰²⁶ This role of NGOs was identified by one interviewee, who described how their organisation was lobbying a specific government to ratify a particular convention.¹⁰²⁷

Private individuals also have little scope for participating in determining whether they are able to have access to forms of individual complaint, as this is determined by state consent to these procedures. An individual cannot select which mechanisms they may make use of as this decision is taken by the state. As with obligations, NGOs can provide a means for individuals to participate in influencing states to accept individual complaints mechanisms. For example, there is an NGO Campaign for the Ratification and Use of the Optional Protocol to the ICEDAW.¹⁰²⁸ Niemi and Scheinin identify that NGO pressure is a major contributing factor to state acceptance of individual

¹⁰²³ Niemi and Scheinin, 2002: 45

¹⁰²⁴ <http://crin.org/organisations/viewOrg.asp?ID=2658>

¹⁰²⁵ http://portal.unesco.org/shs/en/ev.php-URL_ID=3010&URL_DO=DO_TOPIC&URL_SECTION=-473.html

¹⁰²⁶ Weissbrodt, 1982: 419

¹⁰²⁷ ID 33, 15/01/08

¹⁰²⁸ http://www.iwraw-ap.org/protocol/campaign_efforts.htm

complaints procedures,¹⁰²⁹ and Lerner considers that public opinion can certainly influence this.¹⁰³⁰

It is clear that participation by states dominates both options for participation in accountability mechanisms, and decisions concerning the applicability of obligations and individual complaint mechanisms. Whilst private participation by individuals is found in some structures, decisions on the applicability of both obligations and complaints mechanisms predominantly exclude individuals, and in consequence their only means of participation is via NGO activity.

The accountability of private and/or non-state actors is primarily subsumed to the state. Such actors do not, in general, hold human rights obligations; rather, the state has the obligation to protect individuals and groups from the actions of private actors.¹⁰³¹ It has been argued that there are exceptions to this as certain private entities do hold obligations under international human rights law. Individuals have responsibilities under international criminal law for which they can be held accountable. International Financial Institutions and corporations have been argued to have, at least in principle, responsibilities concerning human rights.¹⁰³² However, whilst the concept of non-state obligations may be recognised in theory, in practice current structures of access to justice only enable individual complaint to be brought against the state. An individual cannot bring a case regarding violations of international criminal law by another individual, as the ICC does not permit individual access, and all other bodies only consider complaints against the state. The

¹⁰²⁹ Niemi and Scheinin, 2002: 45

¹⁰³⁰ Lerner, 1970: 91

¹⁰³¹ Skogly, 2006: 69; E/CN.4/Sub.2/1999/12, 28 June 1998, para 52(b)

¹⁰³² See generally, Clapham, 2006

treaty body procedures and regional complaints mechanisms are all structured around the state-individual relationship. Consequently, there is no structure for individual complaint against a private actor; rather, the individual must bring a complaint against the state for failure to protect. This again prioritises the state as the central participant concerning access to human rights procedures. Furthermore, it makes the accountability of private actors conditional on state consent; if the state does not consent to the various forms of individual complaint as detailed above, the individual cannot bring a complaint against the state for failure to protect. Thus, participation through access to human rights mechanisms is restricted as current structures predominantly apply only to public entities.

In summary, it is evident that participation in human rights through access to individual complaints mechanisms is centred on and dominated by the state. Not only does the state have far more extensive opportunities for access than any private actor, it is the dominant participant in determining both the content and scope of its obligations and whether those individuals within its jurisdiction can have access to any form of individual complaint mechanism. Furthermore, the state is the only means by which private actors could be held accountable for human rights violations. Whilst examination of participation as reflected in human rights principles¹⁰³³ and structures of law-making¹⁰³⁴ identified interaction between public and private forms of participation, the relationship between public and private entities concerning access to human rights is far more adversarial. Both individual and NGO participation is directed to holding the state accountable for its action or inaction. As individual complaints mechanisms are the means by which states can be held responsible, they

¹⁰³³ Chapter 2, section 1.1.

¹⁰³⁴ Chapter 3, section 1.1.

are reluctant to allow expanded participation in determining the applicability of these structures.

2.2: Formal and informal participation: restricted and ambiguous rights of access

The extent to which individuals are able to access human rights mechanisms is clearly affected by their formal rights concerning both access to information and access to a complaints procedure. Information about rights, obligations and complaints procedures is necessary for individuals to be able to participate in human rights structures, as without this knowledge individuals will neither be aware that such structures exist nor how to make use of them.¹⁰³⁵ Consequently, the right of access to information about human rights is paramount in enabling access to complaints mechanisms. However, the content of both individuals' rights and states' obligations concerning the acquisition and dissemination of human rights information are ambiguous.

2.2.1: The right to human rights information

The individual right to information is part of the right of freedom of expression, which includes the right to "seek, receive and impart information and ideas of all kinds".¹⁰³⁶ The 'seek and receive' elements of this indicate and have been interpreted as providing a right of access to information.¹⁰³⁷ Although not specified, this right clearly includes access to information on human rights, as this would be encompassed

¹⁰³⁵ See also Chapter 4, section 3.1

¹⁰³⁶ ICCPR, Article 19; ECHR, Article 10; AmCHR, Article 13; see also Article 9 of the AfCHPR which expressly protects the right to receive information, and to express and disseminate opinions.

¹⁰³⁷ I/A Court HR, *Reyes v. Chile*, Judgment of September 19, 2006. Series C No. 15, para 76-77; E/CN.4/1999/64, 29 January 1999, para 12

in “information and ideas of *all* kinds”. This right should therefore enable individuals to request and obtain information on states’ treaty obligations and human rights policies at the national level, and the international complaints structures to which the state has consented. However, it is not clear that there exists an international right of access to information analogous to this, which would entail a right to human rights information held by inter-governmental organisations. Individuals require this information to be provided by these structures if their state is unwilling or unable to do so. Access to international human rights information, including that regarding obligations and complaints mechanisms to which a particular state has not consented, would also enable comparisons of states’ human rights records and enhance the ability to campaign for state ratification of human rights treaties.

Individuals and groups clearly have a right to disseminate human rights information, as part of the right to freedom of expression through the right to ‘impart’ information. The rights of individuals and groups concerning the acquisition and dissemination of human rights information is most clearly elaborated in the Declaration on Human Rights Defenders; that there is a right to promote human rights at the national and international levels¹⁰³⁸ and to seek, receive and disseminate human rights information.¹⁰³⁹ Whilst it must be noted that as a non-binding instrument this does not create formal rights, other elements of human rights law confirm the formal status of these principles. Resolution 1993/45 of the HR Commission recognised that part of the right of freedom of expression is to promote the right itself¹⁰⁴⁰; logically, therefore, it should also include the right to promote other human rights, and general information about human rights. This indicates that part of the right of freedom of

¹⁰³⁸ Article 1

¹⁰³⁹ Article 6

¹⁰⁴⁰ Paras. 3 and 12

expression is a formal right to seek and to disseminate human rights information. The *Kivenmaa* case demonstrated the right of individuals to express opinions on human rights as part of the right of freedom of expression,¹⁰⁴¹ and the right of the media to criticize the government¹⁰⁴² also implicitly indicates a right to disseminate information about the government's human rights record.

However, it is unclear to what extent a state may place restrictions on the exercise of the right to freedom of expression as it relates to the acquisition and dissemination of human rights information. The right of freedom of expression may be restricted by the state in order to "respect... the rights and responsibilities of others" or "for the protection of national security or of public order, or of public health or morals".¹⁰⁴³ The Declaration on Human Rights Defenders contains similar provisions,¹⁰⁴⁴ and also emphasizes that the acquisition and dissemination of information concerning human rights must be conducted peacefully.¹⁰⁴⁵ Although it would seem difficult for a state to demonstrate that the acquisition and dissemination of human rights information constituted a threat to public order or national security, states have certainly prosecuted and imprisoned human rights activists on these grounds. For example, Amnesty International has expressed concern that China is using national legislation concerning crimes of "separatism", "subversion", "espionage" and "stealing state secrets" to detain and imprison human rights activists, and petitioners complaining about human rights abuse have been charged with "illegal assembly" or "disturbing

¹⁰⁴¹ *Kivenmaa v Finland* (412/90) CCPR/C/50/D/412/1990, 31 March 1994, para 9.3

¹⁰⁴² CCPR/C/79/Add.106, 8 April 1999, para 22

¹⁰⁴³ ICCPR, Article 19(3); see also ECHR Article 10(2), AmCHR, Article 13(2). The AfCHPR protects the right to express and disseminate opinions "within the law".

¹⁰⁴⁴ Article 17

¹⁰⁴⁵ Articles 5 and 12

social order".¹⁰⁴⁶ There are also numerous reports of the arrest and imprisonment of human rights activists in Iran on charges relating to national security.¹⁰⁴⁷

It is also unclear how far states may restrict the dissemination of human rights information in relation to 'public health or morals'. The *S. E. T. A. v. Finland* case indicated that the state could legitimately restrict the dissemination of information concerning homosexuality by reference to public morals.¹⁰⁴⁸ Although this case did not concern the dissemination of specifically human rights information, it does imply that the state could prohibit the dissemination of information about the rights of sexual minorities if national legislation criminalised particular sexual behaviour. *Open Door and Dublin Well Woman v. Ireland*¹⁰⁴⁹ concerning the provision of information to pregnant women concerning travel abroad for an abortion also presents conflicting interpretations of the level of restriction permissible in relation to public morals. The European Court stated in this case that

it is appropriate to recall that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".¹⁰⁵⁰

This indicates that the provision of human rights information, even if it conflicted with certain perspectives on public morals, could be justified. However, the Court also notes that it is not illegal within Ireland to travel abroad for an abortion, implying that if it were illegal, the provision of such information could be legitimately restricted by the state, even through such a limitation could adversely affect a

¹⁰⁴⁶ Amnesty International, 2004: 6

¹⁰⁴⁷ see for example Human Rights First, 2007; FrontLine, 2006

¹⁰⁴⁸ *S. E. T. A. v. Finland* (R.14/61), A/37/40, 2 April 1982, 161 at paras. 2.1-2.5, 9.1-9.3, 10.1-10.4, 11

¹⁰⁴⁹ *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, 29 October 1992

¹⁰⁵⁰ *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, 29 October 1992, para 71

woman's right to health.¹⁰⁵¹ The Court also assessed the issue of proportionality,¹⁰⁵² implying that a proportional limit on the dissemination of information conflicting with public morals which would also affect the enjoyment of human rights could be acceptable. For example, it is not clear that it would be acceptable to disseminate information about certain rights of women or the Optional Protocol to the ICEDAW in states which assert the supremacy of certain interpretations of *Sharia* law over the provisions of the Covenant.¹⁰⁵³

There are thus a number of unresolved issues concerning the content of the right to freedom of expression as applied to human rights information. There is a lack of specificity concerning the exact nature of the human rights information to which an individual is entitled, and whether this extends beyond the national to the international level. An individual's right to disseminate human rights information is clearly not absolute. The degree to which the distribution of human rights information may be limited by reference to public morals particularly requires clarification. At present, despite the lack of directly applicable case law, it appears that a reasonable margin of appreciation is applied concerning the particular moral perspective of the state. In addition, although restrictions concerning the dissemination of human rights information on ground of national security have been heavily criticised,¹⁰⁵⁴ there is a paucity of case law on this issue, and the exact extent to which states may limit the activities of human rights defenders on these grounds requires further elucidation.

¹⁰⁵¹ *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, 29 October 1992, para 72. Note that the Court makes no judgement on the question of a right to an abortion (para 66).

¹⁰⁵² *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, 29 October 1992, para 73-74

¹⁰⁵³ See for example the reservations to the ICEDAW made by Brunei Darussalam, Mauritania and Oman.

¹⁰⁵⁴ *Mukong v Cameroon*, (458/91), CCPR/C/51/D/458/1991, 21 July 1994 Para. 9.7

There is consequently considerable uncertainty regarding the extent to which individuals are entitled to information concerning both state obligations and individual complaint mechanisms, and the degree to which they may disseminate such information.

2.2.2: States' obligations concerning the provision of human rights information

Individuals' right of access to human rights information implies a corresponding obligation on the state to provide that information. It is clear that states do have obligations concerning the provision of information about human rights. The general obligation to promote human rights is found in Article 1(3) of the UN Charter, and all of the major human rights treaties make either specific or implicit reference to this in their Preambles. However, it is not clear what this general and vague commitment to the promotion of human rights actually entails in terms of states' obligations concerning the dissemination of specific information about the content of human rights and complaints mechanisms.

The right to education centralises the promotion of human rights. The ICESCR identifies that the objective of education is “the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”.¹⁰⁵⁵ The purpose of human rights education is therefore to both build a universal culture of human rights¹⁰⁵⁶ and to empower communities to identify their human rights needs and ensure they are met.¹⁰⁵⁷ States

¹⁰⁵⁵ ICESCR, Article 13(1); CESCR General Comment 13, E/C.12/1999/10, 8th December 1999, para 4, see also ICPD Article 24(1)(a),

¹⁰⁵⁶ A/59/525/Rev.1, 2 March 2005, para. 3

¹⁰⁵⁷ A/59/525/Rev.1, 2 March 2005, para 8(d)

are consequently obliged to ensure education is aimed at strengthening human rights¹⁰⁵⁸ at all levels of the curricula.¹⁰⁵⁹ The Special Rapporteur on the right to education has confirmed that “education should be a free space for the exercise and study of all human rights, responsibilities and capacities”.¹⁰⁶⁰ These provisions imply more specific state obligations concerning the dissemination of information about human rights through education, but still do not clearly require that the state should provide details of its particular treaty obligations and the complaints mechanisms available to individuals.

The ICRC,¹⁰⁶¹ ICPD¹⁰⁶² and ICMW¹⁰⁶³ also contain specific provisions obliging the state to publicize information about the Convention and/or state reports, and the CEDAW General Recommendation 6 obliges states to “ensure the dissemination of the Convention, the reports of the States Parties... and the reports of the Committee”.¹⁰⁶⁴ However, the exact obligations concerning how and to what extent a state must publicize this information remains unclear, although the ICPD does require that the text of the Convention be made available in accessible formats.¹⁰⁶⁵ For example, the fulfilment of this obligation through inclusion of these documents on a government website is qualitatively different to annually writing to every household or commissioning radio or television adverts concerning these issues. Furthermore, there is no obligation to disseminate contained within the Optional Protocol to the ICCPR. This indicates a fundamental omission.¹⁰⁶⁶ If individuals are unaware that

¹⁰⁵⁸ Vienna Declaration, part 1 para 33

¹⁰⁵⁹ CESCR General Comment 13, E/C.12/1999/10, 8th December 1999, para 49.

¹⁰⁶⁰ E/CN.4/2005/50, 2004, para 44

¹⁰⁶¹ Article 42

¹⁰⁶² Article 36(4)

¹⁰⁶³ Article 73(4)

¹⁰⁶⁴ Para. 2

¹⁰⁶⁵ Article 42

¹⁰⁶⁶ McGoldrick, 1991: 201

they have the right to make a complaint concerning violations, and are unaware that a structure exists which enables such a complaint, their use of this procedure is likely to be reduced. It should be noted that the Optional Protocol to the ICESCR, although not yet accepted, does oblige state parties to disseminate and make widely known both the Covenant and the Protocol.¹⁰⁶⁷ Article 13 of the Optional Protocol to the ICEDAW imposes a similar obligation. This is a significant improvement, although it remains unclear what such dissemination would specifically require of states in practice.

It is thus uncertain whether the obligation to promote or publicize human rights requires the proactive dissemination by the state of information regarding both the rights to which the individual is entitled and the complaints mechanisms that they may access, or if it is limited to the provision of that information on request. This distinction is important because individuals will not request information about their rights under international law if they do not know that they have such rights. Obligations analogous to those found in freedom of information legislation would imply that a state would be obliged to provide information concerning its treaty obligations and the ways in which individuals could access complaints procedures only if that information was requested. Furthermore, it is not clear that a state would be obliged to disseminate information concerning treaties to which it is not a party, and complaints mechanisms to which it has not consented.

It is apparent that formal rights of participation through access to human rights information require significant clarification. Although the right of individuals to acquire and disseminate human rights information, and states' obligations to

¹⁰⁶⁷ Article 16

disseminate such information both clearly exist, neither the right nor the obligations are clearly defined. If states are not required to actively provide information concerning human rights obligations and complaints mechanisms, and individuals do not have a clear right to seek and distribute that information without arbitrary interference from the state, then participation in human rights procedures is fundamentally limited, as effective access requires this particular knowledge. The lack of clearly-defined formal rights and obligations therefore restricts access to human rights complaints structures.

2.2.3: Structural barriers concerning formal access to complaints mechanisms

Whilst rights and obligations concerning access to human rights information remain in need of clarification, formal rules concerning individual access to complaints mechanisms also constitute significant barriers to participation. There are a number of accessibility requirements common to the regional systems and treaty bodies. Complaints must not be anonymous,¹⁰⁶⁸ and the complainant must also have exhausted available domestic remedies, providing that these are not unduly prolonged or unlikely to be effective.¹⁰⁶⁹ Most structures also require that the complaint is not pending before another national body,¹⁰⁷⁰ and the regional structures that it is

¹⁰⁶⁸ Protocol 11 to the ECHR, Article 35(2)(a); AmCHR, Article 46(1)(d); AfCHPR, Article 56(1); ICAT, Article 22(2); ICMW, Article 77(2); Optional Protocol to the ICCPR, Article 3; Optional Protocol to the ICEDAW, Article 3; Optional Protocol to the ICPD, Article 2(a); Optional Protocol to the ICESCR (not yet in force), Article 3(2)(g)

¹⁰⁶⁹ Protocol 11 to the ECHR, Article 35(1); AmCHR, Article 46(1)(a); AfCHPR, Article 56(5); ICAT, Article 22(4)(b); ICMW, Article 77 (3)(b); Optional Protocol to the ICCPR, Articles 2 and 5(2)(b); Optional Protocol to the ICEDAW, Article 4; Optional Protocol to the ICPD, Article 2(d); Optional Protocol to the ICESCR (not yet in force), Article 3(1)

¹⁰⁷⁰ Protocol 11 to the ECHR, Article 35(2)(b); AmCHR, Article 46(1)(c); ICAT, Article 22(4)(a); ICMW, Article 77(3)(a); Optional Protocol to the ICCPR, Article 5(2)(a); Optional Protocol to the ICEDAW, Article (2)(a); Optional Protocol to the ICPD, Article 2(c); Optional Protocol to the ICESCR (not yet in force), Article 3(2)(c)

submitted within a reasonable timeframe,¹⁰⁷¹ specified as six months by the European and Inter-American systems.¹⁰⁷² The Optional Protocol to the ICESCR also requires that the complaint be submitted within one year after the exhaustion of domestic remedies, except where this is demonstrably impossible.¹⁰⁷³ Whilst these conditions may have some negative effect on individual access, they are not particularly onerous, provided that they are interpreted with some margin of discretion sympathetic to the individual.

However, the fundamental restriction on individuals' formal rights of access to complaints mechanisms is the principle of jurisdiction. In order for an individual to bring a complaint before a particular body, that body must have jurisdiction *ratione materiae*: jurisdiction over both the right that has been violated and the state against which the complaint is brought. None of the structures before which a complaint can be brought have universal jurisdiction regarding either states or rights. The jurisdiction of the regional bodies is limited to either state parties to a convention, or member states of a regional organisation, as noted above.¹⁰⁷⁴ The jurisdiction of the treaty bodies is subject to state consent, both to the relevant treaty and to a particular structure for individual complaint. This means that individual access to these bodies is inevitably partial.

The nature of the complaint which may be brought is also limited. Those treaty bodies which provide for an individual complaints mechanism can only hear complaints relating to the specific rights in the relevant treaty. For example, complaints can only

¹⁰⁷¹ AfCHPR, Article 56(6)

¹⁰⁷² Protocol 11 to the ECHR, Article 35(1); AmCHR, Article 46(1)(b)

¹⁰⁷³ Optional Protocol to the ICESCR (not yet in force), Article 3(2)(a)

¹⁰⁷⁴ Chapter 4, section 2.1.

be brought before the HRC regarding violations of the rights contained in the ICCPR by individuals whose state has ratified the Optional Protocol to the ICCPR.¹⁰⁷⁵ This structure is repeated for the other treaty bodies; the CAT may only consider violations of the ICAT by individuals whose states have ratified it,¹⁰⁷⁶ and so on. Similarly, the European Court can only hear claims relating to the violation of rights contained in the ECHR¹⁰⁷⁷ and the Inter-American Commission claims concerning violations of the American Declaration and the AmCHR.¹⁰⁷⁸ This indicates significant disparities concerning individual access to human rights structures regarding the nature of the complaint. The exception here is the African Court, whose jurisdiction extends to the AfCHPR, the Protocol establishing the Court, and “any other relevant Human Rights instrument ratified by the States concerned”,¹⁰⁷⁹ thus giving this body potentially far greater scope concerning the nature of the complaints which may be brought.¹⁰⁸⁰ It must be remembered, though, that the jurisdiction of the African Court is subject to state consent, so whilst it may hear complaints concerning a wider range of human rights instruments, its jurisdiction is still limited to state parties.

The principle of jurisdiction also limits the extent to which states can be held responsible for their actions, as states generally only hold human rights obligations to those within their jurisdiction.¹⁰⁸¹ Thus, if a complaints procedure exists, only those individuals within a state’s jurisdiction can make use of it. Those individuals outside the state’s jurisdiction whose enjoyment of their rights is affected by the actions of the

¹⁰⁷⁵ Optional Protocol to the ICCPR, Article 1

¹⁰⁷⁶ Article 22(1)

¹⁰⁷⁷ Protocol 11 to the ECHR, Article 32(1)

¹⁰⁷⁸ Statute of the Inter-American Commission, Articles 19 and 20

¹⁰⁷⁹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights, Article 3(1)

¹⁰⁸⁰ The Inter-American Court has interpreted its advisory jurisdiction to extend to other human rights instruments (see Advisory Opinion 1, OC-1/182, Series A 1, 24/9/82); this is not however, a means of individual complaint, and individuals cannot request an advisory opinion (AmCHR, Article 64).

¹⁰⁸¹ For example, see ICCPR, Article 2(1); ICAT, Article 2(1); ICRC, Article 2(1); ICMW, Article 7

state have no structure to which they can bring a complaint. This was demonstrated in the *Bankovic* case, when the European Court ruled that the complaint was inadmissible because the victims did not come within the jurisdiction of the respondent states.¹⁰⁸² The test for establishing whether a state does have jurisdiction, and consequently whether it has extra-territorial human rights obligations concerning particular individuals, has received justified criticism.¹⁰⁸³ In addition, although the concept of extra-territorial obligations implies an extension of states' jurisdiction so that individuals should be able to bring a complaint regarding the extra-territorial effects of actions of that state, as yet there is no structure of individual complaint which may be used concerning the violation of extraterritorial obligations.¹⁰⁸⁴

Formal rules concerning jurisdiction therefore constitute an intrinsic limitation on individual access to human rights structures. In order to have access to a complaints mechanism, an individual must be within the jurisdiction of a state which has consented to the jurisdiction of the relevant body, and has ratified the treaty concerning the right that has been violated. Crucially, the individual has no means to participate in determining whether a particular body may hear a complaint either concerning a particular state or concerning a specific right. Nor can the individual determine whether they are within the jurisdiction of the state which has violated their rights.

Consequently, formal structures of access to justice as a means of participation in human rights for individuals are partial and varied, rather than universal and inclusive,

¹⁰⁸² *Bankovic and others v Belgium and others*, Application no. 52207/99, 12 December 2001, para 82.

¹⁰⁸³ Gibney, 2008: 65-78

¹⁰⁸⁴ See Gibney (2008, 121-123) for discussion of potential structures for individual complaints concerning extra-territorial obligations.

because individual access is dependent on jurisdiction which is subject to state consent. There are major gaps in protection for individuals, and huge discrepancies concerning the availability of structures to which an individual may bring a complaint. For example, an individual in France or Germany whose right to a fair trial has been violated may make a complaint either under the Optional Protocol to the ICCPR, or bring a case before the European Court. An individual in the UK suffering the same violation can only bring a complaint to the European Court, as the UK has not ratified the Optional Protocol; therefore the HRC has no jurisdiction to hear the complaint. An individual in Cambodia cannot bring a complaint before any international body, as Cambodia is not party to the Optional Protocol and there is no alternative regional structure. An individual in China arguably does not have the right to fair trial at all, because China is not a party to the ICCPR and therefore has no obligations concerning this right.¹⁰⁸⁵

NGOs' formal rights of participation in these human rights structures are limited in comparison to those regarding standard-setting, and are accurately described as "ad-hoc and indirect".¹⁰⁸⁶ Most importantly, there is little opportunity for NGOs to enable individual participation beyond that allowed for individuals themselves. NGOs do have more extensive formal rights of participation than individuals concerning the treaty body¹⁰⁸⁷ or Charter-based¹⁰⁸⁸ monitoring procedures. However, these rights do

¹⁰⁸⁵ The right to fair trial as a principle of the UDHR could be contended to represent customary law, which would impose obligations on China. However, there is no international mechanism accessible to individuals before which a complaint regarding violation of this customary right could be brought.

¹⁰⁸⁶ Breen, 2005: 109

¹⁰⁸⁷ Different bodies provide for varying degrees of NGO participation, and the modalities of NGO participation are usually found in the Rules of Procedure rather than the treaty itself. The CMW (A74(6) of the ICMW and Rule 28), CESCR (Rule 69.1), CAT (rule 62) and the CEDAW (Rule 47) allow NGOs to provide written information; the CEDAW (Rule 47) and CESCR (Rule 69.2 and 69.3) also allow them to make oral presentations to the Committee and pre-sessional working groups. The CRC (Rule 70) and the CPD (ICPD, Article 38(a)) may invite "competent bodies" to provide expert advice regarding the implementation of the Convention. The CAT may obtain information from NGOs

not relate to processes of individual complaint, and therefore are not a means by which formal NGO participation can enhance individual participation. Similarly, whilst participation via amicus briefs, especially by NGOs, is an effective substitute for direct intervention given the limitations on non-state actors' legal standing under international law,¹⁰⁸⁹ such participation is not a formal right, being limited by the discretion of the court concerned,¹⁰⁹⁰ and is not a form of individual complaint. Whilst NGOs have the formal right to bring cases in their own right under the African and American systems, the same rules of jurisdiction apply as to individuals: NGOs could not bring a case concerning violation by a non-state party. In consequence, NGOs' formal rights of participation in human rights structures do little to extend individual access to human rights complaints mechanisms.

Informal participation by NGOs does however enhance the potential for individuals to make a complaint regarding violations of human rights. NGO participation can enable individuals to make use of a range of informal accountability mechanisms, and thereby to complain about violations without the need for the formal right to bring a case. NGOs constitute a potential means to hold states accountable for their actions without the requirement of formal obligations. Although formal obligations are required for a formal process of complaint to be available, NGOs

contribute to establishing a communicative process whereby the conduct of states is no longer assessed in terms of acting in conformity with international binding rules, but by a much less formal code according to which the legality of their behaviour

and individuals in relation to the inquiry procedure under Article 20 of the ICAT (Rule 76.4), and the CEDAW may do this in relation to the inquiry procedure under the Optional Protocol to the ICEDAW (Rule 83).

¹⁰⁸⁸ NGOs have some entitlements to participate through the provision of information under the 1503 procedure (Bianchi, 1997: 189), and can also provide information to the Special Procedures mandate holders.

¹⁰⁸⁹ Bianchi, 1997: 187

¹⁰⁹⁰ Bartholomeuz, 2005: 276

largely depends on its being consistent with some basic understanding of human values the respect of which is perceived to be fundamental.¹⁰⁹¹

It is therefore possible for individuals to complain, through NGOs, about the conduct of their state concerning violations of human rights even if these form part of a treaty to which a state has not consented. For example, Amnesty International highlights and criticises violations of the rights to freedom of expression and freedom of religion by China, even though China is not a party to the ICCPR in which these rights are contained. Its 2008 Report provides information concerning abuse of these rights at both the general and individual levels.¹⁰⁹² Other NGOs have criticised Iran regarding the protection of the rights of women, although Iran is a party neither to the ICEDAW nor its Optional Protocol.¹⁰⁹³ NGOs thus provide informal means of individual complaint in the absence of formal obligations or access to formal procedures. Whilst these are more indirect methods of complaint, they may still be effective. For example, the ‘Urgent Action’ campaigns organised by Amnesty International are contended to have contributed to the release of various prisoners of conscience.¹⁰⁹⁴ Informal lobbying and campaigns by NGOs can also enhance the potential for effective forms of complaint at the national level. As one interviewee confirmed, “they [the victims] come to a situation where they feel some international pressure could be helpful...to get the issue on the national agenda”.¹⁰⁹⁵ NGO participation enables expanded opportunities for informal modes of individual complaint.

¹⁰⁹¹ Bianchi, 1997: 190

¹⁰⁹² Amnesty International, 2008a

¹⁰⁹³ Human Rights Watch, 2008

¹⁰⁹⁴ Amnesty International, 2008b

¹⁰⁹⁵ ID 10, 13/12/07

2.3: The limits on direct individual participation in complaints mechanisms

The centrality of state participation discussed in section 2.1 also has a major effect on how far individuals can directly access human rights. Firstly, direct individual participation in determining the content and applicability of obligations is clearly limited. Chapter 3 demonstrated that individual participation in law-making and therefore in the content of obligations is minimal, and in consequence that such participation relies on representation by states and NGOs. The discussion in section 1.1 above has demonstrated that participation in decisions regarding the applicability of obligations also excludes direct individual participation. Individuals cannot select the rights that protect them, as ratification is a matter for the state, at times potentially influenced by NGOs. Individual participation in determining the applicability of obligations is therefore predominantly through representative forms.

In addition, some avenues for complaint reflect representative forms of participation, rather than direct access by individuals. In those structures where individuals cannot bring claims, any complaint concerning violations of individuals' rights must be brought by the state. Crucially, such complaints are structured around violations of the complainant state's interest by the violator state, rather than focussing on the ways in which the individual's rights have been violated. In both the *Avena*¹⁰⁹⁶ and *Tehran Hostages*¹⁰⁹⁷ cases complaints concerning the violation of the rights of individuals were asserted in terms of the violation of international legal obligations owed to states. In such cases, the individual is a passive participant, and is reliant on their interests being represented by the state. The state and its interests becomes the central

¹⁰⁹⁶ ICJ, *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgement of 31 March 2004, para. 12(1)

¹⁰⁹⁷ ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980, para. 8(a)

participant in the case, despite the complaint being in response to violation of an individual's human rights. Furthermore, the decision to initiate the case rests with the state, rather than the individual, in accordance with the "classic concept of diplomatic protection as a discretionary power of a State to make an international claim on behalf of its injured national on the basis that an injury to its national is an injury to it".¹⁰⁹⁸ The state is under no obligation to make a complaint, as "diplomatic protection remains the prerogative of the state to be exercised at its discretion"¹⁰⁹⁹ and the decision to do so is subject to political rather than humanitarian considerations.¹¹⁰⁰ The individual is reduced to a passive object, rather than being the central subject and active participant in the case. Such structures consequently reflect both representative and passive forms of individual participation.

Nevertheless, there are some opportunities for direct participation by individuals in human rights accountability structures. Expert individuals may participate in certain bodies through amicus briefs; for example, the Special Court for Sierra Leone sought submissions from two prominent international lawyers regarding the question of the immunity of Charles Taylor, former President of Liberia, from prosecution.¹¹⁰¹ Individual amicus submissions are, though, usually from experts. The exception is the European Court, whose practice indicates that it allows participation by persons other than the applicant with a clear interest in the proceedings, as well as amicus submissions from legal or factual experts.¹¹⁰² In general such forms of direct individual participation are analogous to that found in law-making; participation by an

¹⁰⁹⁸ Bartholomuez, 2005: 216; see also *Mavromatis Palestine Concessions case*, PCIJ, Series A, No. 2, 1924, para. 12

¹⁰⁹⁹ Constitutional Court of South Africa, *Kaunda v. President of South Africa*, CCT 23/04, Judgement of 4 August 2004, para. 29

¹¹⁰⁰ Kamminga, 1992: 57

¹¹⁰¹ Bartholomeuz, 2005: 253-254

¹¹⁰² Bartholomeuz, 2005: 236-240

elite rather than being general and inclusive. Fundamentally, this does not constitute a mode of individual participation in response to a violation, but a means for a Court to seek specific advice and information.

Direct individual participation is also obviously reflected in those structures that are directly accessible to individuals. As noted above, almost all of the major human rights treaties provide for an individual complaint procedure¹¹⁰³ and individuals may also bring cases before most of the regional mechanisms. By bringing a case before an international or regional body, the individual is actively and directly engaging with their rights, through asserting them via a complaints mechanism. As McGoldrick notes in the context of the Optional Protocol to the ICCPR, the concept of individual complaint was “revolutionary” because it recognised the individual as a proper subject of international law;¹¹⁰⁴ an active entity acting in their own interests. When bringing a complaint, individuals are participating directly and on their own behalf. Consequently, there is considerable potential for direct individual participation through having access to complaints mechanisms. However, as noted, this access is fundamentally restricted by state consent, and individuals are unable to actively and directly participate in determining whether they are able to have access to these procedures.

It is clear that direct individual access to human rights accountability mechanisms is limited. Certain structures are reliant on representation by the state as they do not allow for individual participation. Those structures which do reflect direct individual

¹¹⁰³ Chapter 4, section 2.1.

¹¹⁰⁴ McGoldrick, 1991: 198

access are subject to state consent.¹¹⁰⁵ Yet human rights law is intended as a means by which individuals are protected by setting limits on the action of the state. It is therefore inherently contradictory for decisions concerning the extent to which individuals can participate directly to be taken by the state, or for the individual to be reliant on the state to make a complaint on their behalf, as this subsumes individual interests to those of the state. As Bianchi identifies, states may be reluctant to trigger human rights accountability mechanisms which may later backfire on them.¹¹⁰⁶ For example, although most human rights treaties provide for an inter-State complaint procedure,¹¹⁰⁷ these have rarely been used. The procedures under the ICAT and ICCPR have never been used.¹¹⁰⁸ The use of such procedures would be considered a politically hostile act,¹¹⁰⁹ and consequently States have avoided opening what Alston has termed a “Pandora’s box”.¹¹¹⁰ This demonstrates the danger in reliance upon structures of complaint which are dependent on state action.

Unlike participation in law-making, NGOs’ representative role is minimal. There are some ways in which NGO representation can extend individual access; for example one interviewee described bringing a case in the name of the NGO because it would be dangerous for the victims to have their names on it.¹¹¹¹ However, in general NGO representation does not substantially increase individual access, because although NGOs may represent a victim, this is only in forums where individuals also have a right to bring a complaint. Whilst NGOs can bring a case in their own right under the

¹¹⁰⁵ The exception is the complaints procedure under the Charter mechanisms; however the extent to which this reflects direct participation via access to a complaints mechanism is limited as it is not directed towards an individualised remedy.

¹¹⁰⁶ Bianchi, 1997: 190

¹¹⁰⁷ Chapter 4, section 2.1.

¹¹⁰⁸ Arambulo, 1999: 183

¹¹⁰⁹ Arambulo, 1999: 183-184

¹¹¹⁰ E/C.12/1996/CRP.2/Add.1, 1996, para 12

¹¹¹¹ ID 25, 03/12/07

African and American systems, individuals also have access to these systems. It is of value however to note that NGOs may bring such cases without the consent of the victim or their family,¹¹¹² which could result in passive forms of participation.

NGOs' participatory role is more greatly oriented to enabling direct individual access than to representing individual concerns. NGOs assist individual access to complaints mechanisms primarily through providing general information concerning the existence and structures of complaints procedures, and also through providing free legal advice and representation, as further discussed below.¹¹¹³ Whilst NGO participation in this way constitutes assistance to victims rather than representation of victims, there may still be an unequal power relationship between the victim and the NGO, which can translate into how the case is pursued. As identified in Chapter 3, NGOs use strategic litigation to put certain issues onto the regional or international agenda. This could potentially lead to the case being developed in a manner which the victim did not support. This was identified by one interviewee, who described how various organisations had taken over a case on reproductive rights, to the extent where the woman concerned had completely lost control.¹¹¹⁴ In addition, it may be hard for the victim to follow the case; as one interviewee identified "the problem obviously is that litigation is complicated... sometimes the legal arguments...are very difficult, so its quite difficult for some of the clients who aren't necessarily legally literate to really understand what's going on".¹¹¹⁵ Furthermore, although NGOs may work on cases, they may not have direct contact with the victims, as they work with local

¹¹¹² Odinkalu. 1998: 378-379

¹¹¹³ Chapter 4, section 3.3.

¹¹¹⁴ ID 25, 03/12/07

¹¹¹⁵ ID 25, 03/12/07

lawyers who present the case.¹¹¹⁶ They then have an indirect relationship with the victim, and it is likely that this means that the victim has less input into the way the case is developed than if there was a direct relationship with the NGO.

However, several NGOs described their case work as oriented around the desires of the victim: one stated “to our mind the victim is always in charge of what happens in each case”,¹¹¹⁷ others that “when we do a case, we always look at the demands of the victims...we always ask the victims if they want [the organisation] to intervene”,¹¹¹⁸ and “we do not take any case that has not been specifically requested...from us, so we only investigate cases that were reported to us either by the people who were directly affected... or from people who work with them directly”.¹¹¹⁹ Another interviewee considered that it was “absolutely vital [that] the community understands the case; that any decisions/negotiations represent their views”.¹¹²⁰ This indicates recognition from the NGO community of the need to include the victim as fully as possible in the process, and consequently of the importance of the victim having direct participation in the development of their case.

2.4: Levels of participation: *international* rights of access?

Individuals need to be able to make a complaint regarding violation of their rights at the international level. This is of particular importance as the state is usually the violator of individual rights; therefore, the individual needs access to accountability mechanisms beyond the level of the state in order for their rights to be protected. It is

¹¹¹⁶ See for example ID 24, 15/11/07

¹¹¹⁷ ID 25, 03/12/07

¹¹¹⁸ ID 10, 13/12/07

¹¹¹⁹ ID 35, 22/01/08

¹¹²⁰ ID 9, 17/10/07

essential that individuals have access to international complaints procedures, which “allow individuals to seek redress against their own government if national remedies have failed them – a consideration that is especially valid in countries where the administration of justice is in crisis or the judiciary lacks independence”.¹¹²¹ The importance of such structures was also identified by one interviewee as being in “circumstances when there is absolutely no chance of bringing cases at home. People then have got no possibility of agitating for change within the country itself”.¹¹²² As De Waart observes, the effectiveness of international supervision of human rights depends on the capacity of rights bearers to bring international claims.¹¹²³ It is therefore vital that individuals are able to access international structures of complaint.

However, the right of access to justice does not extend beyond the level of the state. Where a right of access to justice is provided for in a human rights treaty, the right extends downwards from the level of the state; it does not provide a right of access to international mechanisms. There is no right of access to international complaints mechanisms, and no state obligations to enable such access. International access remains conditional upon state consent, and is therefore preferential rather than obligatory for the state concerned. For example, an individual has no right to demand that they should have the right of complaint to a treaty body if their state has not accepted the respective procedure. This means that the individual has no international right to bring a complaint against their state regarding abuse.

¹¹²¹ Niemi and Scheinin, 2002: 69-70

¹¹²² ID 3, 18/10/07

¹¹²³ De Waart, 1995: 52

2.5: Discussion

The analysis in section 1 has shown that the principle of state consent fundamentally restricts individual access to and therefore participation in human rights mechanisms. States clearly dominate modes of participation concerning both the applicability of obligations and access to structures of complaint regarding human rights. There are several structures from which individuals, and NGOs, are completely excluded, yet to which states have access. In addition, individuals are generally unable to participate in determining whether they have access to human rights structures. There is no right of access to international complaints mechanisms; rather, access is dependent on state consent. Furthermore, where individuals are excluded from participation, they are reliant on the state to make a complaint on their behalf.

This leads to a number of contradictions to the types of participation identified as appropriate for human rights in Chapter 1. Firstly, human rights requires universal participation, and therefore universal access to complaints mechanisms. However, access to individual complaints structures is inherently partial, due to the necessity for state consent both to human rights obligations for which it may be held responsible, and to the mechanisms which would enable individuals to hold it accountable. In consequence, there are significant disparities of access and thus protection. This results from the lack of a universal right of access to international human rights complaints mechanisms.

Examination of individual access to human rights structures thus illustrates an essential contradiction within human rights. Chapter 1 identified that structures of participation in human rights should centralise the protection of the individual and the

advancement of individual interests. However, state dominance in determining the applicability of obligations and accessibility of complaints mechanisms clearly contradicts this. Human rights are intended as a means by which limits are placed on state behaviour towards individuals, yet states retain control of the applicability of the means by which they may be held accountable. Modes of participation regarding access to human rights structures therefore do not demonstrate the orientation to empowerment required by human rights.

The lack of individual participating in decision-making concerning their opportunities for access to international human rights furthermore conflicts with the requirement that the individual have meaningful influence over matters which affect them. The individual cannot participate meaningfully and effectively in international human rights law if their access to complaint mechanisms is dependent on states, because they have no control over the processes.

Finally, structures of access to human rights mechanisms do not enable participation above the level of the state. This was identified as essential in Chapter 1 to ensure that the individual is not reliant on the state for the protection of their rights. The purpose of human rights is to give the individual protection beyond the level of the state. However, the analysis demonstrated that both individual rights and the corresponding obligations of states concerning access to human rights information require clarification. The result of this ambiguity is that formal rights of access are incomplete, as there is no clear right of access to information at the international level. Neither is there a right of access to international complaints mechanisms as access is

dependent on state consent. This fails to reflect the type of participation required by human rights and results in a lack of vital protection for the individual.

Although participation in human rights as manifested in access to complaints mechanisms does not generally reflect the forms of participation most appropriate for human rights, there is one area where it goes some way towards providing acceptable types of participation. Where individuals have access to human rights complaints structures, a form of direct participation is found which was almost entirely lacking from the modes of participation examined in relation to human rights law-making. Bringing a complaint against a state is an important way for the individual to directly engage with human rights, thus bypassing the state, and, moreover, is an active assertion of their rights. But it must be reiterated that the opportunity for the individual to participate in this way is subject to state consent. The individual has no prospects for direct participation in determining whether particular complaints mechanisms are available, which would then enable this direct form of participation. Although there is informal NGO participation in determining the applicability of obligations and state acceptance of the jurisdiction of the various complaints mechanisms, this does not constitute direct individual participation, but rather participation through representation. Those structures to which the individual does not have access reflect an inherently representative and passive model of individual participation. It is important for the individual to participate directly in complaints structures because it is their rights that have been violated, and they who have suffered the harm, violence or degradation as a result. An injury to state interest is not the same as a violation of individual rights.

It is of value to note that human rights complaints structures offer far greater opportunity for individual participation than other structures of international law, from which access to individual complaints mechanisms is entirely absent. Whilst such structures do not reflect the level and forms of participation ideally required by human rights, they do offer the potential for development.

Part 3: The feasibility of participation: practical barriers to access

Section 2 has discussed the legal and structural barriers to individual participation in human rights through access to complaints mechanisms. It has shown that opportunities for individual access are limited in comparison to those of states, and are fundamentally restricted by the principle of state consent. This section will now consider the two main practical factors which affect individuals' ability to make use of these structures: lack of access to information, and lack of resources. It will also examine NGOs' role in enhancing individual access through overcoming these barriers to participation.

3.1: The role of information, education and knowledge in access to human rights mechanisms

Access to information has been identified as a fundamental factor affecting participation in human rights, as it enables the individual to become aware of and to claim their rights. It is essential for people to be able to make informed decisions about their rights,¹¹²⁴ and also strengthens mechanisms to hold governments

¹¹²⁴ Callamard, 2006: 8

accountable for their promises, obligations and actions.¹¹²⁵ The ability to access information and make use of complaints mechanisms is therefore dependent both on the availability of and the ability to make use of knowledge regarding human rights.

Two forms of human rights knowledge are fundamental to enable access to human rights structures. Firstly, the individual must be aware that they have rights and of the procedures for the protection of these rights. One interviewee identified the importance that “the victims themselves have a clear understanding of human rights, and refer to human rights, learn to use human rights, which is far from natural, unfortunately”.¹¹²⁶ As Niemi and Scheinin note, if people are not aware of the existence of the system they do not use it.¹¹²⁷ Access to information about human rights therefore enables individuals to hold states accountable, as it provides them with knowledge regarding both their individual rights and what means are available to hold the state responsible for its actions. As one interviewee identified, “there is a right to assert your rights...it's as much about raising people's awareness that they do have these rights”.¹¹²⁸

Secondly, specific knowledge is required to enable individuals to make use of the human rights mechanisms available. International human rights law is a specialised subject, and as such knowledge regarding its existence and practices is not widespread. It uses particular terminology, and has complex and contested principles. For effective participation in human rights structures, expert knowledge is required regarding the content of rights, the structure of the law and the requirements of

¹¹²⁵ Callamard 2006: 7

¹¹²⁶ ID 10, 13/12/07

¹¹²⁷ Niemi and Scheinin, 2002: 45-46

¹¹²⁸ ID 24, 15/11/07

complaints mechanisms concerning the issues of obligations, consent, complaint and jurisdiction. As Sohn identifies, there is a multiplicity of obligations within international human rights law, encompassing the UDHR, the first two covenants, and subsequent declarations and covenants.¹¹²⁹ This results in a multi-layered and confusing system, which in turn reduces its accessibility to the average individual. As one interviewee identified, “what we do is so complicated... most lawyers don’t understand what we do let alone the victims themselves who are not legally trained...so it becomes more difficult for everyone to understand”.¹¹³⁰ Another considered the level of information itself as a problem; “[a] big issue... is just the amount of information that’s coming, and trying to keep on top of it. It’s a very fast moving environment”.¹¹³¹

Education is consequently fundamental in enabling participation through access to human rights structures. As recognised in the ICESCR Article 13 (1), the purpose of education is to “enable all persons to participate effectively in a free society”.¹¹³² Education is identified both as a right of itself and a means to realise other human rights,¹¹³³ including rights which enable participation. Education is essential for access to human rights mechanisms for several reasons. It equips the individual with the tools required to seek, receive and impart information. It provides the knowledge required to understand and to make use of human rights provisions and protections. For example, a great deal of information about human rights law and accountability mechanisms is available in written form, primarily via the internet. The individual must therefore be literate in order to access and make use of such information. In

¹¹²⁹ Sohn, 1979: 188

¹¹³⁰ ID 25, 03/12/07

¹¹³¹ ID 50, 29/01/08

¹¹³² See also CESCR, General Comment 13, E/C.12/1999/10, 8 December 1999, para 1

¹¹³³ CESCR, General Comment 13, E/C.12/1999/10, 8 December 1999, para 1; Tomasevski, 2003: 1

addition, to make a written complaint, as required by, for example, the HRC and the CEDAW,¹¹³⁴ literacy is required. The illiteracy of victims has been identified as a barrier to the use of individual complaints mechanisms.¹¹³⁵ These knowledge requirements for access complaints mechanisms may therefore potentially exclude a number of groups: those with little or no education, the illiterate, or the mentally disabled.

Furthermore, it is clear that there are significant barriers to the universal enjoyment of the right to education, resulting from economic, social and political factors. These particularly affect already vulnerable groups.¹¹³⁶ As recognised in the 2006 report of the Special Rapporteur on the Right to Freedom of Expression, reporting on the implementation of the right to access to information, even where national access to information legislation is in force, marginalised or excluded groups may still have difficulties in practice in requesting and receiving information.¹¹³⁷ The additional problems faced by vulnerable groups in accessing human rights information is also reflected in the Decade of Human Rights Education Plan of Action which states

Special emphasis shall be given in human rights education activities under the Decade to the human rights of women, children, the aged, minorities, refugees, indigenous peoples, persons in extreme poverty, persons with HIV infection or AIDS and other vulnerable groups.¹¹³⁸

These comments reflect the further problem that while access to information and to justice may be protected in national and international instruments, the social and economic status of certain groups may hinder their ability to access information

¹¹³⁴ Optional Protocol to the ICCPR, Article 2; Optional Protocol to the ICEDAW, Article 3. This is also required by the Optional Protocol to the ICESCR (not yet in force), Article 3(2)(g).

¹¹³⁵ Niemi and Scheinin, 2002: 39

¹¹³⁶ This problem is reflected in emphasis within human rights instruments on the protection of the right of access to information for particular groups; see for example the DRD, Article 12, ICPD, Article 9(1)(b).

¹¹³⁷ E/CN.4/2005/64, 17 December 2004, para. 37

¹¹³⁸ A/51/506/Add.1, 12 December 1996, para. 23

concerning their human rights. For example, gender discrimination which prevents girls from attending school¹¹³⁹ results in their lacking the ability to access information about their rights, and thus to complain in case of violation. Dissemination of human rights information via education only in the majority language may inhibit cultural minorities from accessing it.¹¹⁴⁰ A lack of education restricts the ability to access and make use of information about human rights, and constitutes a significant barrier to the accessibility of complaints mechanisms for individuals, particularly those vulnerable groups who are in most need of protection.

3.2: The effect of economic status and resources on access to human rights structures

Economic status is a further fundamental factor in influencing the extent to which the individual is able to access human rights mechanisms. Firstly, the financial resources available to the individual affect their ability to access these mechanisms due to the need in some cases to provide counsel in order to access international human rights accountability structures. Whilst legal council may not be a statutory requirement for access, it is a practical necessity for those who, as noted above, may struggle to understand and make use of the complexities of the protection mechanisms concerning international human rights. Legal aid may therefore be required to enable access to justice for those who cannot afford legal advice or representation. Whilst several human rights instruments require states to provide legal assistance to all including legal aid if required,¹¹⁴¹ without discrimination,¹¹⁴² this applies solely on the

¹¹³⁹ E/CN.4/2005/50, 17 December 2004, paras. 73-84, 132

¹¹⁴⁰ E/CN.4/2005/50, 17 December 2004, para. 90

¹¹⁴¹ ICCPR, Article 14(3)(d); ICRC, Article 27(d), Article 40(2)(b)(ii); ICMW, Article 18(3)(d). See also CESCR General Comment 7, 20 May 1997, para 15(h)

national level. There does not appear to be a requirement for states to provide legal aid for applicants to bring a complaint at the international level. The majority of the regional judicial mechanisms have no legal aid facility, with the European system the only exception;¹¹⁴³ applicants to the African and American systems must finance their own travel and representation costs, although the African Court may provide free legal representation.¹¹⁴⁴ The lack of availability of financial resources thus constitutes a major barrier to access to judicial structures. However, non- or quasi-judicial UN treaty body mechanisms require few financial resources for the individual to make a complaint, as they do not require representation in person but rather written communication. Financial resources therefore represent less of a barrier to access for non-judicial proceedings. Despite this, Niemi and Scheinin identify lack of financial resources as a barrier to use of treaty body mechanisms by individuals in developing countries.¹¹⁴⁵

The socio-economic status of the individual also affects their ability to access human rights structures by influencing the amount of time that they are able to use to do so. As one interviewee identified, “international litigation, it goes on forever”.¹¹⁴⁶ This entails significant commitment from the individual. Consideration of a communication by the HRC commonly averages four to five years.¹¹⁴⁷ Consideration of complaints within the European system can be a particularly lengthy process, especially given that the Court in 2005 had a backlog of around 27,000 cases which

¹¹⁴² HRC General Comment 28, CCPR/C/21/Rev.1/Add.10, 28 March 2000, para. 18; CERD General Recommendation 29, 1 November 2002; para.21

¹¹⁴³ Butler, 2007: 105

¹¹⁴⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights Article 10(2)

¹¹⁴⁵ Niemi and Scheinin, 2002: 50

¹¹⁴⁶ ID 25, 03/12/07

¹¹⁴⁷ Schmidt, 1992: 648; Bayefsky, 2001: 25

have exceeded the required time limits for processing, and that this is expected to increase.¹¹⁴⁸ Regarding access to information, the individual must again have the time available to find information and to assimilate it, even before they may be able to act upon it. This is compounded by the requirement common to all individual complaints procedures that domestic remedy must have been exhausted prior to the instigation of an international complaint.¹¹⁴⁹ This adds to both the time and the resources burdens on the individual.¹¹⁵⁰

Secondly, financial factors, essentially income, influence the degree to which the individual is able to access sources of human rights information. As Callamard observes “it is those communities most affected by poverty which are least able to impart and obtain information, especially relating to basic services”.¹¹⁵¹ Consequently, reduced access to information resulting from poverty affects the individual’s ability to participate in human rights mechanisms as it affects the extent to which they may access information about the existence and workings of these structures. Poorer communities have greater difficulties in accessing human rights information for a number of reasons. A fundamental barrier to the ability to access information is lack of education, as discussed above. If the individual is not literate, they are unable to access much human rights information which is provided in written form.

In addition, a great deal of human rights information is provided via the internet. For example, the website of the UN High Commissioner for Human Rights contains

¹¹⁴⁸ Woolf, 2005: 49

¹¹⁴⁹ Chapter 4, section 2.2.3.

¹¹⁵⁰ Niemi and Scheinin, 2002: 50

¹¹⁵¹ Callamard, 2006: 8

details of all human rights instruments and complaints mechanisms. Similar information is provided by NGO websites.¹¹⁵² If this information is not provided by the state, this can be a useful form of individual access. As recognised in the United Nations Development Programme Report 2001 “The Internet, the wireless telephone and other information and communications technology enable people to communicate and obtain information in ways never before possible, dramatically opening up possibilities to participate in decisions that affect their lives”.¹¹⁵³ However, access to and therefore use of communications technology remains unequal both within and between states. This ‘digital divide’ – “the uneven diffusion of information and communications technology”¹¹⁵⁴ - results in inequalities of access to information. For example, around 2 billion people do not have access to electricity;¹¹⁵⁵ they therefore will not have access to the internet.¹¹⁵⁶ Access to the internet furthermore requires a level of income which enables the purchase of a computer and funding an internet connection. The level of resources available to the individual thus directly impinges on their ability to access human rights information, which in turn affects access to complaints mechanisms.

3.3: The role of NGOs in overcoming practical barriers to access

Access to information and the availability of resources have been identified as two major practical barriers to individual access to complaints mechanisms. However, NGOs play a vital role in enabling individuals to overcome these restrictions. Firstly,

¹¹⁵² See for example International Rehabilitation Council for Torture Victims <http://www.irct.org/Default.aspx?ID=67>, International Gay and Lesbian Human Rights Commission, <http://www.ighrc.org/files/ighrc/Fact%20Sheet%20-%20Individual%20Complaints%20Mechanisms.doc>

¹¹⁵³ United Nations Development Programme, 2001: 2

¹¹⁵⁴ United Nations Development Programme, 2001: 38

¹¹⁵⁵ United Nations Development Programme, 2001: 42

¹¹⁵⁶ Schemes for the distribution of wind-up laptops, which could help to overcome this problem, are being developed. See Twist, 2005.

NGO participation is hugely important in enabling individual access to human rights mechanisms through the provision of information. NGOs provide information about both the content of rights and the structures of complaint available and how to use them. Some international NGOs provide basic information on human rights to a broad community, distinct from thematic or country reports.¹¹⁵⁷ Wedgewood highlights NGOs' role of 'intermediation'; explaining UN documents to a wider public.¹¹⁵⁸ For example, the 'Every Human Has Rights' campaign provides more information about the various rights contained in the UDHR,¹¹⁵⁹ Amnesty International has produced a video about these rights to celebrate the fortieth anniversary of the Declaration¹¹⁶⁰ and FrontLine have produced a manual for human rights defenders on the use of international and regional mechanisms for the protection of civil and political rights.¹¹⁶¹

NGO reports also greatly contribute to the dissemination of human rights information.¹¹⁶² For example, both Human Rights Watch and Amnesty International provide annual human rights reports. The provision of basic information and the development of more detailed and specific reports are forms of NGO participation which inform people both that they have rights, and what those rights include. As one interviewee identified, "the question is that sometimes they don't know they have the rights" (sic).¹¹⁶³ The role of NGOs in providing information about the obligations undertaken by state is crucial in enabling individuals to hold them accountable for those undertakings, as recognised by one interviewee: "it's a long way from home to

¹¹⁵⁷ Steiner, 1991: 46

¹¹⁵⁸ Wedgewood, 1998: 23

¹¹⁵⁹ <http://www.everyhumanhasrights.org/every-human-has-rights/campaign-themes>

¹¹⁶⁰ <http://www.amnesty.org/en/universal-declaration-human-rights-anniversary/udhr-film>

¹¹⁶¹ <http://www.frontlinedefenders.org/manual/en/>

¹¹⁶² Bianchi, 1997: 188

¹¹⁶³ ID 35, 22/01/08

Geneva...and governments can do whatever they like here and no-one would ever know. So part of what we do is that the governments are accountable back home for the actions that the representatives take in Geneva".¹¹⁶⁴ In addition, NGOs play a major role in facilitating individual complaints through making the procedures known.¹¹⁶⁵ It has been contended that individuals in states which are more greatly embedded in civil society have a greater awareness of their rights and how to claim them,¹¹⁶⁶ indicating the importance of NGOs in enabling individual participation through access to information.

Secondly, NGOs can help to overcome the resource constraints which limit individual access. NGOs can assist with the costs of legal advice and representation in a number of ways. NGOs may bring cases directly before the African and American Commissions, thus removing the need for the victim to commit any resources. The complaints procedure before the African Commission has mainly been used by NGOs rather than individuals.¹¹⁶⁷ NGOs may also provide direct financial assistance. For example, the International Commission of Jurists Access to Justice Initiative offers up to \$3000 to selected NGOs to help with litigation costs concerning human rights cases in Africa, in order to help overcome the problem of a lack of free legal advice and representation for victims.¹¹⁶⁸ NGOs also directly provide legal expertise and/or representation to the victim. For example, the NGO COHRE provides free legal advice to individuals, communities and other NGOs,¹¹⁶⁹ and the NGO Interights provided legal advice to the victim in *Tysiqc v Poland*, brought before the European

¹¹⁶⁴ ID 3, 18/10/07

¹¹⁶⁵ Brett, 1995: 103

¹¹⁶⁶ Hafner-Burton and Tsutsui, 2005: 1386

¹¹⁶⁷ Motala, 2002: 257

¹¹⁶⁸ <http://www.wougnet.org/News/ICJ+Access+to+Justice+Initiative.doc>.

¹¹⁶⁹ http://www.cohre.org/view_page.php?page_id=258

Court in 2007.¹¹⁷⁰ They enable access to human rights mechanisms by assisting victims or other NGOs with submissions to the appropriate accountability structure.¹¹⁷¹ They may also support and/or train local lawyers to bring human rights cases both at the domestic and regional or international levels.¹¹⁷² All of these activities, through enhancing the legal expertise available to the victim, can help to overcome the need for the victim to pay for legal counsel, and can therefore help to overcome the lack of legal aid available at the international level.

3.4: Discussion

There are clearly considerable practical barriers to individual access to human rights complaints mechanisms. Broadly, these reflect the generic barriers to participation as identified in Chapter 1: lack of resources, motivation, and discrimination against particular groups. Of particular importance is the role of access to information, and the way in which barriers to the acquisition of knowledge concerning both the content of rights and the correlating state obligations, and regarding the existence of and access to complaints mechanisms, indirectly restricts individual access to human rights structures. For example, issues of discrimination against particular groups are clearly identifiable concerning access to domestic complaints mechanisms,¹¹⁷³ but less so regarding direct access to international structures. However, discrimination and marginalisation of certain groups affects their access to information, which then affects the extent to which they can access human rights procedures. Such exclusion is a clear contradiction to the forms of participation required for human rights.

¹¹⁷⁰ Interights Annual Review, 2006/07: 11

¹¹⁷¹ ID 26, 30/10/07

¹¹⁷² ID 24, 15/11/07

¹¹⁷³ See for example *Avellanal v. Peru* (202/1986), A/44/40, 28 October 1988, 196, paras. 10.1, 10.2 and 11

Whilst section 1 identified that NGOs have a limited representative role concerning individual access to human rights complaints mechanisms, it is clear that they have an essential role in enabling access. NGOs play a vital role in overcoming the two main barriers of lack of access to information and lack of resources. They are therefore more able to enhance individual access through overcoming practical barriers than in relation to the legal or structural limitations on access identified above. Consequently, the primary role of NGOs concerning individual participation in human rights through access to complaint mechanisms is enabling such participation through the provision of information and legal representation.

Chapter 1 identified the need for assistance concerning the practical barriers to participation in human rights. However, it is not clear that states have any obligation to assist individuals in bringing a claim before an international body, as the provision of legal counsel only applies to the national level. Furthermore, as was also discussed in section 2,¹¹⁷⁴ the extent of state obligations concerning the content of human rights education also affects individual access to human rights mechanisms. To enable universal or at least more widespread access to human rights structures, education must be firstly universally available and accessible, and secondly must be more specifically targeted to making individuals aware of their rights and of structures for complaint. As the right to education is subject to progressive realisation, it would be of benefit to develop the core minimum obligations concerning the right to education to include forms of education targeted at enabling access to human rights structures.

¹¹⁷⁴ Chapter 4, section 2.2.2.

Part 4: Normative participation in the development of individual complaints mechanisms

Sections 2 and 3 have examined the practical, legal and structural factors which affect the extent to which individuals can participate in human rights law through accessing complaints mechanisms. It is also necessary to examine how the norms of access to these structures have been constructed, and who has participated in this, as participation in the construction of norms inherently affects the resultant structures of participation. As the norms of access to human rights complaint mechanisms are primarily found in treaties, this section will discuss participation in law-making. The analysis differs from that in Chapter 3 as it is concerned with participation in human rights law-making as it relates to the construction of the norms of operation of human rights structures, rather than the development of the content of human rights principles.

Whilst sections 1 to 3 have focussed on structures of individual access to human rights complaints mechanisms, this section, which considers participation in determining the norms of individual access, does not directly consider the role of individuals. As Chapter 3 identified, individual participation is extremely limited concerning the construction of human rights law, and this pattern is repeated regarding the development of the norms of individual complaints mechanisms. Individuals have little opportunity to determine the structure and applicability of complaints procedures, or their operating practices. Such participation is therefore analogous to that found in Chapter 3, where individual participation is predominantly manifested through NGO participation. This section will therefore examine participation by states, NGOs and the bodies themselves in determining the norms of individual access to human rights complaints structures.

Firstly, participation in determining the norms of the formation and application of obligations must be considered. Participation in the determination of norms concerning the content of obligations was discussed in Chapter 3,¹¹⁷⁵ which identified the primary role of states but also the important influence of NGOs in human rights law-making, and consequently in determining the content of the obligations deriving from human rights treaties. In addition, the treaty bodies and regional structures also play a vital role in elaborating and elucidating the content of human rights obligations through their participation in the interpretation of the law.¹¹⁷⁶

Norms which determine the applicability of obligations vary depending on whether the obligations concerned derive from treaty or customary law. Whilst obligations deriving from customary law are less dependent on express state consent, there are no international structures for individual complaint concerning violation of customary norms, and therefore their applicability is to a large extent irrelevant. Treaty based obligations, as identified above, cannot apply to a state without its consent. The principle of state consent is fundamental to international law. It is codified in the Vienna Convention on the Law of Treaties,¹¹⁷⁷ and its centrality was identified in the *Lotus* case.¹¹⁷⁸ Consequently, state consent is the central norm of participation concerning the applicability of human rights obligations. It is a foundational norm of international law, and clearly reflects the centrality of state power and interest. However, there is some potential for challenge or redefinition of this norm through the development of the concept of *jus cogens* principles, which are binding on all

¹¹⁷⁵ Chapter 3, section 4.1

¹¹⁷⁶ Chapter 3, section 1.1.

¹¹⁷⁷ Article 34

¹¹⁷⁸ PCIJ, *The Case of the S.S. "Lotus"*, Series A, No. 10, Judgement of 7 September 1927, 18

states regardless of consent. Whilst there is considerable uncertainty regarding the exact content of these principles, and who participates in their development¹¹⁷⁹ and, as with customary law, the structure by which an individual could potentially make a complaint regarding their violation, their existence does indicate the possibility of norms concerning the applicability of obligations that are less state-directed and oriented.

Secondly, analysis of participation in determining the norms of individual complaints procedures in international human rights is required. States clearly played, and continue to have, a huge role in determining the structure and operation of human rights complaints mechanisms. The mechanisms contained in the treaty bodies, the Optional Protocols and regional structures were constructed through processes of treaty negotiation, in which states were major participants. Furthermore, the development of new structures, such as the Optional Protocol to the ICESCR is reliant on state participation. Equally, any change to existing structures, such as allowing direct individual access to the European Court via Protocol 11 to the ECHR, is primarily dependent on states.

However, there is also clear evidence of NGO participation in determining the structure and function of human rights complaints mechanisms, and therefore of the norms of participation through complaint to these bodies. NGO influence can be identified regarding the development of the concept of human rights accountability mechanisms. A call for effective international human rights mechanisms was part of the initial appeal in 1961 by Peter Benenson, the founder of Amnesty

¹¹⁷⁹ Danilenko, 1993: 214, 219

International.¹¹⁸⁰ The importance of implementation mechanisms to enable accountability both to promote a stable society and to uphold the rule of law was also highlighted by the founder of HRW, Aryeh Neier.¹¹⁸¹

In addition, as Chapter 3 identified, NGOs participate in human rights law-making in a number of both formal and informal ways. Consequently, they are able to influence the development of human rights complaints mechanisms created by law-making processes. A clear example is participation by NGOs in the ongoing development of an Optional Protocol to the ICESCR. Representatives of eighteen NGOs participated in an early workshop to discuss a draft Optional Protocol, which was organised by the OHCHR in cooperation with the International Commission of Jurists.¹¹⁸² More recently, the International NGO Coalition campaigning for this Protocol has participated in the Working Group which has produced a draft of the Protocol, both through written submissions,¹¹⁸³ oral presentations¹¹⁸⁴ and meetings with delegates.¹¹⁸⁵ NGOs also participated in the development of the Optional Protocol to the ICEDAW. It is clear that their views were sought during the drafting process,¹¹⁸⁶ and they participated in the Working Group which drafted the Protocol.¹¹⁸⁷ NGOs also participate through calling for the development of additional complaints mechanisms, as demonstrated by NGO coalition campaigning for a communications procedure for the ICRC.¹¹⁸⁸

¹¹⁸⁰ Zagorac, 2005: 11

¹¹⁸¹ Korey, 1998: 309

¹¹⁸² Mahon, 2008: 627; E/CN.4/2001/62/Add.2, 22 March 2001, paras. 1 and 2

¹¹⁸³ See for example <http://www.icj.org/IMG/pdf/submission.pdf>

¹¹⁸⁴ http://www.choike.org/nuevo_eng/informes/2556.html

¹¹⁸⁵ See <http://www.opicescr-coalition.org/fourthreport.htm>

¹¹⁸⁶ E/CN.6/1996/10, 10 January 1996, paras. 54-60

¹¹⁸⁷ E/1997/27 CSW, 10-21 March 1997, Appendix II, para. 3

¹¹⁸⁸ A/HRC/8/NGO/6, 26 May 2008

There is also some evidence for NGO participation in the development of the regional structures. For example, NGOs participated in drafting the AfCHPR, which established the African Commission.¹¹⁸⁹ The Commission itself has acknowledged the role of NGOs in exerting pressure on the Organisation of African Unity (OAU) to develop a human rights protection mechanism.¹¹⁹⁰ Furthermore, NGOs may influence the development of such bodies' procedural norms; one interviewee described how they participated in a working group to revise the rules of procedure in a regional body.¹¹⁹¹ This gives NGO potential scope to contribute to the construction and redefinition of norms of individual access at the regional level.

As with law-making, NGOs clearly participate in constructing informal modes of individual complaint. This is illustrated by the development of the technique of 'shaming' governments. Korey describes how, until the 1970s, NGOs were prevented from specifically naming abuser regimes before UN bodies, and even outside the UN; should they do so, they were threatened with loss of their UN credentials. This resulted in the development of alternative means to document and publicize abuses: the use of the international media.¹¹⁹²

Thirdly, the regional courts and commissions and the treaty bodies have themselves participated in determining their own norms of operation, and consequently how individuals are able to participate in them. The 'special procedures' of the Inter-American Commission, which allows for investigation, reporting and recommendations on specific cases of abuse, was created by the Commission itself,

¹¹⁸⁹ Motala, 2002: 246

¹¹⁹⁰ www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.1.doc

¹¹⁹¹ ID 26, 30/10/07

¹¹⁹² Korey, 1999: 156-158

and only later endorsed by the OAS.¹¹⁹³ The African Commission is empowered by the AfCHPR to use appropriate methods regarding the protection of human rights, and whilst these methods are not determined by the Charter the Commission has used its right to determine rules of procedure to enable the consideration of individual communications.¹¹⁹⁴ Whilst as noted in section 1, these procedures are still ultimately subject to state consent to the initial treaties which gives the Inter-American and African Commissions their powers, this indicates significant independent participation by these bodies in determining some of the specificities of individual access.

The regional courts and commissions therefore constitute a way for some individuals to participate in the development of the norms of individual complaint. The members of treaty bodies and the regional courts are explicitly not state representatives; they must be independent.¹¹⁹⁵ Such individuals can influence how the norms of individual complaint are developed, through the work of the relevant body. However, it must be noted that this is an exclusive and limited form of participation, as it is not open to any individual, only to specialists.¹¹⁹⁶ It is analogous to the types of individual participation identified in Chapter 3 which are only open to experts. NGO participation remains the primary way in which individual can participate in determining the norms of access to human rights structures.

¹¹⁹³ Tardu, 1976: 783

¹¹⁹⁴ Odinkalu, 1998: 372-373

¹¹⁹⁵ *inter alia* Protocol 11 to the ECHR, Article 21(2) and (3); AmCHR, Article 36(1); AfCHPR, Article 31(2); ICERD, Article 8(1); ICPD, Article 34(3); ICCPR, Article 28(3)

¹¹⁹⁶ *inter alia* Protocol 11 to the ECHR, Article 21(1); AmCHR, Article 34; AfCHPR, Article 31(1); ICERD, Article 8(1); ICPD, Article 34(2); ICCPR, Article 28(2)

4.1: Discussion

Consideration of participation in determining the norms of access to justice in human rights shows that states and NGOs both participate, as with law-making. As with all other aspects of individual access to human rights structures, states remain the dominant participants in determining the norms of individual participation. However, it is clear that, unlike in other areas, NGOs have an important and active role. There are opportunities for both direct NGO participation in the construction of complaints mechanisms, and for NGO influence over their development by states. Furthermore, a third key group of participants may also be identified: the treaty bodies and regional structures which consider individual complaints. These entities have had an important role in developing certain norms of individual access. There is, however, little opportunity for individuals to participate in determining the norms of access to human rights procedures, other than through representation by NGOs, or as experts working for the treaty bodies or regional mechanisms. Consequently, individuals are predominantly unable to participate in development of the various rules and principles which govern their access to human rights structures.

This demonstrates a contradiction with the type of participation required by human rights as identified in Chapter 1. It is essential that individuals are able to participate in constructing and redefining the norms of their own participation, in order to ensure that such norms are oriented to their interests. Consideration of how the norms of individual access to human rights structures have been developed demonstrates this. The norm of state consent, which is the basic norm of participation concerning the both the applicability of obligations and access to complaints mechanisms, is clearly a

principle developed by states with regard to state interest, and is consequently ill-suited to safeguarding the concerns of individuals.

Concluding Remarks

This Chapter has examined individual access to complaints mechanisms as a means of participation in human rights, as consideration of this mode of participation offers the clearest means by which individuals may participate in the application of international human rights law. It is clear that although access to human rights complaints mechanisms offer considerable opportunities for direct, active and empowering individual participation, this participation is fundamentally limited by the principle of state consent. This is evident concerning the content and applicability of obligations, the jurisdiction of the various bodies, and the structures which individuals may use to bring a complaint regarding violation of their rights.

It should be noted that there are a number of issues which received only peripheral treatment in this Chapter; notably customary law and Charter based accountability mechanisms. These would merit further analysis, although this is beyond the scope of this project. It would also be of particular value to consider means by which individuals could hold states accountable for violations of obligations resulting from norms of *jus cogens*, as these have universal application, thus bypassing the need for state consent.

The fundamental contradiction identified through this examination of participation as access to human rights is that whilst human rights are conceptually and theoretically

universal, human rights protection mechanisms are not. Similarly, whilst human rights are a means to protect the individual from the abuse of state power, means to challenge that abuse remain primarily controlled by states. Individual access to human rights mechanisms has the potential to fulfil the forms of participation required by human rights as identified in Chapter 1, but without an international right of access this remains inherently limited. A further contradiction is that certain complaints structures are reliant on state representation, although states are notoriously reluctant to bring complaints regarding human rights violations against each other.

Chapter 5 will expand on these contradictions, as well as those identified in previous Chapters.

Chapter 5: Contradictions and Implications

This Chapter will focus on key issues which have arisen from the analysis of participation in relation to the principles and structures of human rights as examined in Chapters 2-4. It will highlight particular areas of importance where the type of participation examined in these Chapters deviates from the forms of participation required by human rights, as identified in Chapter 1, and will explore the problematic implications arising from these divergences. The main contradictions arising from the preceding analysis are centred on issues of universality and legitimacy, representation by both states and NGOs, empowerment, and the structures of both international law and international human rights law.

Part 1: Participation, universality and human rights legitimacy

1.1: Participation and universality in human rights

The essential contradiction arising from this analysis of participation in human rights revolves around the principle of universality. As Chapter 1 identified, universality is the fundamental characteristic of human rights, as reflected in numerous international instruments and further illustrated through the principles of equality, non-discrimination and inalienability.¹¹⁹⁷ Freeman rightly states that to say human rights are universal “is to invoke the principle of non-exclusion... that no human being may be excluded from this protection”.¹¹⁹⁸ Human rights universality is therefore not a

¹¹⁹⁷ Chapter 1, section 2.1.

¹¹⁹⁸ Freeman, 1998: 38

conceptual construct but a *real* characteristic requiring universal protection, and consequently universal participation. However, participation in human rights, particularly concerning being subject to human rights protection through access to human rights structures, is comprehensively partial and exclusive.

As Chapter 4 illustrated, there is a fundamental discrepancy between the theoretical universality of human rights principles and the legal obligations for which entities may be held accountable. Consequently, access to human rights mechanisms is not equal, universal and inclusive as all individuals are not protected by reference to the same obligations. Regarding state obligations, the principle of state consent results in selective applicability of the protection afforded by treaty based obligations. Individuals are unable to directly hold foreign states or non-state actors accountable for human rights violations, as it is at best unclear what structures of obligations exist regarding these relationships. Whilst customary obligations are potentially more inclusive, how far these obligations extend and to what extent they may be challenged by states is currently indeterminate.

Furthermore, effective individual participation in human rights via access to human rights procedures requires the existence of avenues for individual complaint. However, the structure of international human rights law regarding individual complaints is exclusive rather than universal, being limited by state consent or geographical application. This consequently excludes some individuals from such protection and creates disparity rather than equality of access. This further illustrates the contradiction between the principle of universality within human rights and the reality of participation in human rights.

1.2: Participation and human rights legitimacy

Human rights universality is intrinsically linked to its legitimacy, and consequently the lack of universal participation in human rights enables challenges to this legitimacy. The link between participation and the legitimacy of human rights is demonstrated by critiques concerning both the construction and the application of human rights principles.

The importance of the relationship between participation and the perceived legitimacy of human rights principles is best illustrated by the relativist-universalist debate. For example, the dispute concerning the participation of non-Western states in the development of the UDHR as discussed in Chapter 3 clearly illustrates how both the universalist and relativist positions use participation to either attack or defend the legitimacy of human rights law.¹¹⁹⁹ Relativist perspectives contend that current human rights principles are inherently Western in character,¹²⁰⁰ and consequently that they fail to represent universal concerns by excluding the specific values of particular cultures or societies.¹²⁰¹ Because they lack this universality, they are contended to be illegitimate. As Penna and Campbell recognise, “the notion of Western proprietorship of human rights... puts the global movement at risk”.¹²⁰² It must however be noted that it is not necessarily the specifically Western character of human rights that leads to their being considered illegitimate, but that because they are Western they are not

¹¹⁹⁹ Chapter 3, section 3.4

¹²⁰⁰ Woodiwiss, 2003:21; Cerna, 1994: 740; see also Mutua, Pannikar

¹²⁰¹ See for example Ibawoh (2001: 59) concerning an Africanist prioritisation of economic and social rights over political rights, and Davis regarding the ‘Asian values’ argument which rejects democracy and human rights on the ground that Asian societies emphasize principles of authority, social hierarchy, order and the group rather than the rights of the individual (2000: 140-141).

¹²⁰² Penna and Campbell, 1998: 7; see also Brown, 1997: 42

considered universal. It is this universality, and consequent requirement of universal participation, that is inherent to the legitimacy of human rights.

It is important to emphasize that the relativist position has itself been challenged as a means to advance particular political interests rather than the reflection of genuine concern for the non-representativeness of and lack of participation in human rights principles.¹²⁰³ The appeal to cultural practices is manipulated by cultural elites to mask their own self-interest and arbitrary rule.¹²⁰⁴ However, the fact that relativist arguments use participation or lack thereof to attack the legitimacy of human rights shows that participation is regarded as important for human rights to be perceived as legitimate, and therefore that the legitimacy of human rights may be challenged on the grounds of non-universal participation. Whether utilised for political gain or not, the relativism debate identifies the importance of participation either in rhetoric or reality to the legitimacy of human rights.

Moreover, refutations of the relativist critique of human rights also demonstrate the centrality of participation to the legitimacy of human rights. Whilst acknowledging some elements of the relativist position, the universalist perspective asserts that human rights principles do represent universal norms and consequently reflect the shared values of humanity.¹²⁰⁵ Human rights is perceived as a dynamic concept with multiple Western and non-Western actors participating in its evolution.¹²⁰⁶ The universalist position therefore indicates that human rights are legitimised by

¹²⁰³ See for example Brems, 1997: 149; Higgins, 1994: 96-97; Harris-Short, 2003: 132-133

¹²⁰⁴ Ibawoh, 2001: 55-56

¹²⁰⁵ See for example Baderin (2001: 74) who contends that the concept of human rights is present and perceivable within every human civilisation, despite the impetus for the creation of standards originating from the West. See also Freeman, 1998: 27; Ibawoh, 2001: 58; Panikkar, 1982: 78, 87.

¹²⁰⁶ Merry, 2001: 35

participation, both in their application and their construction, as they argue that multiple actors were participants in the definition of human rights principles and those principles either do or are capable of representing universal concerns. This indicates recognition of the importance of participation either directly in the construction of human rights or indirectly through human rights representing universal principles. If universality was not important for human rights to be regarded as legitimate, there would be no need to refute the relativist position on these particular grounds.

Furthermore, participation has been recognised as important for the practical application of human rights. If a particular society does not recognise particular human rights principles as their own, and therefore see them as lacking in legitimacy, they consequently do not support them and implementation even with official state support is extremely problematic.¹²⁰⁷ Law reform in relation to human rights principles is ignored,¹²⁰⁸ as “the effectiveness of human rights depends to a large extent on their being alive in civil society and public opinion”.¹²⁰⁹ Clearly, international human rights principles have a greater chance of being widely respected if they broadly reflect cultural ideals,¹²¹⁰ conversely conceptual differences regarding the content and scope of human rights contribute to the difficulties regarding their universal observance.¹²¹¹ In order to be effective, human rights norms must be considered legitimate from within the framework of a particular culture;¹²¹² they will be resisted if they are seen as the imposition of ‘outside’ beliefs or interests. Cultural and social participation via the inclusion of different perspectives in the construction

¹²⁰⁷ Harris-Short, 2003: 134; see also Coomaraswamy, 1994: 39-40

¹²⁰⁸ Banda, 2003: 9

¹²⁰⁹ Brems, 1997: 158

¹²¹⁰ Howard, 1993: 320

¹²¹¹ Baderin, 2001: 72-73

¹²¹² An-Na’im, 1992: 3

and application of human rights norms is thus considered to contribute to their perceived legitimacy and this in turn impacts on their successful implementation and continuing respect. This was discussed in Chapter 2, which demonstrated that human rights principles recognise the importance of participation in the development of policies and programmes for the implementation of human rights, and the contribution that such participation makes to the efficacy of human rights strategies.¹²¹³

Participation is therefore identified as an important contributing factor to the legitimacy of human rights. Both participation in the social and cultural construction of the norms that are codified in human rights instruments, and participation in the actual construction of the documents concerned are considered as having an effect on human rights legitimacy. Human rights are derided as illegitimate because they are exclusive, or are propounded as legitimate because they are inclusive. Human rights legitimacy is thus intrinsically linked to participation. In turn, this illustrates that the legitimacy of human rights can be challenged on participatory grounds. For human rights to be considered legitimate, the process by which such principles are determined must be participatory and inclusive, and/or the resulting principles must be accepted as universally representative.¹²¹⁴ Current human rights principles are argued to be illegitimate as a universal discourse because they do not represent universal principles, and can therefore be legitimately rejected. The contradiction between the universal basis of human rights and the lack of universal participation in human rights enables such challenges to the legitimacy of human rights, and consequently facilitates justifications for abuse.

¹²¹³ Chapter 2, section 2.4

¹²¹⁴ Similarly, Brems identifies that the feminist critique of human rights views them as illegitimate because they represent male concerns to the exclusion of women (1997; 137); see also Peterson, 1990 on this issue.

Part 2: The limitations of participation via representation

The second major contradiction between the participation appropriate for human rights and that reflected in human rights principles concerns the prioritisation of representation. As Chapter 1 identified, human rights requires direct forms of participation if it is to be effective, active and meaningful. However, participation as reflected in human rights principles centralises representative forms, particularly in relation to rights of political participation. Although there are some elements of human rights which indicate recognition of the value of more direct forms, most understandings of participation consider it in political terms, and political participatory rights focus on representation.¹²¹⁵ This approach is replicated in participation in law-making, where the primary actors are states and NGOs, with extremely limited opportunities for direct individual participation, fundamentally limited to experts.¹²¹⁶ Regarding access to human rights, accountability structures and access to human rights information does provide for more direct forms of participation by individuals; nonetheless, certain modes of access to justice are reliant on state representation.¹²¹⁷ The centrality of participation via representation thus presents an important contradiction to the type of participation determined as appropriate for human rights. Furthermore, this focus on representation has significant implications for human rights protection.

¹²¹⁵ See Chapter 1, section 1.1.1, and Chapter 2, section 1.3.

¹²¹⁶ Chapter 3, 1.3.

¹²¹⁷ Chapter 4, section 2.3

2.1: Limitations of representative democracy

Participation in decision-making as conceived within international human rights is premised around structures of representation within a democratic state. The right to a democratic system of political participation is centralised as the primary mode by which citizens exercise influence over decision-making processes which affect them, including participation in decision-making concerning human rights. This includes determination both of the content of human rights and whether they are applicable, and consequently whether and how citizens may access them. In theory, the state is the representative of the people, and consequently makes decisions on their behalf as directed by them.

However, this centralisation of representative democracy is an inadequate representation of international politics. Firstly, this system is premised around individuals' interests being given adequate representation at the international level via structures of representation. Individuals are assumed to participate internationally via their state representatives. As Simonovic identifies

The state is also becoming an intermediary between its citizens and the international community. It is through state representatives that interests of citizens are represented in international organizations, during deliberations in various associations or while participating in the creation of international treaties.¹²¹⁸

To operate meaningfully and effectively, this structure consequently requires the existence of a democratic political system at the national level. However, whilst there is some evidence for a developing universal norm of the right to democratic governance,¹²¹⁹ this is certainly not practiced universally. Many states simply do not have even theoretically democratic systems of government, and the political

¹²¹⁸ Simonovic, 2000: 401

¹²¹⁹ See Franck, 1992

participatory rights of their citizens are violated on a regular basis. Wapner argues that only slightly more than sixty percent of the world's states are democratic, and points to the many "kleptocracies, theocracies, and warlord regimes" whose power structures leave many unrepresented.¹²²⁰ Van Boven agrees that "in many instances governments cannot be considered the genuine representatives of the people over whom they exercise authority",¹²²¹ and that a great deal of international human rights law is created by entities acting without democratic control or input.¹²²²

In addition, so-called democratic states may not provide for effective and meaningful participation by their citizens. For example, a state may hold elections, but if the result is disregarded by one party, as was recently seen in Zimbabwe and Kenya, having a theoretical democratic system does not translate into democracy in practice. Furthermore, voting structures may be manipulated in both direct and more insidious ways. Individuals may be threatened with violence if they vote for a particular candidate, as was seen in the 2008 elections in Zimbabwe, or may be obstructed from voting at all. Alternatively, as Chapter 1 discussed, particular requirements for political participation within democracies have been used to disenfranchise certain groups.¹²²³

Furthermore, there is a major contradiction between the concept of state legitimacy to participate in the international system propounded by democratic theory and that found in international law. According to democratic theory, state legitimacy is dependent on the extent to which it represents the interests of its citizens and the

¹²²⁰ Wapner, 2002: 198

¹²²¹ Van Boven, 1989: 221

¹²²² Van Boven, 1989: 223

¹²²³ Chapter 1, section 1.3.

degree to which it is accountable to them.¹²²⁴ Democratic theory therefore presents a concept of legitimacy dependent on participation via representation. However, this is contradicted by international law which requires neither national nor international democracy to legitimise state participation. State legitimacy under international law is centred around the concept of state sovereignty, which is dependent on power. Article 1 of the Montevideo Convention on the Rights and Duties of States presents the following characteristics as determinants of a state's international legal personality giving legitimacy to participate: a permanent population, a defined territory, government, and capacity to enter into relations with other states. Such government is not required to be participatory or democratic. State legitimacy is thus affected by but is not dependent on how far the state is internally democratic. This means that a state can legitimately participate in human rights on behalf of its citizens without them having given it the authority to do so or having the opportunity to hold the state accountable for its action or inaction. Consequently, individuals may be legitimately excluded from participation in international human rights as the state is not required to enable such participation in order to be a legitimate participant itself.

This fundamentally excludes those living within undemocratic states, or states where the democratic process is bypassed or manipulated, from participation through state representation on the international level and therefore in international human rights. It illustrates an elementary contradiction between the theory and practice of participation in human rights. It is those individuals whose state neither allows them the means to influence its actions, nor who respects their human rights, who are most

¹²²⁴ Teson, 1997: 117; Cohen, 1996:95

in need of access to the protection afforded by international human rights, yet conversely, they are those who are most excluded from participation.

The increasingly globalised and interconnected nature of the international system can impact on the ordinary lives of individuals in ways that were previously inconceivable. Decisions taken by states and other organizations exert influence over individuals and groups over great distances; global interdependence is increasing.¹²²⁵ Whilst global forces outside the state structure clearly impact on forms and effects of participation for both groups and individuals, participation in such global forces is restricted. Although individuals, minorities and states are all in principle equal subjects of international law, the only entities with participatory rights are state governments.¹²²⁶ This means individuals are dependent on their state to represent their concerns and enable their indirect participation at the international level. However, if the state is to be this conduit for the opinions and needs of the individuals within its jurisdiction, through representing their concerns at the international level, it must have the ability to do so. If the state is unable to participate, then it is unable to represent the concerns of its people, and they are consequently also excluded from participation.

Whilst state participation in international law is theoretically equal,¹²²⁷ such equality is one of the great deceptions of international law.¹²²⁸ Firstly, the principle of the sovereign equality of all member of the UN is overruled by the veto powers of the permanent members of the Security Council.¹²²⁹ The veto rights, designed to protect what were then the Great Powers both from each other and from challenge by a

¹²²⁵ Keohane, 2005: 121

¹²²⁶ Brunckhorst, 2002: 687

¹²²⁷ UN Charter, Article 2(1) “The Organisation is based on the sovereign equality of all its Members”

¹²²⁸ Krisch, 2003: 135

¹²²⁹ UN Charter, Article 27(3); Cassese, 1986: 129; Brunckhorst, 2002: 687

majority rule¹²³⁰ thus codify and perpetuate particular power relations within the international system. Secondly, member states are clearly not equal in political or economic terms, and indirect intervention via trade, aid and so forth means that states' power of consent may be manipulated by more powerful actors, both political (states) and economic (corporations). Consequently, reliance on representation to enable individual participation via state participation at the international level results in a democratic deficit regarding globalised structures of participation,¹²³¹ in turn resulting in inequalities of access to participation. Due to the lack of universal democratic structures on both the level of national governments and within the international decision-making system, entire populations may either be entirely excluded from influencing the construction of human rights, or may have their interests inadequately represented. The clear democratic deficit in international relations means that participation through representation at the national level cannot guarantee representation at the international level.

Representative forms of participation may also not best serve the interests of human rights protection. Chapter 1 identified some of the problematic elements of participation realised through representative structures.¹²³² These problems are clearly applicable to the human rights context. As Cohen notes, there is a danger in reliance on majoritarian structures to enable legitimate decision-making; “some democratic collective decisions are too execrable to be legitimate”.¹²³³ Whilst Petersmann correctly identifies that to avoid such ‘tyranny of the majority’, democracy must be

¹²³⁰ De Visscher, 1957: 109; Köchler, 2006: 325

¹²³¹ Benner, Reinicke and Witte, 2004: 195; Scholte, 2004: 428-429; Otto, 1996: 127

¹²³² Chapter 1, section 1.1.3.

¹²³³ Cohen, 1996: 97

limited by “inalienable rights of citizens”,¹²³⁴ the inability of citizens to participate in determining what those rights should be, and whether they should apply, functions to remove this fundamental limitation. It is therefore possible to have democracy without effective human rights protection, due to the lack of guarantees for individuals to participate in human rights. Consequently, representation at the national level cannot necessarily equate to human rights protection.

The inadequacy of majoritarian forms of decision-making is also illustrated at the international level as the decisions of the Security Council bind all states, including those that disagree.¹²³⁵ This means that even if those states are representing the will of their peoples that will can be overruled by other members of the world community. Representative systems which operate under the principle of majoritarianism therefore restrict participation in human rights at both the national and international levels.

In conclusion, participation through representation does not enable the effective, meaningful and active individual participation required by human rights, and representative forms rely on a concept of democracy that does not function in practice. As Allott argues

The peoples of the world are represented externally by their state-systems and by the governments which speak for them. But the idea and the ideal of democracy has evolved and the people have matured with it. They demand not merely to be represented but to participate...¹²³⁶

There is consequently a need for forms of participation which go beyond the representative model to enable effective participation in human rights by individuals on both the national and international levels.

¹²³⁴ Petersmann, 2001: 13

¹²³⁵ Bodansky, 1999: 597

¹²³⁶ Allott, 1990: 251

2.2: Problematic elements of NGO representation

NGOs may enable participation via representation, as was particularly identified regarding participation in human rights law-making,¹²³⁷ where NGOs were the primary conduit for (indirect) individual participation. This role of NGOs has also been recognised by the (formal) Secretary-General, whose 1994 Review stated that NGOs provide “the closest approximation to direct popular participation in the intergovernmental machinery of the UN”.¹²³⁸ In addition, as both Chapters 3 and 4 identified, private forms of participation in human rights are primarily represented by NGOs, and the ways in which they participate are predominantly informal. NGOs can therefore provide a means for individual participation where democratic representation by the state is absent,¹²³⁹ as they offer alternative structures of participation in international human rights to those of the state. Consequently, NGOs are an important means to broaden individual participation in human rights through representative structures.

However, the extent to which representation by NGOs actually enables effective and meaningful participation in human rights by individuals must be investigated. There are three main areas of concern. Firstly, the extent to which NGOs are themselves representative must be evaluated, as they do not necessarily operate in a participatory, inclusive or democratic manner. In addition, numerous questions have been raised concerning the degree to which NGOs are accountable to their various constituencies and these require consideration, as their legitimacy as participants has been challenged on this basis. Finally, the efficacy of NGO participation must be examined, as the degree to which they are successful affects how far the indirect

¹²³⁷ Chapter 3, section 1.3.

¹²³⁸ E/AC.70/1994/5, 26 May 1994, para 33

¹²³⁹ Schoener, 1997: 551

individual participation enabled by representative NGO participation is itself effective.

2.2.1: NGO representativeness

As identified, NGO participation constitutes a primary means for individuals to participate in international human rights law through structures of representation. However, it is debateable how far NGOs are themselves representative and inclusive. The degree to which NGOs are a conduit for actual individual influence over the development and application of human rights is therefore affected by how far those individuals can influence the ways in which the NGO participates, and consequently how far it represents their concerns.

Firstly, there is no guarantee that NGOs are truly representative of those on whose behalf they participate. Crucially, most NGOs are self-appointed rather than elected or chosen by their beneficiaries.¹²⁴⁰ There are examples of organisations which have developed from the grassroots level and were a response by victims to the abuse that they had suffered, or others in the community acting on behalf of victims,¹²⁴¹ but most of the major human rights organisations were established by individuals who had no initial connection with those on whose behalf they speak and act.

There have also been critiques of the extent to which the NGO sector is dominated by particular perspectives. Amnesty International has been described as being “mainly

¹²⁴⁰ Pearce, 1993: 223; Lindblom, 2005: 525

¹²⁴¹ For example, the international organisation La Via Campesina, the Nigerian NGO Child Rights and Rehabilitation Network and the Kosova Women’s Network

white, male and able-bodied".¹²⁴² Similarly, one interviewee identified that their organisation tended to be seen as predominantly middle-class, and had a problem engaging with working class people and minorities.¹²⁴³ This indicates that the perspective of such groups may not be adequately represented within the NGO, and subsequently through NGO participation in international human rights law. In addition, Connors argues that traditional and established NGOs have been slow to recognise the specific claims of women, as they conform to the traditional human rights discourse which focuses on civil and political, rather than private, rights.¹²⁴⁴ Furthermore, she contends that "the NGO human rights establishment is dominated by men and, accordingly, concerns itself predominantly with issues of central importance to men".¹²⁴⁵ This is however contradicted by the argument that women's rights became a major part of the international agenda due to the efforts of NGOs.¹²⁴⁶

Human rights NGOs have also been considered to represent a particularly Western perspective.¹²⁴⁷ For example, Mutua contends that the major human rights NGOs represent a principally Western viewpoint favouring universal human rights and liberal democracy, and that their mandates, policies and strategies are developed by a predominantly Western leadership and focus on civil and political rather than ESC rights.¹²⁴⁸ The largest and most well established NGOs are Western in origin, and continue to have their headquarters based in Western countries: the International Secretariats of Amnesty and FIAN are based in London and Heidelberg respectively,

¹²⁴² Amnesty International Cultural Diversity and Equal Opportunities Policy, quoted in Hopgood, 2006: 161

¹²⁴³ ID 18, 30/10/07

¹²⁴⁴ Connors, 1996: 165-7

¹²⁴⁵ Connors, 1996: 167

¹²⁴⁶ Chapter 3, section 1.2.

¹²⁴⁷ Friedman *et al*, 2005: 36-9

¹²⁴⁸ Mutua, 2001: 153-156

and that of Human Rights Watch in New York. Hopgood identifies that Amnesty staff and researchers are principally Western.¹²⁴⁹ Steiner does note however that whilst the staff and membership of Amnesty are predominantly Western, its International Executive Committee has a cross-section of Third World members.¹²⁵⁰ Northern NGOs are more dominant and numerically overrepresented at UN conferences than those from the South. States have expressed concern at the predominance of NGOs based in the developed world, considering that they represent a biased perspective.¹²⁵¹ Some NGOs have expressed similar concerns.¹²⁵²

There is no guarantee that the internal political structure of NGOs will truly represent the interests of either its membership or its beneficiaries. NGOs vary in the extent that they include the participation and perspectives of their constituents in the development and implementation of policy. Certain NGOs have structures whereby members are able to influence or contribute to the position of the organisation on a particular issue, which includes campaigning for the development of legal standards on that issue. Some interviewees described how their organisations conducted consultations of members regarding a particular issue before adopting a position for the organisation as a whole.¹²⁵³ One interviewee described how a particular issue, now one of the main policy areas of the organisation, originated from individual members.¹²⁵⁴ The ability of individual members to influence the direction of one organisation as a whole was considered variable, and to a great degree dependent on

¹²⁴⁹ Hopgood, 2006: 162-164

¹²⁵⁰ Steiner, 1991: 61

¹²⁵¹ Lovold and Jenie, 2005: 5; see also A/57/387, 9 September 2002, para 139(d)

¹²⁵² Steiner, 1991: 61

¹²⁵³ ID 1, 05/05/07; ID 6, 10/08/07; ID 33, 15/01/08

¹²⁵⁴ ID 10, 13/12/07

both individual motivation or concern regarding a particular issue, and on internal power structures within the organisation.¹²⁵⁵

However, some interviewees at the lower levels of NGOs indicated that they did not feel included to a great extent in how organisational policy was formulated: “in general how [the organisation] make their policy is still a mystery”.¹²⁵⁶ For this interviewee this did not seem to be considered negative, although other interviewees found it more of a concern.¹²⁵⁷ A contradiction may be identified between the degree to which an organisation may try to take account of the perspectives of the membership when formulating policy, and the extent to which the membership perceives the central organisation to be doing this.¹²⁵⁸ Concerns were also raised regarding an organisation adopting a position on a particular issue which may contradict the feelings of some members.¹²⁵⁹ For example, Baehr notes how the issue of extending Amnesty International’s mandate to include campaigning on behalf of persons imprisoned on the basis of homosexuality “threatened to split up the organisation along multicultural lines”.¹²⁶⁰

Structures of decision-making within an NGO can also be influenced by funding sources. The NGO is often accountable to the funder in a way that it is not to the beneficiaries of its work.¹²⁶¹ There may be conflict between the interests of the NGOs membership and or/funders, and the resulting policies of its leadership, and the

¹²⁵⁵ ID 10, 13/12/07

¹²⁵⁶ ID 1, 05/05/07

¹²⁵⁷ ID 7, 24/10/07

¹²⁵⁸ ID 7, 24/10/07

¹²⁵⁹ ID 25, 03/01/07

¹²⁶⁰ Baehr, 1994: 18

¹²⁶¹ Pearce, 1993: 223

interests of its beneficiaries.¹²⁶² This can restrict the work of the NGO, and consequently the degree to which it is able to represent the concerns of its constituents.

The importance of enabling effective participation, as far as possible, by beneficiaries in the work of NGOs has been persuasively argued:

International human rights standards are already relatively clear on the need for consultation, and listening to people's views before taking action that will affect them...However difficult it is for NGOs to establish and maintain contact with those who are expected to benefit from their activities, NGOs should be ready to listen to their views if and when they are expressed. They should also feel an obligation to react to those views, and should not simply dismiss them, even if they believe they are irrelevant or inappropriate. Very few human rights NGOs seem to have established procedures to determine how, once contacted, they will create conditions in which they will dialogue with, and be answerable to, such beneficiaries.¹²⁶³

The interview data does, to some extent, reflect these positions. With regard to the general lobbying work of NGOs with regard to human rights law-making, problems were identified regarding how far the voice of beneficiaries is heard in the determination of NGO policy. Several NGOs identified a lack of inclusion of the voices and perspectives of victims in the development and evaluation of campaigns, including those relating to human rights law-making.¹²⁶⁴ It was also identified that there can be a lack of clarity in demonstrating that an individual has given consent for their case to be used as part of a broader campaign.¹²⁶⁵ This indicates recognition of the inclusion and appropriate representation of beneficiaries as important goals.

Direct inclusion of beneficiaries in policy making seemed to be associated more with specifically development organisations than with human rights NGOs which focussed

¹²⁶² Keohane, 2002: 447

¹²⁶³ Archer, 2003: 122, paras. 390-391

¹²⁶⁴ ID 49, 08/02/08; ID 50, 29/01/08

¹²⁶⁵ ID 33, 15/01/08

on research and/or campaigning.¹²⁶⁶ This is reflected in Archers's assertion that NGOs who provide services tend to recognise the need to be accountable to their 'clients', whereas those who work mainly through campaigning and advocacy tend not to think of those whose rights they defend as active participants.¹²⁶⁷ Nonetheless, one interviewee described how a campaign on a particular issue had undergone some major changes due to the input of victims,¹²⁶⁸ demonstrating the potential for beneficiaries to influence NGO policy-making. It was also identified that whilst there were few formal mechanisms for victims' to influence policy-making, there were a number of informal structures of participation.¹²⁶⁹

Significant barriers were identified to enabling beneficiary participation in the work of the NGO, although most interviewees would have liked to encourage this. For example, it might be dangerous to work too closely with some victims,¹²⁷⁰ particularly concerning issues which could be perceived as an imposition of foreign values.¹²⁷¹ It could be problematic balancing the desires of the beneficiaries with accountability to donors.¹²⁷² The lack of capacity of smaller, local grassroots organisations was also identified as limiting their participation.¹²⁷³ A further difficulty was determining who to work with and how far local groups were themselves representative of victims' concerns.¹²⁷⁴

¹²⁶⁶ ID 33, 15/01/08

¹²⁶⁷ Archer, 2003: 62-62, para. 94

¹²⁶⁸ ID 32, 15/01/08

¹²⁶⁹ ID 50, 29/01/08

¹²⁷⁰ ID 33, 15/01/08; ID 18, 30/10/07

¹²⁷¹ ID 4, 05/11/07

¹²⁷² ID 4, 05/11/07

¹²⁷³ ID 31, 06/02/08

¹²⁷⁴ ID 31, 06/02/08

The question of NGO representativeness therefore highlights a contradiction in that NGOs have a fundamental representative role in participation in human rights, due to their more developed rights and abilities to participate, but they are not, in general, representative organisations, as usually they are not elected and have a small membership base.¹²⁷⁵ Amnesty International is a key exception here, as it has a large membership and a democratic internal structure. Nonetheless, these decision-making processes are predominantly structured around enabling the views of the membership to influence the direction of the organisation, rather than also including the views of the beneficiaries. Whilst there is significant recognition from within the sector of the importance of the inclusion of beneficiaries' voices in the development of NGO policy, this issue has not yet been adequately addressed. In consequence, representation by NGOs is, with some exceptions, currently failing to enable appropriate forms of participation by individuals in international human rights law.

2.2.2: NGO accountability

The importance of NGO accountability has been increasingly identified as an essential aspect of NGO participation in international human rights. Archer argues that while there is a tendency for human rights activists to perceive themselves as "clean" and immune to the negative tendencies of other decision makers; however, as NGOs become more powerful, there is a need to make sure that they are properly accountable.¹²⁷⁶ Interviewees also observed that the issue of NGO accountability has become more prominent in recent years.¹²⁷⁷

¹²⁷⁵ Archer, 2003: 8, para. 26

¹²⁷⁶ Archer, 2003: 2-3, paras. 7-11

¹²⁷⁷ ID 50, 29/07/08; ID 13, 18/10/07

The degree to which NGOs are representative is one means by which NGO accountability is assessed. It is argued that in order to be legitimate, NGOs must represent the concerns of their constituents and be accountable to them for the decisions made by the organisation.¹²⁷⁸ Yet, as discussed above, the extent to which NGOs are representative of and accountable to their various constituents is extremely variable. As Aston identifies, NGOs represent particular interests, and there is no democratic control over their activities as there is (in theory) with governments¹²⁷⁹. It has been asserted that NGOs are only accountable to, at best, their funders and members¹²⁸⁰.

Challenges to NGO legitimacy have therefore been made on the basis of a lack of accountability,¹²⁸¹ based on a lack of representation. This is further reflected by NGOs' recognition that in order to defend their credibility they must justify their participation in terms of 'voice';¹²⁸² their authority to speak on behalf of the poor and marginalised. NGOs are criticised for being white, middle-class and Western, rather than composed of representatives of the communities on whose behalf they speak,¹²⁸³ and as such have been accused of having an interest in keeping the poor voiceless.¹²⁸⁴

However, NGOs' legitimacy as participants in international human rights should not solely be evaluated on the degree to which they are representative of and accountable to their constituents. Other means by which the legitimacy of NGO participation may be assessed include peer accountability between participants from the same sector,

¹²⁷⁸ Slim, 2002: paras. 4, 16

¹²⁷⁹ Aston, 2001: 961

¹²⁸⁰ Grant and Keohane, 2005: 38; Mutua, 2007: 614

¹²⁸¹ Archer, 2003: 8, para. 27

¹²⁸² Slim, 2002: para 8

¹²⁸³ Slim, 2002: para. 15

¹²⁸⁴ Slim, 2002: para. 18

and reputational accountability from the wider public.¹²⁸⁵ Such forms of accountability are crucial to NGOs' continued participation, as if their credibility is undermined they risk losing their political status and authority to participate.¹²⁸⁶ Keohane agrees that these forms, rather than democratic structures, are the primary way in which NGOs can be held accountable; if an organisation were shunned by its peers, or its reputation with the general public was poor, it would struggle to participate and would lose support.¹²⁸⁷ Wapner agrees that NGOs can be accountable to their members in the absence of democratic structures of participation, because NGOs must act in ways which satisfy and even excite members and garner additional support; if they fail to do this, members will "vote with their feet" and the NGOs will lose support and consequently institutional strength.¹²⁸⁸ It has also been argued that some NGOs gain their authority to participate in human rights based on their expertise, rather than their role as representatives.¹²⁸⁹

Although the degree to which NGOs are representative and inclusive of the concerns of both their members and beneficiaries has a profound impact on individual participation in international human rights due to the centrality of representative forms of participation in human rights, this should not necessarily permit challenges to NGOs' authority as participants. NGOs are legitimate participants in their own right. Furthermore, due to the centrality of representative forms of participation, if NGOs were excluded as legitimate participants, this would mean that they were unable to enable individual participation through representation, and a far broader constituency would consequently also be excluded. NGOs do need to enhance the

¹²⁸⁵ Benner *et al*, 2004: 199

¹²⁸⁶ Wapner, 2002: 203

¹²⁸⁷ Keohane, 2002: 478; see also Wapner, 2002: 201-202; Hilhorst, 2003: 145

¹²⁸⁸ Wapner, 2002: 201; see also Spiro, 2002: 163-164

¹²⁸⁹ ID 13, 18/10/07

extent to which beneficiaries in particular are directly and meaningfully included in the determination of the strategy and policy of the organisation, but this need for improvement should not be used as justification to exclude NGO participation. It is also notable that many challenges to NGO legitimacy have come from states, many of whom have a particular interest in limiting NGO participation, and who themselves have a poor track record of representing the concerns of their citizens.

2.2.3: NGO efficacy

As NGOs enable individual participation via structures of representation, as well as in other ways the efficacy of NGO participation must be examined. If NGO participation is ineffective, then so is the participation of those individuals who participate indirectly through the actions of the NGO. For such individuals this would result in exclusion from human rights as their opportunities to participate directly are so limited. The effectiveness of NGO participation has therefore had implications for individual participation, due to the centrality of representative structures of participation in international human rights.

A number of issues affect NGO efficacy, as identified in Chapters 3 and 4. These include availability of resources, timescale, knowledge and the specific political context.¹²⁹⁰ Such resource problems could potentially be addressed simply through the provision of more resources, and the lack of resources, particularly core funding, was specifically identified as a barrier to NGO participation.¹²⁹¹ The two issues which

¹²⁹⁰ Chapter 3, section 2.1.

¹²⁹¹ Chapter 3, section 2.1.

will now be discussed indicate structural or conceptual contradictions in relation to participation in human rights.

Firstly, it is extremely problematic to assess the degree to which a particular campaign has been effective. This was identified by a number of interviewees. As NGOs often either work in coalition, or there are several groups working on the same issue, it was not possible exactly assess the contribution of a single organisation.¹²⁹² It was difficult to assess how far the outcome was the result of action by NGOs, and how far other factors were involved.¹²⁹³ One interviewee considered that “if you were to say give me one thing that has happened just because of you, I would say nothing”, but stressed the cumulative effect of NGOs as a sector.¹²⁹⁴ The intangibility of impact on the enjoyment of human rights was also identified, especially compared to development objectives, such as building a certain number of schools or clinics.¹²⁹⁵ As one interviewee identified, it was easier to measure NGO impact in terms of input, rather than output.¹²⁹⁶

Secondly, as both Chapters 3 and 4 identified, as formal structures of participation clearly centralise states and governmental actors to the exclusion and detriment of individuals, NGOs predominantly participate in informal ways. Their informal modes of participation seek to influence decision-makers regarding the development and

¹²⁹² ID 33, 15/01/08

¹²⁹³ ID 18, 30/10/07; ID 31, 06/02/08

¹²⁹⁴ ID 13, 18/10/07

¹²⁹⁵ ID 31, 06/02/08

¹²⁹⁶ ID 18, 30/10/07

application of international human rights law,¹²⁹⁷ and to apply informal structures of accountability,¹²⁹⁸ in the absence of extensive formal rights of participation.

There are both advantages and disadvantages to the primacy of informal means of participation for NGOs. The use of informal means of participation provides NGOs with greater flexibility than participation via formal rights, in terms of both the methods they use and the interests they promote. Whilst formal methods of participation are defined primarily by states, informal means are developed by NGOs themselves, and can therefore potentially be more suited to achieving the objectives of NGOs.¹²⁹⁹ NGOs can be more creative in the stances they take as they are not tied to a particular government position.¹³⁰⁰

Informal participation also contributes to the development of an alternative public sphere, which may present a different and potentially more inclusive model of international human rights law. Informal modes of participation are more inclusive than formal participation requiring accreditation by ECOSOC, as any NGO can participate in this way. For example, the “non-status” of NGOs under international law means that the criteria for participation is not rigorously regulated, which presents more inclusive opportunities for participation by a variety of actors.¹³⁰¹ Similarly, the lack of a definitive definition of an “NGO”¹³⁰² also enables greater inclusion; “closed categories tend to control rather than encourage participation and creativity”.¹³⁰³ This alternative sphere also creates different structures of participation and legitimate

¹²⁹⁷ Chapter 3, section 1.2.

¹²⁹⁸ Chapter 4, section 2.2.3.

¹²⁹⁹ See Chapter 3, section 4.1

¹³⁰⁰ Charnovitz, 2006: 361

¹³⁰¹ Martens, 2003: 2

¹³⁰² Introduction, Part 4.

¹³⁰³ Otto, 1996: 112

constructions of meaning that are not dependent on state acceptance. For example, NGO participation in human rights through the spread of information concerning a state's failure to respect human rights standards can and does create hostility towards that state, regardless of its formal participation in particular treaties.¹³⁰⁴

However, the efficacy of such methods of participation remains dependent on factors including the political influence and resources that the NGO has, and on the sensitivity of the government concerned to citizen or international pressure.¹³⁰⁵ As Falk notes, "the Westphalian box can still be tightly closed in a variety of circumstances, and even a generally mobilised civil society cannot pry it open".¹³⁰⁶ Whilst the mobilisation of public opinion is a potentially powerful tool its effectiveness is predicated to a great extent on the democratic nature of states. If a state is repressive, it is unlikely to be pressured by its own citizens to implement or respect human rights norms. Furthermore, the position of the state concerned in the international hierarchy and its relationships with other states also affects how far such methods can both directly affect its behaviour and influence other states to bring pressure to bear on the offending state. Brett identifies various instances where NGO campaigns do not translate into action at the UN level due to the powerful status of the state in question, or due to political expediency concerning relationships between states.¹³⁰⁷ Simply, NGOs have a limited ability to influence powerful states,¹³⁰⁸ and this influence varies depending on the political and economic resources available to the particular NGO. For example, influence via lobbying at conferences is variable, depending on how developed a particular state delegation's position is, what resources

¹³⁰⁴ Bianchi, 1997: 191

¹³⁰⁵ Clapham, 2000: 184, see also Smith et al, 1994: 143

¹³⁰⁶ Falk, 2004: 39

¹³⁰⁷ Brett, 1995: 104

¹³⁰⁸ Call, 2002: 123

the delegation has available and the personal positions of the members of the delegation.¹³⁰⁹ As one interviewee observed, “you don’t always control outcomes... [there is] no certainty that what you do or what you say will be used”.¹³¹⁰

Consequently, reliance on informal methods can result in exclusion. The degree of informal influence that NGOs can have is variable and unequal. The reliance on informal methods means the degree of influence that an NGO has over human rights decision-making is very much dependent on the resources and status of the NGO. Whilst NGOs can exert huge influence via informal participation, such influence is inevitably variable and effects cannot be guaranteed. Such exclusion of NGOs translates into wider exclusion of the constituencies that NGOs represent, especially in cases where NGOs provide structure of representation when the state does not.

Informal structures do have the possibility of codification, as Article 71 of the UN Charter formalised customary NGO participation under the League of Nations.¹³¹¹ Current proposals for improving the legal status of NGOs include enhancing the role of NGOs with consultative status, recognising NGOs as creators of customary law, and permitting NGO participation as *amicus curiae* before the ICJ.¹³¹² However, the exclusion of NGOs from formal structures of law making, including those which govern the development of international rules of participation, limit the potential for extension of NGOs formal role. Any development of NGOs’ formal rights of participation is ultimately dependent on state consent. Whilst NGOs can influence state conduct, they are unable to change legal norms without the support of at least

¹³⁰⁹ Lindblom, 2005: 474-475

¹³¹⁰ ID 20, 25/01/08

¹³¹¹ Charnovitz, 1997: 250, 258

¹³¹² Schoener, 1997: 541-547.

some states. Furthermore, whilst the importance of NGO participation is recognised by the UN,¹³¹³ there is suspicion and at times outright opposition from some states to any extension of NGOs' participatory rights.¹³¹⁴ Indeed, there have been attempts by some states to restrict NGOs current rights of participation.¹³¹⁵

Furthermore, it is arguable how desirable the extension of NGOs formal rights of participation would be. The formalisation of informal methods can lead to a restriction of participation; Article 71 limited NGOs' participatory rights to a consultative role.¹³¹⁶ Any extension of formal participation would remain embedded within a context of state consent; thus formal norms of participation would continue to be controlled by states. As demonstrated, the use of informal methods gives NGOs greater flexibility and greater control over the development of alternative norms of participation, whereas more formal participation would run the risk of cooption.¹³¹⁷ NGOs have been forced to be innovative in developing means to participate due to their exclusion from formal participation. Extended rights of participation could potentially stifle this creativity.¹³¹⁸ This could limit the ways in which NGOs participate and therefore in turn restrict indirect participation by those whom NGOs represent.

In addition, greater formalisation of NGO participation could have implications for NGOs' accountability. Formalising NGOs' international legal status would not only recognise their rights of participation but also enable them to be held accountable for

¹³¹³ Breen 2005: 116; see also Clapham, 2000: 181; Van Boven, 1989: 207

¹³¹⁴ Aston, 2001: 960

¹³¹⁵ Breen, 2005: 125; Aston, 2001: 956

¹³¹⁶ Butler, 2007: 264

¹³¹⁷ Charnovitz, 1997: 284

¹³¹⁸ Schoener, 1997: 548 considers that expansion of rights of participation for NGOs with consultative status could in practice limit their participation

what they do.¹³¹⁹ Spiro argues that full inclusion of NGOs in formal decision-making institutions would “have the effect of outing NGO power and advancing a transparency objective...it would also hold NGOs... accountable to institutional bargains”.¹³²⁰ This illustrates that whilst greater formalisation of NGO participation could be positive as it might enable greater accountability to their constituents, it could also restrict their freedom of activity, which would in turn limit indirect participation via NGOs by their constituents.

In summary, it is problematic to rely on NGO representation as one of the major ways in which individuals can participate in international human rights law. NGOs are at best variable in the extent to which they are representative of their various constituents, and there is a particular lack of input from the beneficiary community. However, this should not undermine NGOs’ legitimacy as actors within international human rights; rather, greater emphasis should be placed on structures other than NGOs which enable greater direct forms of individual participation, as well as encouraging greater inclusion of beneficiaries in NGOs’ internal decision and policy-making structures. A further problem of reliance on NGOs is that this form of individual participation is dependent on the degree of influence that NGOs have. NGOs’ formal rights of participation are limited, and extension is dependent on states and therefore unlikely. It is also debateable how far an extension of formal rights of participation would be advantageous to NGOs. In consequence, it is likely that NGOs will continue to depend on informal modes of participation. Whilst these offer significant potential for the development of NGO participation, and therefore

¹³¹⁹ Maragia, 2002: 332

¹³²⁰ Spiro, 2002: 162

participation by those whom NGOs represent, care must be taken in order to prevent the perpetuation of existing structures of power and exclusion.

Part 3: Participation as empowerment: the contradiction of normative participation

As demonstrated in Chapter 1, human rights are intrinsically oriented to the empowerment of the individual.¹³²¹ Furthermore, for participation to be effective, active and meaningful it must be empowering. Chapter 1 showed that participation oriented to individual empowerment requires that people take active control of their life, rather than being the passive subjects of other entities' decision-making. Forms of participation oriented to the interests of the state consequently cannot fulfil this goal of individual empowerment, which further requires that individuals are able to determine, challenge and redefine the norms of participation.¹³²² The role of participation in engendering empowerment is reflected in participatory human rights principles, as discussed in Chapter 2, which identified the empowering facets of the rights to education, legal participation, development and the rights of marginalised groups.

However, the examination of structures of participation in human rights illustrated various contradictions concerning how far such participation is oriented towards empowerment. Firstly, the over-reliance on structures of representation as a means for individuals to participate in human rights limits the empowering potential of participation. Representative forms do not enable the individual to actively participate

¹³²¹ Chapter 1, section 2.1.

¹³²² Chapter 1, section 2.2.4.

on their own behalf; rather, they remain dependent on decisions taken by others. For example, all representative democracy empowers individuals to do is vote for representatives; they then remain passive until the next election. Most structures of participation in international human rights leave the individual dependent on the state to participate on their behalf; the state is the key participant in determining the content and applicability of rights, and the extent of individual access to structures of complaint. Furthermore, certain structures of complaint concerning human rights abuses are entirely dependent on the state; the individual has no rights and no means to participate actively on their own behalf.¹³²³ This emphasis on representation contradicts the requirement of active and empowering forms of individual participation.

As discussed above, NGOs constitute an alternative means to states for individuals to participate in international human rights law. However, whilst some NGOs act to facilitate the empowerment of their beneficiaries in order to enable them to take a more active role in decision-making processes, other NGOs act in a more exclusionary way which results in the empowerment of the organisation rather than the beneficiaries.¹³²⁴ Few NGOs are able to show a truly participatory track record of promoting facilitation rather than creating new structures of dependency.¹³²⁵ Pearce asserts that true empowerment requires more than the development of intermediary organisations which represent the concerns of the “poor and the weak”; rather it necessitates enabling them to “fight for their own rights as citizens”.¹³²⁶ Consequently, structures of participation in human rights where individual

¹³²³ Chapter 4, section 2.3.

¹³²⁴ Pearce, 1993: 224

¹³²⁵ Ginther, 1992: 61

¹³²⁶ Pearce, 1993: 225-226

participation only or predominantly occurs through NGO participation cannot be considered truly empowering. This further illustrates the limited potential of representative forms of participation to truly enable empowerment.

Furthermore, the emancipatory potential of participation in human rights is limited by the centrality of states and state power as participants in the international system, and by their use of structures of participation as a means of control and assertion of power. For example, both participation in law-making and access to human rights mechanisms were identified as areas where power is contested between states, individuals and NGOs.¹³²⁷ The dominance of states within these structures is both a manifestation of state power and a means to perpetuate this supremacy.

This presents a contradiction between the emancipatory orientation reflected in human rights principles, which conceive of participation in human rights as a means to empower the individual in their relationship with the state, and the structures of human rights, which permit state participation as a means of control. This is illustrated by the centrality of the principle of state consent, which promotes state interest in the construction and application of human rights. The achievement of the human rights goal of empowerment is significantly restricted by structures in which state interest is the overriding power. The particular structures of international law and human rights which promote the power of states to the detriment of individual participation are further discussed in section 4 below.

¹³²⁷ Chapter 3, section 3.3; Chapter 4, section 1.3.

Finally, the dominance of states to the detriment of individual empowerment presents a further contradiction. For participation to be truly empowering there needs to be participation in determining what the ends and forms of participation itself are.¹³²⁸ Determination of these norms is a means to protect or to challenge power relationships, because participation is a means of asserting power. Therefore, for participation in human rights to be oriented to individuals, it must be designed to do so. Norms of participation which serve the interests of states are unlikely to enable individual empowerment. As Hartwick identifies “states dictate the rules of participation in international organizations like the UN”.¹³²⁹ This was clearly illustrated in both Chapters 3 and 4. Regarding law-making, states determine who may formally participate¹³³⁰ and the extent and manner of such participation. Individuals and NGOs therefore have little opportunity to extend their participation. A similar pattern is found concerning access to human rights structures. Participation in human rights through use of these is hugely important for individual access to justice at the international level, yet such access is subsumed to state consent. The modalities and accessibility of this form of participation is primarily determined by states, and those states which do not want those within their jurisdiction to have this opportunity for complaint can legitimately exclude this form of participation. Whilst individuals are unable to determine or redefine the norms of their participation, states retain tremendous control, and the ability of these structures of participation to enable individual empowerment is restricted. The empowering potential of participation in human rights is therefore contradicted by the exclusion of individuals from determination of the norms of participation.

¹³²⁸ cross ref Chapter 1, section 1.4.

¹³²⁹ Hartwick, 2003: 221

¹³³⁰ As Chapter 3, section 1.2 identified, NGOs have been able to extend their influence through the development of informal modes of participation.

Part 4: Contradictions arising from structural elements of human rights and international law

4.1: The structure of human rights protection and levels of participation

A participatory analysis of human rights also highlights internal contradictions between the principles of human rights and structures of human rights protection. There is a fundamental contradiction between the concept of participation reflected in human rights on the national level, and the application of that conception of participation in human rights at the international level. The individual has a range of participatory rights that are political, social and cultural.¹³³¹ However, these all operate solely on the national level, because human rights law regulates the relationship between a state and its citizens. This excludes individuals from international participation in human rights, regarding both construction and application, as demonstrated in Chapters 3 and 4. The individual has no *right* to participate in the construction of human rights at the international level, nor a *right* to access international human rights protection mechanisms.

Consequently, the individual is unable to participate in human rights decisions which affect them, despite such participation itself being implied as a human right by various principles of international human rights law.¹³³² Whilst the rights of the individual exist outside the domestic jurisdiction of states,¹³³³ individual participatory rights operate only on the national level, although there may be international obligations to protect the enjoyment of these rights. The individual cannot assert their rights of participation above the national level, because participation as a right is viewed as being something that occurs on the national level. The only international aspect is the

¹³³¹ Chapter 2, section 1.1.

¹³³² Chapter 2, section 1.4.

¹³³³ Orakhelashvili, 2001: 242

role of the international community to enable such national participation. There is no concept of such individual participation extending to the international level.

This means that participation in human rights cannot ultimately be active and meaningful, as it depends on indirect influence over states via either representation by states or NGOs, or via the operation of political, social and cultural participatory rights on the national level. Human rights therefore presents two conflicting concepts of participation; participation as broad, active and empowering on the national level, and participation as representative and restricted, as applied to the role of individuals on the international level.

All participatory rights operate under this restriction, although the resultant problems for promoting effective and meaningful participation are most clearly illustrated via the right of access to human rights structures. As identified in Chapter 4, there are no international rights regarding either the existence of obligations for which a state may be held accountable nor concerning access to accountability mechanisms which provide for individualised forms of complaint. These are both subject to state consent, and consequently participation in this way is dependent on state participation. There is no means for the individual to bypass these state-centric norms of participation and participate directly at the international level.

Consideration of participation via access to international human rights mechanisms therefore illustrates a fundamental contradiction. Whilst a right of access to justice may be clearly identified within human rights principles, this right does not extend beyond the national or regional levels into the international arena. Whilst the principle

of access to justice is protected by international human rights law, it is not applicable to the structure of that law itself. This means that if rights are not protected on the national level the individual has no guaranteed right of access to international structures of protection, resulting in an internal contradiction as human rights reflects the principle that the state may not treat individuals with impunity, yet fails to provide a means for international access to justice and consequent state accountability which would prevent state abuse of human rights.

In addition, states are the primary participants in determining the content of human rights law, and the particular elements of it by which they will be bound. However, states are also the entities held accountable under human rights law. This demonstrates a further contradiction. States have significantly less interest in developing a comprehensive and effective system of human rights protection and accountability than the individuals whom such a system is designed to protect. If human rights are to be successful, individuals, as the target of human rights protection, should participate in their construction, including both the content of human rights principles and the structure and applicability of human rights mechanisms.

As human rights are structurally limited to the national level, individuals are also unable to participate effectively in decisions that affect them concerning the actions of non-state actors or a foreign state. The relationship between the individual and such actors is mediated through the home state. Individuals therefore remain reliant on their state to take action, as they are unable to break the national barrier and claim their own rights as regards these actors at the international level. This is particularly

problematic within the context of globalisation, as extra-territorial factors are increasingly affecting individual human rights enjoyment, yet the individual has no means to directly participate in mitigating or challenging how these issues will impinge on them.

This presents a fundamental contradiction concerning the purpose of human rights. If participation in human rights is limited to the level of the state, and does not extend beyond the state onto the international level, then the primary purpose of human rights to go beyond the barrier of state sovereignty and provide international protection to individuals is neutralised. Decisions concerning the content and applicability of international human rights law are by definition taken at the international level; if individuals are excluded from participation at this level then there is no guarantee that human rights will protect them appropriately or effectively.

The essential reason for this contradiction is that the structure of human rights law traditionally concerns the relationship between the state and those individuals within its jurisdiction. It does not take account of relationships which transcend this structure, and consequently does not provide for forms of participation which are required to enable individual rights to be protected beyond this traditional paradigm. Consequently it is clear that although human rights requires, and human rights principles promote, comprehensive forms of participation that are wide ranging with regards levels and actors, the structures within which it operate serve to restrict this in practice.

4.2: The effect of international law

Contradictions between the types of participation required by human rights and those enabled by the traditional structure of international law can also be identified. Several of the discrepancies between the type of participation appropriate for human rights and the forms actually found within human rights are related to its position and development within broad structures and principles of international law. Fundamentally, these contradictions arise due to the traditionally state-centric structure of international law, which presents an exclusive and limited model of participation.

International law has traditionally been the law of states and the relationships between them, and has therefore historically prioritised state interest and consequent participation. Alston argues that even the terminology used, “*non-state actors*”, “*non-governmental organisations*” intentionally reflects the marginalisation of these entities and the consequent centrality of states within international law.¹³³⁴ The principle of state sovereignty is the primary definitional ideology of international law; the “basic constitutional doctrine of the law of nations”.¹³³⁵ The corollary of sovereignty is state consent, which centralises state participation in the construction and definition of international law.

Because human rights are a part of international law, they reflect these structures of participation and inclusion. Examination of structures of participation in human rights law-making and access to human rights clearly demonstrated both the dominance of state-centric forms of participation, and the centrality of state interests in determining

¹³³⁴ Alston, 2005: 3

¹³³⁵ Brownlie, 1998: 289

norms of participation. In consequence, the contradiction between the universality of human rights and the partiality of access to human rights results from the principle of state consent which controls the structures and formation of human rights obligations. The restrictions on participation at the international level also stem from the centrality of states as the only international actors: decision-making at this level is solely their concern.

Fundamentally, the state remains central in determining both what human rights law is, and whether individuals can participate in human rights by having access to structures of complaint. The individual has no right to decide what their rights should be. They have no right to develop the content of the law, or to determine how it should be developed to best protect their rights. They have no right to demand that they are protected by particular aspects of international human rights law. All of these forms of participation in human rights are subject to state consent. Individual participation oriented to extensive and effective protection of human rights is therefore severely limited by the centrality of the principle of state consent within international law.

Concluding Remarks

It is clear that there are a number of major contradictions between the types of participation appropriate for human rights and that actually reflected in the principles and structures of human rights. There are significant discrepancies between the principle of universality in human rights and the realities of access to human rights, and this disparity enables challenges to the legitimacy of human rights. Human rights

require active, effective and meaningful participation; in practice, participation in human rights is over-reliant on representative forms, which are unable to provide this. The key human rights goal of empowerment is restricted by norms of participation primarily determined by and oriented to state interest. Fundamentally, it is this centrality of states in international law that restricts the ability of structures of human rights to reflect appropriate forms of participation. There is consequently an inherent contradiction between the participatory requirements of human rights and the structures of international law within which human rights operates.

Conclusion

Part 1: Addressing the Research Questions

The relationship between participation and human rights has not received sufficient development or attention, despite participation being identified as a human rights issue in itself as well as providing a conceptual connection between several different human rights concerns. This thesis has remedied this deficiency, by significantly expanding understandings both of the concept of participation and what it both should and does mean in a human rights context.

It is clear that there is no single way to conceptualise ‘participation’; rather it is complex, contested and contextual. There are various different forms which participation may take and diverse ends to which it may be oriented. There are also clearly different levels of participation by diverse actors. In addition, the particular form of participation found in a given situation is affected by its practical feasibility. The forms and purposes of participation are also inherently determined by the underlying norms of participation which establish the particular structures of participation in a given context.

Similarly, approaches to and understandings of the basis, meaning, purpose and content of human rights are varied and disputed. However, four key characteristics of human rights can be identified: universality, empowerment, dignity and justice. Assessment of participation through the application of these principles provides the

type of participation most appropriate to human rights, in terms of the modes, purposes, feasibility and norms of participation. Such participation is oriented to the concerns of the individual; it is fundamentally active, effective and meaningful, rather than passive, tokenistic and manipulated. It therefore requires broad-ranging and direct rights of participation, including access to justice and to human rights information, and must enable individual participation at the international level; thus implying the needs for 'international' rights of participation. It is universally inclusive, which requires equality of opportunity and access without discrimination to participatory structures and processes. Finally, participation in human rights must be oriented to the empowerment of the individual and the accountability of the state, which further requires inclusion in the determination and redefinition of the norms of participation itself.

The establishment of these criteria enables comparison between the type of participation appropriate for human rights and that manifested by the principles and structures of international human rights law. Human rights legal instruments largely reflect acceptable forms of participation. A broad range of participatory rights are protected, and the importance of active, effective and meaningful forms of participation is identified. Participation is recognised as a form of individual empowerment and a means to hold states accountable for their actions. Non-discriminatory access to participatory processes is considered essential, although the principle of progressive realization indicates that state obligations concerning the fulfilment of some participatory rights are not absolute and may vary between states. Finally, principles of international human rights law recognise the importance of normative participation, although the principles which actually protect such forms of

participation currently appear to potentially have specialised rather than general application, and are in need of further development.

There is, however, a lack of clarity regarding the extent to which political participatory rights protect direct modes of participation, due to the lack of development of the content of the right to participate in public affairs compared to the right to vote. Principles of human rights law clearly focus on representative rather than direct forms of participation, through the centralisation of the right to vote and the right to democracy. Furthermore, international human rights legal principles do not protect the right of the individual to participate at the international level. This limits the ability of participation in human rights to fulfil an essential function; to provide protection above the level of the state.

Examination of participation in structures of international human rights law also reflects these, and other, contradictions. Participation in human rights law-making is dominated by states as the principle actors in international law. Prospects for individual participation in law-making are extremely limited, and consequently their predominant means of participation is via representation by NGOs. NGO participation in human rights law-making has been extensive, although their formal rights are hugely restricted compared to those of states. Participation in human rights law-making therefore reflects a power struggle between NGOs and states over the content of human rights, the consequent state obligations and the norms of participation in law-making.

Individual access to human rights mechanisms is more extensive than individual participation in law-making, with various opportunities for direct participation through individual complaint mechanisms. However, states still dominate the accessibility of human rights, as state consent determines whether individuals may participate in structures of human rights protection. State participation determines the existence and content of obligations, and decides whether individual complaints procedures are available. Furthermore, the ability of NGOs to extend individual participation through representation is far more limited than within human rights law-making. Regarding access to human rights, NGOs' role is primarily that of enabling individual participation, as they are generally also excluded from forums to which individuals do not have access. This enabling role of NGOs is however vital, especially concerning the provision of human rights information concerning the content of rights and obligations and the details of complaints mechanisms. This is particularly important because state obligations regarding the dissemination of human rights information are unclear, and such information is essential for other forms of individual participation.

Consequently, underlying contradictions are identified between the type of participation appropriate for human rights and that manifested in the principles and structures of international human rights law. Firstly, both principles and structures of participation in international human rights law prioritise participation via representation over more direct forms. This limits the potential for participation to be active, effective and empowering. Furthermore, for representative structures to be effective, successful representative democracies are required at both the national and international levels, and these are clearly not present in practice.

Although NGOs do provide an important counterbalance to the centrality of state power and interest manifested in participation in human rights, there are also problems with reliance on NGO participation as a means for individuals to indirectly participate. The extent to which NGOs are truly representative, in particular regarding their beneficiaries rather than their membership, must be questioned. Furthermore, whilst NGOs are important participants in human rights, particularly with regard to law-making, their influence is limited compared with that of states. Considering NGOs as a means to ensure individual participation therefore places individuals within these same restrictions.

Finally, the centrality of the principle of state consent within international law and consequently within structures of international human rights law fundamentally limits the extent to which participation in human rights can be equal, universal and inclusive. Both the obligations for which states may be held responsible and the complaints mechanisms used to ensure such accountability are determined by state rather than individual participation. States are also central in determining the norms of participation in human rights. Consequently, the ability of human rights to protect and empower individuals and to ensure justice and dignity is fundamentally restricted. Furthermore, the discrepancy between the principle of universality and the partiality of access enables challenges to the legitimacy of international human rights law. The essential contradiction regarding participation in human rights, between the principle of state consent and the orientation of human rights to the protection of individuals, is therefore the result of a wider conflict between the ideology of human rights and the context of international law within which human rights structures have developed.

Part 2: Resolutions: reform and research

The aim of this thesis has been to explore the relationship between participation and international human rights law, and to identify inherent tensions and contradictions through comparing the ideal of participation in human rights with the participation found in practice. It is beyond the scope of this project to comprehensively consider all of the potential ramifications and implications of the relationship between participation and human rights, especially given the paucity of existing research on this topic. However, there are a number of issues currently under discussion within human rights and international law analyses which could offer ways to more fully explore the interaction between participation and human rights and to potentially resolve some of the identified contradictions resulting from current structures of participation within international human rights law. It is therefore of value briefly to identify and explore those areas which would benefit from enhanced analysis.

2.1: Reform of the UN

As identified, the UN is profoundly undemocratic, and this affects how far individual concerns regarding human rights can be represented and addressed. The democratic deficits of the UN are well-recognised, and there have been various approaches to reform of the UN formulated. Some approaches focus on the exclusion of individuals from UN decision-making processes, and advocate the establishment of new UN bodies to enable greater inclusion. For example, Held argues that the UN, as an inter-state organisation, is currently unable to operate as an effective institution to represent the people of the world. For the UN to fulfil this role, it therefore requires the “establishment of an independent assembly of democratic peoples, directly elected by

them and accountable to them".¹³³⁶ Others commentators have discussed the development of a People's Assembly for the UN as a means to make it more democratic, and there are considerable debates concerning the exact nature and function of this body.¹³³⁷ It is argued that good governance within the UN requires inclusion of, participation by and engagement with both all states and broader society, including NGOs, academic institutions, the business community and the general public.¹³³⁸

Such approaches certainly offer the potential of a more democratic international system, albeit a form of democracy centred on representation. They would, however, also potentially offer more opportunities for direct individual participation at the international level and consequently in decision-making regarding the construction and application of international human rights law, because they envisage a role for individuals that is not reliant on state participation.

Other proposals advocate internal reform of current UN institutional mechanisms in order to make them more democratic. Suggestions include reform of participation in the Security Council; the abolition of the veto¹³³⁹ and the redefinition of permanent membership to enable greater global balance of power.¹³⁴⁰ Whilst this would make the internal decision-making processes of the UN more democratic, and enhance states' ability to represent the concerns of their citizens at the international level, it would nonetheless still be predicated on the existence and efficacy of representative

¹³³⁶ Held, 1995: 273

¹³³⁷ Newcombe, 1991: 83-91 surveys the various proposals for a 'People's Assembly'; see also Held, 1995: 273-275; Childers, 1994: 205; Hoffman, 1991: 52-56

¹³³⁸ De Waart, 1995: 59

¹³³⁹ Köchler, 2006: 337; Köchler, 1991: 238-244

¹³⁴⁰ Köchler, 2006: 337

democracy at the national level if it were to enable individual participation in international human rights law.

However, it seems unlikely that the UN will either reform existing mechanisms or develop new ones in ways that would enable more appropriate and effective participation in human rights. Existing unequal structures of participation militate against such change. The power of the veto and the interests of more powerful states in restricting participation indicate that progress is unlikely. For example, Paul notes that in the 1996 meeting of the Working Group on the reform of the Security Council, four of the five Permanent Members vigorously defended its retention.¹³⁴¹ This illustrates the importance of participation in the construction of the norms of participation, and further highlights how the inequalities of state participation in the UN system not only restrict individual participation via representative forms, but also limits the potential for change. Nonetheless, it would be of value to further develop analyses exploring how the individual could participate more directly in international organisations, and could therefore have a more active and effective relationship with the development and application by these structures of international human rights law. A greater emphasis on individual participation would provide at least a conceptual challenge to current state-centric norms of participation within the UN and other international organisations.

¹³⁴¹ Paul, 1996

2.2: Deliberative approaches to participation

The analysis above has shown the problematic aspects of reliance on representative forms of democracy as a means of participation in human rights. However, more deliberative approaches to democracy could provide more appropriate types of participation in human rights. Whilst, as noted in Chapter 1, there are many perspectives on the concepts of deliberative democracy,¹³⁴² certain common themes can be identified which may provide for a more appropriate form of participation in international human rights.

Firstly, direct or deliberative democracy presents a more active conception of the role of the individual, rather than their role being restricted to voting for representatives. Gaventa argues that truly inclusive democracy requires more than elections.¹³⁴³ In addition, deliberative forms allow for greater inclusion of minority interests, which may be excluded by an aggregative system. Wheatley argues that greater recognition of the deliberative nature of democracy would provide for greater participation by minority and marginalised groups, as it would enable them to bring issues onto the political agenda.¹³⁴⁴ Furthermore, deliberative forms emphasize consensus and cooperation, rather than competition,¹³⁴⁵ which raises the potential of a more widely acceptable outcome.¹³⁴⁶ In consequence, deliberative approaches promote a more active, inclusive and collective concept of participation.

Deliberative forms of participation therefore appear to fulfil many of the human rights criteria concerning the forms and purpose of participation. Although significant

¹³⁴² Chapter 1, section 1.1.3.

¹³⁴³ Gaventa, 2002: 10

¹³⁴⁴ Wheatley, 2003: 527

¹³⁴⁵ Cohen, 1996: 111-112

¹³⁴⁶ Wheatley, 2003: 527

challenges have been identified regarding the practical applicability of more direct or deliberative forms of decision-making,¹³⁴⁷ it would be of value to further consider what these approaches could offer and how they could potentially be applied within the human rights context. A fully deliberative human rights structure appears unlikely, but these more direct modes of participation could offer a means to enhance some bottom-up forms of decision-making, which would be both more inclusive and would make human rights more meaningful to those whom they affect. In addition, more active and direct forms of participation would assist individual empowerment, and, if translated to the international level, would decrease reliance on the state to represent the concerns of individuals.

2.2.1: Direct participation in practice: localised definition and application of human rights

One potential means to apply deliberative concepts of participation to human rights is through more localised processes of interpretation and implementation. Although the legitimacy of human rights has been challenged by applying a participatory critique, a more participatory approach to the construction and application of human rights could enhance their legitimacy and consequent respect. This form of participation is understood as ownership over human rights principles and embodies their cultural and social resonance. Participation as ownership over human rights can be expressed in a number of ways: either by direct involvement in the development of principles, by agreeing that those principles are representative, and/or by participating in processes of implementation. Gaventa argues that in order to ‘make rights real’; that is in order for rights to have meaning to people, individuals and groups must participate in

¹³⁴⁷ Chapter 1, section 1.1.3.

determining what those rights are and how they should be implemented.¹³⁴⁸

Furthermore, a sense of ownership of human rights principles entails greater commitment to the achievement of those principles. By expanding the concept of ownership of human rights across and between cultures and societies there is a greater chance of universal understanding of human rights standards and their implementation.¹³⁴⁹ As Freeman observes, there can be no effective rights without supportive institutions and communities.¹³⁵⁰ This particular need for local support in order for human rights to be effective was also specifically identified by interviewees.¹³⁵¹

In addition, it is contended that ratification of human rights instruments, frequently with reservations, is “an assertion of membership in the world community and not a commitment to the implementation of these rights or their legitimacy”.¹³⁵² It is also argued that although states may have a genuine commitment to human rights principles, and will sign conventions with the intention of putting them into practice, this aim is impeded by local cultures which do not recognise such human rights principles as their own, and consequently do not support them.¹³⁵³ Both of these perspectives indicate that the sole participation of governments is insufficient to create a true human rights culture, with effective respect for these rights, within different societies. For both global and local human rights culture to be meaningful and effective, norms of participation must be widened to produce greater inclusion of

¹³⁴⁸ Gaventa, 2002

¹³⁴⁹ Penna and Campbell, 1998: 22

¹³⁵⁰ Freeman, 1998: 37

¹³⁵¹ ID 3, 03/03/07; ID 4, 05/11/07

¹³⁵² Pollis, 2000: 15

¹³⁵³ Harris-Short, 2003: 134

different perspectives, which may not necessarily correspond with those currently dominant in the human rights discourse.

This indicates that greater participation and inclusion of individuals and communities in the development and implementation of human rights would enhance their legitimacy and consequent respect. This approach therefore emphasizes a ‘bottom-up’ rather than ‘top-down’ approach to participation as a determinant of human rights legitimacy and implementation, entailing direct involvement of individuals, rather than reliance on governments. It is suggested that such enhanced participation should come via processes of internal cultural discourse and cross-cultural dialogue¹³⁵⁴ to explore the possibilities of cultural reinterpretation and reconstruction of human rights. Such dialogue would be inclusive, representational and non-hierarchical, and would aim to enhance participation both within and between different cultures in the construction and application of human rights norms. An international legal system which includes participation by non-state actors opens the possibility of both national and international dialogue between governments, non-state individuals, communities and groups.¹³⁵⁵ Dialogue is preferable to coercion, and it must be remembered that so-called human rights intervention may be motivated by political, cultural or economic imperialism.¹³⁵⁶ Such dialogue requires certain guaranteed rights if it is to be effective and inclusive; a level of material and psychological wellbeing is necessary for participation in dialogue, and it must not be monopolised by governments.¹³⁵⁷ By extending the concept of ownership of human rights to non-Western societies via

¹³⁵⁴ An-Na’im, 1992: 3

¹³⁵⁵ McCorquodale, 2004: 485

¹³⁵⁶ Freeman, 1998: 33

¹³⁵⁷ Freeman, 1998: 35

cross-cultural dialogue there is a greater chance of universal understanding of human rights standards and their implementation.¹³⁵⁸

It would therefore be of value to not only develop research into the concept of cross- and inter-cultural discourse concerning the definition and application of human rights, but also to expand assessment of how far this is reflected in practice. This would also allow consideration of what, if any, forms of deliberative participation are being utilised in these processes. Such analyses would also enable consideration of the extent to which grassroots forms of participation contribute to universal understandings and acceptance of human rights principles, and whether such expanded participation in turn enhances the legitimacy of international human rights law at the local level.

2.3: Challenges to traditional structures of participation in international law

Finally, the central factor restricting participation in human rights is, as has been demonstrated, traditional structures of international law. These inherently restrict participation by promoting a state-centric understanding of participation. However, there are certain evolving perspectives which challenge these traditional structures, and in doing so offer the potential for a reconfiguration of the norms of participation in international law and consequently in human rights.

¹³⁵⁸ Penna and Campbell, 1998: 22

2.3.1: Contrasting theoretical approaches to international law

Different theoretical approaches to international law provide contrasting accounts of participation in international law. The theoretical position adopted therefore affects how participation is understood, and how such understandings may be developed to become more acceptable and appropriate. The positivist account, currently the dominant philosophical approach within international law¹³⁵⁹ emphasizes that all legitimate law emanates from a law-making authority; the sovereign will of states.¹³⁶⁰ A fundamental principle of international law is that states may not be legally bound without their express (via treaty) or implicit (via custom) consent; thus the positivist requirement of a law-creating sovereign will is satisfied. In this way international law centralises the will and interest of states in the creation of binding positive legal rules. This includes the legal principles which determine how law itself is made; consequently state participation is a self-replicating structure. The positivist account therefore centralises state participation and centralises states as the only legitimate participants in international law.

However, whilst positivism still dominates international law in theory and practice, other approaches provide the potential for competing and more progressive accounts of participation. A natural law position presents a different account of legitimacy and participation in international law. It considers that legal principles derive their authority from their basis in general moral standards, which have universal applicability;¹³⁶¹ the “basic human goods” discovered via the application of reason.¹³⁶² Natural law thus argues that justice is the condition for legal legitimacy

¹³⁵⁹ Goldsmith and Posner, 2005: 82, also Brownlie, 1998: 289

¹³⁶⁰ Ward, 1998: 102-3; Lee, 1989: 135

¹³⁶¹ Brown, 1997:44-45

¹³⁶² Finnis, 2002: 25

rather than state consent; unjust law is no law at all.¹³⁶³ Both international law and human rights are therefore determined by the application of reason, which is assumed to produce a universal account. In consequence, natural law approaches imply universal participation; that these just principles are a communal creation that serves collective interests, rather than being the product of particular state interests.

Critical analyses¹³⁶⁴ explicitly examine minority and/or marginalised perspectives on international law, and consequently identify multiple understandings and meanings of human rights. Critical approaches consider international human rights to be the product of a particular discourse, context or philosophical or political perspective, which thus contests claims of universality. This challenges understandings of the norms of participation as fixed, and rather seeks to interrogate who has been excluded from participation in the construction of human rights law and why. Critical approaches therefore indicate the possibility of a reconstruction of international law discourse and methodology in order to incorporate other world views.¹³⁶⁵ This indicates that the norms of participation are flexible, and open to challenge or development.

However, none of these perspectives presents a complete and appropriate account of participation in human rights. Through determining the validity of law solely in relation to its emanation from the sovereign will, the positivist account presents an inadequate and partial account of the power structures of the international system, and consequently of the role of power in the norms of participation in law-making. For

¹³⁶³ Cotterrell, 2003: 15

¹³⁶⁴ Critical analyses include, *inter alia* feminist and third world accounts of international law and law-making; see Boyle and Chinkin, 2007; Rajagopal, 2003; Charlesworth *et al*, 1991; Fellmeth, 2000; Charlesworth and Chinkin, 2000; Mutua 2000

¹³⁶⁵ Charlesworth *et al*, 1991: 644; Wheatley, 2003: 519; Mutua, 2000: 31

example, Carty questions the basis of the positivist account of the sources of law, arguing that the drafting of Article 38 of the Statute of the ICC must be considered in the context of the post World War I attempt to institutionalise relations among States.¹³⁶⁶ Legal positivism can only offer a partial and inadequate account of the norms of participation as it necessarily excludes from consideration the multiplicity of informal participants who, as shown in the analysis above, have a major influence over the construction and application of international human rights law. In addition, the positivist account serves to legitimise states' actions in their own self-interest¹³⁶⁷ and thus does not take account of how issues of power and justice impact on norms and structures of participation.

Natural law presents a more inclusive account of participation, but is unable to give an adequate account of the source of human rights norms. Reason as a source of natural law principles assumes that the concept of public reason is universal and that it will thus result in universal principles. As George and Wolfe identify, the idea of reason is subject to manipulation by elites, who may control what is included in public discourse.¹³⁶⁸ In assuming that the natural law account is available and obvious to all, restricted participation in the identification and application of norms of human rights is ignored. Whilst contending that unjust law is illegitimate, natural law theory does not explain who participates in the assessment of the legitimacy and justice of norms of human rights, and therefore does not overcome structures of power and control.

¹³⁶⁶ Carty, 1986: 14

¹³⁶⁷ Koskenniemi, 1989: 132

¹³⁶⁸ George and Wolfe, 2000: 54

Critical accounts imply a far more inclusive and reflexive account of participation in human rights than either natural law or positivism. However, critical approaches fundamentally raise questions rather than provide answers. They seek to deconstruct the dominant human rights discourse, and although they identify the need for an inclusive and participatory reconstruction of the norms of participation in human rights, critical accounts do not clearly identify the processes by which this could take place, nor the specific changes required within current practices regarding the construction of international law. Consequently, whilst they are useful in identifying the importance of a participatory evaluation, they do not detail how such an approach can be applied to the reconstruction of participation in international law and consequently in human rights.

Examination of different theoretical approaches to international law is of value because it demonstrates that accounts of participation are not rigid but are open to interpretation and challenge. Whilst none of these perspectives presents an ideal account of participation in international human rights law, there are elements which would merit further development. Firstly, it is clear that the positivist account is inadequate as a reflection of the realities of participation in international human rights law. In consequence, because positivism is so dominant within international law, challenges to this account promote a reconception of the fundamental structures and norms of participation. Natural law is of value because it promotes a universal concept of participation in determining the principles of human rights law, although the way in which it does this is contradictory. However, this principle of universal participation is worthy of further development. Finally, critical approaches are of value due to their centralisation of participation beyond the state, and their

identification of underlying power relationships and normative assumptions, but require further development of their practical implications regarding enhanced inclusion.

2.3.2: The role of NGOs

NGO participation in international human rights constitutes a challenge both in practice and in principle to state-centric norms of participation. It is well recognised that the role of NGOs in international relations is increasingly important.¹³⁶⁹ This is affecting norms and structures of participation in human rights in several ways. Firstly, it challenges the dominance of state participation in international law. NGOs have affected the norms of international law in terms of both content and process,¹³⁷⁰ and their participation has introduced new voices into the international law discourse beyond those of states and the international organisations established by states.¹³⁷¹ Consequently, their participation has redefined norms of participation in international law and therefore in international human rights law to be more inclusive.

Therefore, understandings of participation in the creation, development and implementation of international law can no longer be limited to states. Perspectives on participation which incorporates NGO participation therefore in turn challenge traditional, positivist perspectives of participation in international law. As Maragia identifies “there is little doubt that the presence and growing importance of NGOs in international politics today, assaults the states assumed monopoly of the system – in

¹³⁶⁹ Otto, 1996: 127; Suter, 1991: 12; Cakmak, 2008: 7; Khagram, Riker and Sikkink, 2002: 4

¹³⁷⁰ Charnovitz, 2006: 361

¹³⁷¹ Cullen and Morrow, 2001: 31

particular sovereignty, and statehood".¹³⁷² Furthermore, this role of NGOs requires a reconceptualisation of international law, which has "not yet fully caught up to the reality of NGO participation".¹³⁷³ International law must be expanded to take account of NGO participation as state-dependent understandings of the system are no longer coherent or sustainable.¹³⁷⁴ NGO participation therefore presents a fundamental challenge to the ways traditional understandings of international law conceive of participation, and consequently promotes significant redefinition of the norms of participation as reflected in principles of international law.

Secondly, it has been contended that NGO participation makes the international system more democratic and accountable. As identified above, the institutions of the UN can be considered neither democratic nor representative, meaning that individuals are unable to indirectly participate in human rights through their state's participation at the UN. Van Boven considers that NGOs go some way towards filling a 'democratic gap' in international law-making, as they provide a means for the interests of peoples, rather than states, to be represented.¹³⁷⁵ Similarly, Scholte suggests that civil society activism offers the potential to reduce the democratic deficit in global governance through enabling expanded opportunities for public participation, representation and accountability.¹³⁷⁶ In addition, NGOs offer an opportunity for those individuals whose state is undemocratic and whose interests will therefore not be represented by it in international forums to participate, by acting as "surrogate representatives of people from undemocratic countries".¹³⁷⁷ Although there

¹³⁷² Maragia, 2002: 312; see also Otto, 1996: 128

¹³⁷³ Charnovitz, 1997: 278

¹³⁷⁴ McCorquodale, 2004: 485

¹³⁷⁵ Van Boven, 1990: 224

¹³⁷⁶ Scholte, 2004: 420

¹³⁷⁷ Willets, 2000: 111

remain issues to be resolved concerning the degree to which NGOs are themselves representative and accountable, and therefore the extent to which they can overcome the deficiencies of the international system, there is no doubt that their activities have enabled greater individual participation in international human rights, and that this has improved its accountability and representativeness.

Although there is increasing research directed towards NGO participation in international law and in human rights,¹³⁷⁸ current analysis primarily focuses on participation by NGOs in their own right, and the implications of this participation as a challenge to the norms of international law.¹³⁷⁹ However, certain elements and implications of NGO participation would merit greater attention. The nature of the relationship between NGOs and individuals and the extent to which it is representative or enabling requires further exploration, in order to determine how far NGO participation does or can facilitate enhanced individual participation in international human rights law, both within international organisations, and as a counterbalance to state power and interest.

2.3.3: The dynamism of international law and human rights

Finally, neither international law nor human rights are static and fixed systems. Rather, both are in a constant state of evolution, development and redefinition. The changing nature of the mutually constitutive relationship between human rights and international law has therefore affected both principles and structures of participation in international human rights law, and offers opportunities for further improvement.

¹³⁷⁸ Introduction, Part 4.

¹³⁷⁹ For example, Butler (2007, 145-193) explores how NGO participation impacts on the norm of state sovereignty in relation to participation in law-making.

The development of human rights has had a major effect on participation in international law, notwithstanding the restrictions that still exist, as discussed above. As Bianchi notes, the development of international human rights “has inevitably and irrevocably altered the main tenets of the traditional paradigm of international law”.¹³⁸⁰ Fundamentally, the human rights doctrine has changed the status of the individual and the nature of the relationship between individual and state within international law. It has conceptualised the individual as an active participant with their own interests rather than a passive object of international law. The recognition within human rights of the individual as a subject, rather than the object of government policies, requires a reconstruction of international relations to enable a bottom-up approach, rather than the top-down structure of traditional international law.¹³⁸¹ This demonstrates expansion of participation in international human rights to include individuals, at least in principle. In consequence, the state is no longer the only subject of international law,¹³⁸² thus constituting a major challenge to state-centric norms of participation.

Furthermore, through centralising the individual, human rights require that the individual replaces the state as the primary normative unit of international law.¹³⁸³ Understandings of human rights as inherent and inalienable challenge the dominance of state consent, and centralise the rights of the individual over the interests of the state. The human rights discourse has therefore sought to limit state participation through the principle that certain actions of the state are legitimately subject to

¹³⁸⁰ Bianchi, 1997: 182

¹³⁸¹ Petersmann, 2001: 15-16

¹³⁸² Simonovic, 2000: 397

¹³⁸³ Petersmann, 2001: 23

international scrutiny and judgement. Again, this has challenged traditional norms of participation by seeking to limit the power of the state in relation to the rights of individuals rather than of other states.

However, whilst the development of human rights within international law has enabled major challenges to established norms of participation, a number of problematic aspects remain, as have been detailed in the preceding analysis. Consequently, significant challenges remain if participation in human rights law is to fully embody that required by the fundamental principles of human rights.

Firstly, the nature of obligations needs to be reconceptualised in order to ensure universal access to human rights: “The traditional human rights paradigm, according to which individuals are subjects of rights and states holders of obligations, does not fully reflect present-day tendencies”.¹³⁸⁴ Most importantly, there is a need to reconsider both the structure and formation of obligations in orientation to the underlying principle that power should entail human rights obligations, irrespective of territory, type of actor, or consent. This would overcome the lack of applicability of human rights and the consequent lack of access to them caused by both the restrictions of state consent, and the gaps in protection entailed by the deficiencies in obligations held by non-state actors.

This thesis has not considered state obligations concerning participation in great depth; there remains a need for research which addresses this issue. Current developments in obligations theory have been directed towards establishing the

¹³⁸⁴ Rosas, 1995: 77

theoretical basis and practical application of extra-territorial obligations.¹³⁸⁵ However, as Chapter 2 noted, such analysis has focused on the extra-territorial obligations of states. The logical extension of the individual right to participate in all matters that affect the individual is the concept of extra-territorial participatory rights concerning the actions of states which will have extra-territorial effect. Research on extra-territoriality in international human rights law should be expanded to explore this hypothesis.

In addition, there is a lack of clarity concerning particular participatory rights including the right of access to information, the right to participate in public affairs and the right to self-determination. Analysis directed to more fully exploring the participatory aspects of these rights, and developing their relationships with each other is therefore required. The concept of participatory rights and how this equates to or is distinct from a specific right to participation, would also merit further attention, as would the relationship between rights of participation and participation in human rights.

Furthermore, the concept of the expansion of human rights to the international level links both extra-territorial obligations research and analysis of the content of rights. Fundamentally, the 'right to have rights' needs to be determined in international law. This right entails the right to participate in determining the content and applicability of all other human rights, and a right of access to an international complaints mechanism. This thesis has demonstrated that individual participatory rights at the national level, particularly concerning access to justice, are fundamentally limited as a

¹³⁸⁵ *inter alia* Skogly, 2006; Gibney, 2008

means to ensure state accountability. The development of *international* human rights has been posited as a means to address this. Further analysis is therefore required to determine how rights might function in this supra-national and extra-territorial way, and what the content and resultant obligations of truly ‘international’ and participatory human rights would be.

Finally, the power of the state remains central in international law. International law is still dominated by states, despite the fundamental changes brought about by the development of human rights and the expanding role of NGOs. If individuals are to be able to truly participate in human rights in active, effective and meaningful ways, then a significant redefinition of the power relationships between states and individuals is required, and a greater balance of power directed towards the needs, interests and participation of individuals. States will always be a fundamental actor in international law; however, the development of human rights has shown that the role of individuals can be expanded. There is clearly an ongoing tension between the traditional structures of international law and the more revolutionary aspects of human rights concerning norms of participation. Therefore, there is a need for further research into how this tension can be overcome, through examining the ways in which human rights has influenced and can further redefine the structure of international law in order to enable appropriate forms of individual participation.

In consequence, there is a fundamental need simply to centralise the participatory perspective when considering human rights and international law. This in itself will challenge the traditional and dominant state-centric norms of participation, which, as identified, are the source of the majority of contradictions concerning participation

and human rights. Writings of academics do, as has been discussed, at least have the potential to influence the ways the concepts and practice of international law are understood. Analysts and jurists perhaps need to be reminded that the central participant in human rights is the individual, not the state. This reflects an underlying tension between the purpose of human rights and the international legal context in which it has been developed. It will not be easy to resolve this conflict, but it is a worthwhile and essential challenge.

Appendix 1: NGO interviews

The interviews are held on file with the author.

Fifty individuals from twenty-five organisations were approached, of whom thirty-two from sixteen organisations agreed to be interviewed. Of these, **twenty-six interviews** in total were conducted, from thirteen different organisations, as it did not prove possible to find mutually convenient times for some, or no further responses other than the initial acceptance were received.

Nineteen interviews were conducted in person and seven by email. Of the former, five were face-to-face and fourteen by telephone.

Six follow-up interviews were conducted, one in person and five by email.

The interviews conducted in person were all recorded except one, due to equipment problems. Fifteen of the recordings were transcribed verbatim, and three in note form. Detailed notes were taken for the interview that was not recorded. The email interviews took the form of a questionnaire, which provided a record of responses. The follow-up interview conducted in person was transcribed in note form.

One individual was interviewed from each of seven organisations, two from four organisations, three from one organisation and eight from one organisation.

Information concerning the organisations:

Scope:

International: 8

National: 5

Of the national organisations, one was the national branch of an international organisation.

Head office:

Based in UK: 7

Based in Europe (not UK): 5

Based elsewhere: 1 (Africa)

One organisation was based in the UK but was entirely concerned with the protection of human rights in an African state.

Information concerning the interviewees:

Basis of involvement:

Volunteer: 6

Staff: 20

Note: one interviewee was a volunteer at the time of the first interview, but by the follow-up had become staff.

Level of organisation:

Local: 1

Regional: 2

National: 10

International Secretariat: 13

Appendix 2: Example questionnaire/interview schedule

Participation in International Human Rights Law

Coversheet

Reference Number	
Interview Date/Place	
Respondent Name	
Organisation	
Address	
Phone	
Email	

Brief introduction

- Looking at the concept of participation in human rights.
- As part of this, researching the role of NGOs in human rights.
- Conducting interviews with members of NGOs to get a range of perspectives on participation.
- Interested in firstly, how NGOs participate themselves in the construction and protection of human rights, and secondly, how they may help others to participate.

Protocol

- Interviews will be recorded & transcribed
- Data for use in PhD thesis & possible publications
- I would like to use unidentified direct quotes – is this ok?
- Offer to send copy of transcript & drafts of any potential publications

Questions

Part 1:

General information about the organisation, its aims and methods – how does it participate? The way in which an NGO determines, pursues and evaluates its goals contributes to the construction of human rights law. For all questions try to distinguish between 'organisational' view and 'personal' view.

1. What is your role within the organisation? How long have you been involved?
This is an easy opening question

2. Tell me about the aims of your organisation.

What rights does your organisation focus on?

This is to identify which (if any) participatory rights the organisation is concerned with

3. How does your organisation determine its aims, goals and strategies? (*in partnership with those affected? Top down or bottom up process?*). Is this the most appropriate way to do it? Why?

4. What methods does your organisation use to achieve its aims? Do you think that these methods are effective? How could they be improved?

This is both to identify the broad ways in which the organisation participates and whether it uses participatory methods, also to introduce discussion of problems

5. Do you think that your organisation faces any problems in achieving its aims?

This is to identify the restrictions (on participation) under which the organisation may operate

6. How is your organisation funded? Do you think that this has an effect on policy? How? Why?

7. How does your organisation evaluate its work? Is this the most effective way to do it? Why? (*ie in partnership with those affected? Top down or bottom up process?*)

8. What influence do you feel that you/your organisation have over the development of human rights?

9. Do you think that you/your organisation has contributed to the protection of human rights? How?

This is to identify if/how the organisation participates in the definition & application of human rights.

10. Does your organisation work in partnership with others? How? Why?
This is to explore issues of facilitation/inclusion/representation

11. Do the people on whose behalf your organisation works participate in its work? Should they? Why? How?

Do you (personally) feel connected to the people that the organisation is working for?
This is to explore issues of facilitation/inclusion/representation

Part 2:

More conceptual issues regarding the nature of both participation and human rights

12. What does 'participation' mean to you? *For example, is it political, economic, social, cultural?*

Different perspectives on the meaning of participation – wider than just political decision-making? Further exploration of facilitation of participation.

12. What does 'human rights' mean to you?

This is to explore different meanings of human rights – narrow/broad? Law/discourse? Also to define different ways of defining and constructing 'human rights' – by who? What criteria?

13. Do you think that participation is important for human rights? Why? How?

Is this something that you/your organisation feel that you do/should campaign for?

Link participation and human rights.

(Return to questions 8 & 9 in follow up interview to allow reflection by interviewee?)

14. Is there anything else that you would like to tell me about that you think is relevant?
Open ended question allowing respondent to determine subject matter.

Checklist "go back to, tell me more about":

- Ways in which the organisation determines, pursues & evaluates its goals and methods?
- Problems faced
- Work with others?
- Influence over development/protection of human rights
- Discussion of 'participation'
- Discussion of 'human rights'
- Link participation and human rights

Thank you for participating.

Possibility of follow-up interview?

Is there anyone else that you think it might be useful for me to talk to?

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