Article

Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact

Jeroen van Bekhoven [*]

ABSTRACT

It is often acknowledged that the environment is a concern for everyone. A clean environment benefits all, and no one can escape the impacts of a polluted environment. But to what degree does international environmental law give us the opportunity to participate in managing the environment? International environmental law is traditionally designed for States, and so are the general principles that constitute its foundations. So, are we excluded from influencing decisions over an essential part of our life?

In this article, I examine the status of public participation in international environmental law through an analysis of national, regional and international environmental instruments.

I conclude that public participation is a crucial part, a general principle, of this branch of law. It impacts international and national environmental law, and decision-making, in different ways, because it leads to more democratic influence and oversight. Although the practice of public participation faces various difficulties, it is widely accepted and firmly embedded in the international environmental legal framework. But eventually the State maintains a high degree of

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[*] LL.M International Public Law Utrecht University; Ph.D. candidate National Taiwan University College of Law. Contact: d01a21013@ntu.edu.tw. The author wishes to thank his thesis supervisor Professor Wen-Chen Chang of the National Taiwan University College of Law and the anonymous reviewers of NTU Law Review for their insightful comments on the draft version of this article. He also thanks Professor Marc Anthony of the National Taiwan University Academic Writing Education Center for proofreading the article.

control, determining the extent, content, and impact of public participation. The principle of public participation therefore does not seriously challenge the dominance of States in international environmental law.

Keywords: *International Environmental Law, General Principles of Law, Public Participation, Environmental Decision-Making, Access to Environmental Information, Access to Judicial and Administrative Proceedings*

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I. INTRODUCTION

During the most recent meeting of the governing body of the United Nations (hereinafter 'U.N.') Framework Convention on Climate Change (hereinafter 'Climate Change Convention') in November and December last year, the streets of Paris were filled with the colorful presence of non-governmental organizations (hereinafter 'NGOs'), indigenous peoples, farmers, fishermen, women, and students. They were all there to express their views on the issues at stake and to raise awareness for urgent climate change-related problems. They turned the meeting into a highly mediatized international event.[1]

But to what extent does international environmental law really give non-State actors such as those present at the Climate Change Convention meeting the opportunity to make their voices heard? International environmental law is traditionally directed at the State and its goal is to protect and preserve the environment and its living and non-living components.[2] Similarly, the principles upon which international environmental law is constructed are essentially State-centered, such as the principle of State sovereignty, the principle of sustainable development, and the obligation not to cause environmental harm. For these reasons one may wonder to what degree public participation really is an acceptable concept in international environmental law.

To find out if a concept is embedded in a branch of law, in this case international environmental law, it is very useful to investigate if it has the status of general principle. General principles of law can be seen as the foundations of law and reflect its content, objectives, and directions. Scholarly opinions on the status of public participation as a principle of international environmental law however are divided. Some scholars confirm that it is such a principle, but do not further elaborate this.[3] Yet others firmly deny that public participation is a principle of international environmental

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1. *E.g.*, John Vidal & Terry Slavin, *Paris Talks: Indigenous Peoples and Small Farmers Say Rich Are Setting the Agenda*, THE GUARDIAN (Dec. 8, 2015, 02:55 PM), http://www.theguardian.com/global-development/2015/dec/08/paris-climate-talks-small-farmers-rich-setting-agenda.

2. Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 1 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

3. *E.g.*, DAVID HUNTER, JAMSE SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 534 (4th ed. 2007). *Cf.* Leslie-Anne Duvic-Paoli, *The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence*, 23 Y.B. INT'L ENVTL. L. 80, 81-85, 105 (2012). In this detailed study, Duvic-Paoli analyzes the right to public participation in international environmental law and human rights law. Although she briefly touches upon the possible status of public participation as a principle of international environmental law, she rather focuses on its possible status as a norm of customary international law.

law.[4]

The aim of this article therefore is to examine carefully to what extent public participation is a general principle of international environmental law. In this way it will be possible to determine the role of public participation in international environmental law.

Through an analysis of literature, national laws, and international environmental instruments, I examine the status of public participation in international environmental law. To determine this status, it is necessary first to clarify the general principle of international environmental law. In section II of this article, I therefore will describe it, analyze its functions, and examine how it can be identified. In the third section, I will give an overview of the emergence and development of public participation in international environmental law. I will also describe its basic features. It thus becomes clear what is usually meant by "public participation". I continue in section IV by reviewing how this principle manifests in national and international environmental law. It is important to take into consideration national law, because general principles of international law are usually strongly connected to national legal systems[5] (*see infra* section II under A). I furthermore subdivide the international environmental agreements in those agreements with an international scope and those that only apply within a specific region. In this way I can find out if, in some regions, the principle is more strongly developed than in others. In the same section I will also evaluate whether or not public participation is a principle of international environmental law.

II. THE CONCEPT OF GENERAL PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW

A. *Description of the Concept*

To describe the concept of "general principle of international environmental law", we can start by taking a look at article 38.1 of the Statute of the International Court of Justice (hereinafter 'ICJ Statute'). This article enumerates the four sources of international law that the Court can use to decide the disputes that appear before it. These sources include international conventions (treaties), international custom, general principles of law, and judicial decisions and the writings of legal experts. Article 38.1

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4. *E.g.*, Melvin Woodhouse, *Is Public Participation a Rule of the Law of International Watercourses?*, 43 NAT. RESOURCES J. 137, 147, 165, 179-80 (2003).

5. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 8 (3d ed. 2004); ALISTAIR RIEU-CLARKE, INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: LESSONS FROM THE LAW OF INTERNATIONAL WATERCOURSES 28 (2005).

of the ICJ Statute is widely seen as an exhaustive list of the sources of international law.[6] Since international environmental law is a branch of international law, its sources include those mentioned in article 38.1 of the ICJ Statute.[7]

Article 38, sub paragraph 1(c) of the ICJ Statute refers to "the general principles of law recognized by civilized nations". Perhaps the most striking words of this subparagraph are the words "civilized nations". What exactly those civilized nations are is open to debate, but there seems to be a consensus in international law that all Member States of the U.N. are considered civilized nations.[8] However, since this is not the focus of this article, it is more important here to concentrate on the other part of subparagraph c, "general principles of law".

General principles of law are a source of law, and do not need to be (but can be) reflected in a treaty or customary law.[9] There nevertheless is not an official definition of "general principle of law", or an authoritative collection of recognized general principles of law.[10] For this reason, many legal authors have spilled ink on the question of what the drafters of the ICJ Statute meant with this mysterious concept.[11] One particularly useful description of "general principles of law" was recently given by ICJ Judge Cançado Trindade. In his separate opinion in the case of *Pulp Mills on the*

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6. Article 38.1 of the Statute of the International Court of Justice (1946) reads as follows:
    1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;
        a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
        b. international custom, as evidence of a general practice accepted as law;
        c. the general principles of law recognized by civilized nations;
        d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

7. Palitha Kohona & Barbara Ruis, *Multilateral Environmental Agreements*, *in* UN ENVIRONMENT PROGRAM TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 1, 1 (Lal Kurukulasuriya & Nicholas A. Robinson eds., 2006) [hereinafter MANUAL]. In the arbitration between Belgium and the Netherlands regarding the Iron Rhine Railway, the arbitral tribunal affirmed that principles of international environmental law exist and subsequently applied them to assess the case. *See* Iron Rhine ("IJzeren Rijn") Railway (Belg. v. Neth.), 17 R.I.A.A. 35, ¶ 223 (Perm. Ct. Arb. 2005) [hereinafter *Iron Rhine Arbitration*].

8. M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L L. 768, 768 (1990).

9. Pulp Mills on the River Uruguay (Arg. v. Uru.), Separate Opinion of Judge Cançado Trindade, 2010 I.C.J. Rep. 14, ¶ 17, 21, 27 (Apr. 20) [hereinafter *Separate Opinion of Cançado Trindade*].

10. Kohona & Ruis, *supra* note 7, at 8; Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 n. 56 (1995). The Permanent Court of Arbitration also observed that within international environmental law there is a considerable lack of clarity if a certain concept is a "rule", soft law, or a principle. *See Iron Rhine Arbitration*, *supra* note 7, ¶ 58.

11. Scholars such as Bodansky have argued that it is not useful to contemplate on the legal status of certain concepts of international environmental law, and that it is more appropriate to incorporate such concepts into treaties and State actions. Bodansky, *id*. at 119.

River Uruguay (Argentina v. *Uruguay)* (hereinafter 'the *Pulp Mills* case' or 'the *Pulp Mills* judgment') he describes general principles of law as follows:

> As basic pillars of the international legal system (as of any legal system), those principles give expression to the *idée de droit*, and furthermore to the *idée de justice*, reflecting the conscience of the international community.[12]

Hence, Cançado Trindade considers general principles of law as the basic ideas behind the specific norms of international law, being its "pillars". Indeed, the ICJ has stressed earlier in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* that general principles have a fundamental character.[13] Present in Cançado Trindade's description is also the contention that principles have a moral value, encompassing the concept of "justice" and reflecting "the conscience of the international community".[14]

It furthermore has been argued that principles of international (environmental) law are stated in general terms and do not have a specific content; they need to be specified further in order to be applied.[15] The degree to which they are established may also differ between each region of the world.[16] There is furthermore consensus in international law that "general principles" include principles of both the national and the international legal order,[17] such as the principle of good faith, which originates in domestic laws, and the principle of State sovereignty, which is a typical example of a principle that has its roots in international relations.

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12. *Separate Opinion of Cançado Trindade*, *supra* note 9, ¶ 39.

13. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. Rep. 246, 289-90 (Oct. 12).

14. *See* GENNADIĬ MIKHAĬLOVICH DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 173 (1993). *See* for example, Bassiouni, *supra* note 8, at 770-71, who enumerates a number of definitions of general principles put forward by legal thinkers; JONATHAN VERSCHUUREN, PRINCIPLES OF ENVIRONMENTAL LAW: THE IDEAL OF SUSTAINABLE DEVELOPMENT AND THE ROLE OF PRINCIPLES OF INTERNATIONAL, EUROPEAN, AND NATIONAL ENVIRONMENTAL LAW 26 (2003); Christina Voigt, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 RETFÆRD NORDIC J.L. & JUST. 3, 8 (2008). The original draft of article 38.1(c) literally mentioned 'conscience' ('la conscience juridique des peuples civilés'); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Dissenting Opinion of Judge Tanaka, 1966 I.C.J. Rep. 6, 298-99 (July 18).

15. KISS & SHELTON, *supra* note 5, at 89; Jaye Ellis & Stepan Wood, *International Environmental Law*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 343, 356 (Benjamin J. Richardson & Stepan Wood eds., 2006); Menno T. Kamminga, *Principles of International Environmental Law*, *in* ENVIRONMENTAL POLICY IN AN INTERNATIONAL CONTEXT: PERSPECTIVES 109, 111, 128 (Pieter Glasbergen & Andrew Blowers eds., 1995).

16. Kamminga, *id*. at 128.

17. RIEU-CLARKE, *supra* note 5, at 28; KISS & SHELTON, *supra* note 5.

B. *The Functions of General Principles of Law*

International legal scholars have identified a number of functions of general principles of law. General principles can fulfil these functions because they are legally binding.[18] First of all, as Judge Cançado Trindade notes in his definition above, general principles of law can be considered as "reflecting the conscience of the international community". As such they can inspire ('guide') the formation and content of treaty provisions and customary rules.[19] Having such status also enables general principles of law to play an important role in international negotiations as in guiding the behavior of the negotiating parties.[20]

Thirdly, the principal reason to include general principles of law in article 38 of the ICJ Statute was the concern that the ICJ would not be able to adjudicate a case if there were no applicable treaty provisions or customary norms.[21] As a result, when international treaty norms or customary norms do not apply or are non-existent, general principles are to be relied on to fill such gaps in international regulation.[22] In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, for instance, the ICJ found that although international law did not unequivocally allow or prohibit the use of nuclear weapons, a threat or use of such weapons would not be compatible with the principles of humanitarian law.[23] Finally, general principles can be used to interpret and apply existing treaty and customary norms.[24] The latter two functions are particularly important in court cases.[25]

The functions of general principles of law mentioned above show that there is a close relationship between general principles of law and treaty and customary norms, two other sources of international law mentioned in article 38.1 of the ICJ. Treaty and customary norms and general principles mutually

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18. DANILENKO, *supra* note 14, at 8-9 (quoting the Permanent Court of International Justice, which determined in the *Case of the S.S. "Lotus"* that "the word 'principles of international law,' as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of states"). *See* The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J (ser. A) No. 10, at 16 (Sept. 7).

19. *Separate Opinion of Cançado Trindade*, *supra* note 9, ¶ 17; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 390 (2006). Dupuy points out that other sources of international law, in particular treaties, are necessary to clarify the content of general principles of law. *See* Pierre-Marie Dupuy, *Formation of Customary Law and General Principles*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 449, 462 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

20. *See* Owen McIntyre, *The Role of Customary Rules and Principles of International Law in the Protection of Shared International Freshwater Resources*, 46 NAT'L RESOURCES J. 157, 163 (2006).

21. DANILENKO, *supra* note 14, at 181 (referring to the *travaux préparatoires* of the ICJ Statute).

22. CHENG, *supra* note 19; PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 130 (2d ed. 2003).

23. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 266 (July 8).

24. CHENG, *supra* note 19, at 360; *Separate Opinion of Cançado Trindade*, *supra* note 9, ¶ 216.

25. *See also* VERSCHUUREN, *supra* note 14, at 26.

enforce each other and give each other substance.[26]

C. *Identification*

Sometimes it is not clear if a concept has the status of general principle of law, or that it is developing or emerging.[27] This is also the very topic of this article with respect to public participation, but it is not an easy task to ascertain the legal status of a principle. In addition, States can have different views on the legal status of a principle and the understanding and the implications of a principle can vary depending on the legal system.[28]

As a rule, it is not *necessary* that a principle is generally applied to be recognized as such in international (environmental) law,[29] but a shared understanding of the international community that a principle exists, and that it has certain consequences can be sufficient to consider it a general principle of law.[30] Because general principles of law can originate in either the national or international legal order, evidence for such shared understanding is drawn from both international and national legal instruments and international and national case law.[31]

Article 38.1(c) of the ICJ Statute furthermore spells out that general principles are "recognized" by States, which suggests that States have (at least implicitly) consented to the existence of these principles.[32] Codification in international agreements, judgments of international judicial bodies,[33] repeated inclusion in soft law documents,[34] and State practice are strong indications for such consent on the existence and acceptance of a general principle of law,[35] although as stated above it is not mandatory that a

26. McIntyre, *supra* note 20, at 176.
27. Kohona & Ruis, *supra* note 7, at 14.
28. *Id.*
29. CHENG, *supra* note 19, at 24.
30. Voigt, *supra* note 14, at 8.
31. *Id.*
32. *See also* DANILENKO, *supra* note 14, at 176, 193.
33. It has been observed however that general principles of international environmental law have at best played a marginal role in international and (European) regional case law so far. *See* VERSCHUUREN, *supra* note 14, at 13, 98; PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 117 (3d ed. 2012). *See also Separate Opinion of Cançado Trindade*, *supra* note 9, at 138, 143, 161, 177 (in his separate opinion in the *Pulp Mills* case, Judge Cançado Trindade explicitly expressed his dissatisfaction with the majority's reluctance to interpret the treaty between Argentina and Uruguay in conformity with general principles of law, even though both parties to the dispute invoked such principles before the Court). In non-environmental cases however, the ICJ and its predecessors issued judgments (partially) based on such general principles as reparation for a breach of international law (*e.g.*, Factory at Chorzów (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26)) and non-intervention (*e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, 181 (June 27)).
34. NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 313 (2002).
35. Kohona & Ruis, *supra* note 7, at 14.

principle is widely implemented.

III. THE CONTENT OF THE PRINCIPLE OF PUBLIC PARTICIPATION

A. *General*

To put it briefly, the principle of public participation enables the public to be heard and to affect decisions.[36] One of the first international instruments that proclaimed this principle was the U.N. World Charter for Nature, which was adopted by the U.N. General Assembly in 1982. Paragraph 23 of that document states that

All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.[37]

Adopted ten years later, the Rio Declaration on Environment and Development (hereinafter 'Rio Declaration') describes the principle of public participation as follows:

> Principle 10
>
> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[38]

The description of the principle as laid down in Principle 10 makes clear that it consists of three different elements: participation in decision-making processes on environmental issues, access to environmental information (which was not included in Paragraph 23 of the U.N. World Charter for Nature), and access to administrative and judicial proceedings. These three

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36. KISS & SHELTON, *supra* note 5, at 674.
37. G.A. Res. 37/7, World Charter for Nature (Oct. 28, 1982).
38. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

elements have been described as the 'pillars of environmental democracy.'[39] They will be discussed in more detail below.

The three elements are connected to each other and the effective fulfilment of each of them depends on the other elements (*also see infra* subsections C and D of this section): without access to environmental information for example, the participation in decision-making is without substance. Similarly, obtaining a form of compensation for environmental harm through administrative or judicial proceedings is difficult if not all facts are on the table.[40]

The principle of public participation sets out a procedure for environmental decision-making, sharing of environmental information, and environmental judicial proceedings. It essentially fosters bottom-up decision-making, democracy, accountability, and transparency. It also opens up international environmental law by giving non-State actors the tools to influence environmental decision-making. International environmental norms are directed at State governments, but the duties and obligations associated with the principle of public participation enable non-State actors to play a role in the drafting and implementation of international environmental law on the national level and to some extent on the international level (*see infra* subsections B - D of this section).

It is exactly for these reasons that the principle of public participation has gained prominence. Since the 1960s, public awareness about the environment and criticism on the functioning of the State system has grown and led to, among others, the understanding that parliamentary democracy is not sufficient to address everyday environmental issues.[41] The idea that such issues can best be managed with the participation of those that are affected by them has gradually taken root, and also fits within an increased interest of international organizations in strengthening civil society and the promotion of good governance.[42]

It is assumed that through public participation the quality of the decisions on environmental issues is improved, as well as the implementation of these decisions. In addition, consultations with the public can provide different points of view, various kinds of knowledge, and useful insights that augment the overall efficiency of environmental

39. HUNTER, SALZMAN & ZAELKE, *supra* note 3, at 535.

40. Dinah Shelton, Sylvia Bankobeza & Barbara Ruis, *Information, Public Participation, and Access to Justice in Environmental Matters*, *in* UN ENVIRONMENT PROGRAM TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 7, at 79, 79-80.

41. Benjamin J. Richardson & Jona Razzaque, *Public Participation in Environmental Decision-making*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER, *supra* note 15, at 165, 165-67.

42. *Id.* at 166-67.

decision-making.[43] Public participation, most importantly through judicial proceedings, can also compensate to a certain extent an absence of political will or authorities' lack of capacity to implement environmental regulations.[44]

Public participation also enables authorities to take into consideration the public's environmental concerns. In this way, the accountability and transparency of decision-making on environmental issues is enhanced, as well as the public support for such decisions. This decision-making gains legitimacy through the democratic process it includes.[45] It can thus prevent social unrest that otherwise might arise when certain environmental decisions are taken, such as a mining concession that might result in severe disruptions of communities. Public participation furthermore is thought to raise environmental consciousness among the population.[46]

B. *Participation in Decision-Making Processes on Environmental Issues*

As stated above, the principle of public participation consists of three elements: participation in decision-making processes on environmental issues, access to environmental information, and access to administrative and judicial proceedings. The first element that will be discussed here is participation in decision-making processes on environmental issues.

This element implies that individuals, groups, and organizations have the opportunity to share their views and interests in the making of decisions that have or may have an impact on the environment. Such decisions include the drafting of regulations, the enforcement of such regulations, and environmental impact assessments. It includes participation in decision-making on local, national, and international policies, strategies, and plans, both on long-term and short-term projects.[47]

Participation in decision-making can take different forms, such as "notice and comment" and "regulatory negotiation". "Notice and comment" means that the authorities develop a proposal and then introduce it in a public community meeting, where the participants can express their views and concerns.[48] "Regulatory negotiation" is the procedure in which those

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43. Richardson & Razzaque, *supra* note 41, at 170. A study of the World Resources Institute for instance reports that consultation with communities in Mexico resulted in significant improvements to a conservation plan. NORBERT HENNINGER, ELENA PETKOVA, CRESCENCIA MAURER, FRANCES IRWIN, JOHN COYLE & GRETCHEN HOFF, WORLD RES. INST., CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT 6 (2002).

44. Jonas Ebbesson, *Public Participation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 19, at 681, 682, 689.

45. *Id*. at 682.

46. *Id*. at 699.

47. *See* HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 3.

48. Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation,*

that are directly affected cooperate with the authorities to formulate environmental rules.[49] Setting up natural resource management partnerships with local and indigenous communities is another possible materialization of the principle of participation in decision-making, which is notably promoted under the framework of the Convention on Biological Diversity (hereinafter 'CBD') (*see infra* section IV, under B).

Participation in decision-making applies to both the national and the international level. Participation in decision-making on the international level normally involves granting an observer status to NGOs at the meetings of the supervisory mechanism (for example a Conference of Parties, hereinafter 'COP') (*also see infra* section IV, under B). NGOs can also participate in the negotiation of international environmental agreements, and sometimes NGO representatives are even included in the delegations of States to environmental treaty negotiations.[50]

C. *Access to Environmental Information*

Access to environmental information consists of two elements: the availability of information about the environment, and the mechanisms of public authorities to provide environmental information.[51] The requirement seems to refer only to public authorities' environmental information, and not to environmental information held by private parties. Environmental information includes information on materials and activities that have or potentially have a serious negative impact on the environment, such as the presence of hazardous materials within a community.[52]

The following duties are considered concrete duties of State authorities concerning access to environmental information: collecting and updating relevant information, responding to demands for information within a reasonable limit of time, maintaining low costs for obtaining information, and guaranteeing equal access for everyone to the information.[53]

Access to environmental information is essential to public participation, because it enables the public to obtain knowledge about factors such as the decision-making processes, the decisions to be taken, and the relevant facts and interests necessary to make an informed personal choice.[54]

Litigation and Beyond, 17 J. ENVTL. L. & LITIG. 207, 212 (2002).

49. *Id.*

50. Kohona & Ruis, *supra* note 7, at 10; Kamrul Hossain, *The International Environmental Law-Making Process*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 61, 64 (Shawkat Alam, Jahid S. Bhuiyan, Tareq M. R. Chowdhury & Erika J. Techera eds., 2013).

51. Shelton, Bankobeza & Ruis, *supra* note 40, at 79.

52. *Id.*; Duvic-Paoli, *supra* note 3, at 87.

53. Richardson & Razzaque, *supra* note 41, at 181.

54. Daniel B. Magraw Jr. & Barbara Ruis, *Principles and Concepts of International Environmental Law*, *in* UN ENVIRONMENT PROGRAM TRAINING MANUAL ON INTERNATIONAL

When considering disclosing information, authorities should weigh the interests of such disclosures against the interests of not making the information available.[55] States in any case do not seem to be under an obligation to provide full access to environmental information; the environmental agreements that contain provisions on access to information at the same time limit this access, for reasons of public security, for instance, or for commercial and industrial confidentiality.[56]

On the international level, the World Bank, the U.N. Development Program (hereinafter 'the UNDP'), and the World Trade Organization (hereinafter 'the WTO'), set up information disclosure mechanisms (*see* further *infra* section IV, under B).[57]

D. *Access to Judicial and Administrative Proceedings*

The third and final element of the principle of public participation is access to judicial and administrative proceedings. Access to judicial and administrative proceedings is important to make rights effective. A right is meaningless if there are no mechanisms available to complain when the right is not respected.[58] Access to judicial and administrative proceedings enables individuals who suffer damages from environmental harm to initiate actions before the appropriate administrative and judicial authorities to obtain a form of prompt and adequate compensation.[59] Similarly, when environmental information is sought but not provided, there should be a review procedure available to ascertain if the requested information was lawfully denied.[60] Authorities can thus be held accountable by civil society for failing to meet its obligations.

Through judicial review public participation may influence public environmental policies. A spectacular example is a recent judgment from the district court of The Hague, The Netherlands.[61] A climate change citizen platform had filed suit against the Dutch State for, briefly stated, failing to adopt regulations to substantially diminish the country's greenhouse

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ENVIRONMENTAL LAW, *supra* note 7, at 23, 28; HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 1.

55. Claudia Saladin, *Public Participation in the Era of Globalization*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 57, 66.

56. SANDS, *supra* note 22, at 853.

57. Saladin, *supra* note 55.

58. *Id*. at 62-63.

59. Shelton, Bankobeza & Ruis, *supra* note 40, at 79.

60. Saladin, *supra* note 55.

61. This paper is not the place to extensively discuss this case, in which the court made some highly interesting observations. My description of the case therefore is very brief, yet it captures its essence. Unfortunately, an English translation of the judgment is not (yet) available.

emissions by 2020.[62] The court ruled that the Dutch State has a duty of care, which requires that it adopts measures to mitigate the serious impacts of climate change. According to the court, the State's current climate change policies are inadequate to comply with this duty of care. This results in a sufficiently probable and concrete risk to damage to the present and future generation of Dutch citizens, whose interests are represented by the platform. Hence, the State acted unlawfully against the present and future Dutch population.[63] The court therefore urged the State to adopt the measures necessary to limit the total annual Dutch greenhouse emissions with at least a 25% reduction in comparison to the emission level of 1990.[64]

Access to judicial and administrative proceedings requires States to adopt legal provisions on access to administrative and judicial review. States should also guarantee such access in practice by making the proceedings affordable and available to anyone. The conditions of impartial and speedy decisions apply as well.[65]

Access to judicial and administrative proceedings furthermore is connected to the other two elements of public participation. Firstly, the public should be duly informed about the procedures and competent bodies to seek relief.[66] Secondly, judicial review of environmental decisions normally focuses on the decision-making procedure and not on the content of the decision itself. Courts namely, are not expected to interfere with the decision-maker's discretion, unless a decision is "manifestly unreasonable".[67]

On the international level, this element of the principle of public participation is limited to the international human rights courts,[68] which requires victims of environmental degradation to connect the harm to one or more human rights, for instance the right to health. NGOs furthermore can submit reports or statements to international courts pending cases.[69] Not many organizations however provide for a review procedure if they deny providing certain data. Only the World Bank and the UNDP have quasi-judicial bodies that allow for some kind of review in such a situation.[70]

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62. Rechtbank Den Haag 24 juni 2015, ECLI: NL: RBDHA: 2015: 7196 (Urgenda/The State of Netherlands (Ministry of Infrastructure and the Environment)), ¶ 3.1.

63. *Id.* ¶¶ 4.83-.87, 4.89, 4.92.

64. *Id.* ¶ 5.1.

65. HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 3.

66. Saladin, *supra* note 55.

67. Richardson & Razzaque, *supra* note 41, at 182.

68. Ebbesson, *supra* note 44, at 694.

69. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 353 (2006).

70. Saladin, *supra* note 55, at 67.

E. *Connected Principles and Concepts of International Environmental Law*

Public participation is not an isolated part of international environmental law. Instead, it is clearly connected to other principles and concepts in international environmental law, such as the principle of sustainable development. Sustainable development policies usually include forms of public participation to assist decision-makers in identifying the uncertainties and risks of certain activities.[71] The importance of public participation to sustainable development has also been explicitly recognized in the 2001 General Assembly Resolution on the right to development, which states that effective participation by civil society is one of the key elements of sustainable development.[72] Public participation is also connected to the principle of assessing environmental impacts, because such assessments normally involve local communities through consultations on the planned project(s).[73] Public participation furthermore is affiliated with the principle of good governance, since it increases the transparency and responsiveness of decision-making on environmental issues.[74] The principle of subsidiarity promotes decision-making at the lowest level of government or social organization. As such it is intrinsically linked to public participation, since it assumes addressing local stakeholders and their opinions in environmental decision-making.[75]

Public participation is also related to the concept of "environmental justice". This concept includes securing the opportunity to initiate legal proceedings to resolve environmental disputes. It also consists of guaranteeing equitable decisions in environmental issues that take into account the interests and concerns of the different parties concerned. It tends to particularly focus on disadvantaged groups in society, such as racial minorities.[76] The principle of public participation can increase the influence

71. Richardson & Razzaque, *supra* note 41, at 166; Stephen Dovers & Robin Connor, *Institutions and Policy Change for Sustainability*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER, *supra* note 15, at 21, 36, 55.

72. G.A. Res. 55/108, ¶ 4(f) (Mar. 13, 2001).

73. ELENA BLANCO & JONA RAZZAQUE, GLOBALISATION AND NATURAL RESOURCES LAW: CHALLENGES, KEY ISSUES AND PERSPECTIVES 156 (2011). *E.g.*, article 14.1 of the Convention on Biodiversity [hereinafter CBD] provides that State parties should, as far as possible and appropriate, incorporate environmental impact assessment procedures within their domestic legal order that include, again as far as possible and appropriate, public participation mechanisms.

74. Magraw & Ruis, *supra* note 54; Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 50, at 77, 77-78.

75. HUNTER, SALZMAN & ZAELKE, *supra* note 3, at 521.

76. Klaus Bosselmann, *Environmental Justice and Law*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER, *supra* note 15, at 129, 132-33, 150; Andrew Harding, *Access to Environmental Justice: Some Introductory Perspective*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY 1, 4 (Andrew Harding ed., 2007).

of these groups on environmental decision-making that affects them.

F. *Public Participation and Human Rights*

The principle of public participation is not limited to international environmental law; it is also closely connected to human rights. It can even be argued that the manifestation of the principle of participation in international environmental law is based upon human rights law.[77] Human rights law basically offers the mechanisms and procedures that are essential to the principle of public participation. Particularly important is the opportunity human rights law offers to seek judicial review outside the national order by initiating proceedings before the supervisory bodies of human rights treaties. This enables individuals, groups of individuals, and NGOs to participate directly in the monitoring of human rights treaties. NGOs can also submit information to these supervisory bodies to counterbalance human rights data provided by governments.[78] This information usually takes the form of so-called 'shadow reports'.[79]

Public participation forms also part of the body of various human rights. The right to participate in governance is a widely recognized human right, incorporated in for instance article 25 of the International Covenant on Civil and Political Rights, article 23 of the American Convention on Human Rights, and article 13 of the African Charter on Human and Peoples' Rights. In addition, international human rights bodies developed a right to participate in situations in which there is a risk of severe environmental degradation. Interpreting such rights as the right to health, the right to private life and the home,[80] the right to culture,[81] and the right to property,[82] international human rights bodies such as the U.N. Human Rights Committee, the European Court of Human Rights (hereinafter 'ECtHR'), the African Commission on Human Rights and Peoples' Rights, and the Inter-American Court on Human Rights established that individuals and groups of individuals have the right to access to environmental information,

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77. *See* SANDS, *supra* note 22, at 118.

78. Caroline Dommen, *How Human Rights Norms Can Contribute to Environmental Protection*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 105, 109-10.

79. *E.g.*, Coordinadora Derechos Humanos Paraguay et al., S*hadow Report to CEDAW. Paraguay 2011: A Report by Civil Society on the State of Paraguay's Compliance with the United Nations Convention on the Elimination of All Forms of Discrimination against Women (Executive Summary)* (Sept. 2011), http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_submission_Paraguay_CEDAW50_en.pdf.

80. *E.g.*, Lopez-Ostra v. Spain, App. No. 16798/90, 303 Eur. Ct. H.R. 41, 46 (1994).

81. *E.g.*, Human Rights Committee, Lubicon Lake Band v. Canada, Comm. No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40), at 1 (Mar. 26, 1990) [hereinafter *Lubicon*].

82. *E.g.*, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148 (Aug. 31, 2001).

the right to participate in decisions which affect their environment, and the right of effective access to judicial and administrative proceedings, including redress and remedy.[83]

Particularly interesting is the human rights case law on indigenous peoples' rights, since this case law contains participation rights for indigenous peoples in decision-making that affects their traditional lands. These traditional lands often are rich in biodiversity and natural resources, such as rainforests, and indigenous peoples' cultural and physical survival depends on them. Indigenous peoples therefore are disproportionally affected by environmental degradation and industrial activities that take place on, or close to, these traditional lands and that have a profound impact on the environment, such as natural resource extraction and the construction of infrastructure. Human rights bodies have acknowledged this particular vulnerability of indigenous peoples to environmental degradation. The right to effective participation in decision-making on activities that might have an impact on indigenous peoples is one of the requirements that must guarantee that the human rights of indigenous peoples are not arbitrarily violated.[84]

The effective enjoyment of established human rights such as the freedom of expression and the freedom of association furthermore is essential for efficient participation in environmental decision-making. Participation is also linked to the right of non-discrimination, because all (potentially) affected parties should have equal access and equal opportunities to participate in the decision-making.[85]

In sum, human rights law strongly confirms that public participation is an essential element of environmental decision-making procedures.[86] In the following sections it will be examined if this is the same under international environmental law.

IV. PUBLIC PARTICIPATION IN NATIONAL AND INTERNATIONAL ENVIRONMENTAL LAW

A. *Public Participation within the National Legal Order*

As aforementioned in section III subsection A, in the 1960s there was a

83. *See also* Richardson & Razzaque, *supra* note 41, at 167; SANDS, *supra* note 22, at 307.

84. *E.g.*, *Lubicon*, *supra* note 81, ¶ 33; The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96, Afr. Comm. on Human and Peoples' Rights, ¶ 53 (Oct. 13-27, 2001); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 172, ¶¶ 129, 133-34 (Nov. 28, 2007).

85. *See* Ebbesson, *supra* note 44, at 698.

86. *See also* Duvic-Paoli, *supra* note 3, at 96-105 (discussing the potential status of public participation as a norm of customary human rights law).

growing demand for more public participation in decision-making that also expanded to environmental decisions. This first led to reforms on the national level, and public participation eventually found its way to the international level,[87] for instance in the U.N. World Charter for Nature and the Rio Declaration (see section III, subsection A, and below in subsection B of this section). There have also been developments in the field of government transparency and accountability on the national level.[88] It is asserted that in current times, a vast majority of States recognizes the importance of public participation.[89]

The United States and the United Kingdom were among the first States that provided for public participation mechanisms in environmental matters, but today a considerable number of States facilitate public participation. States with specific legislation on public participation are diverse and include the Member States of the European Union (hereinafter 'E.U.') and the United States, but also African States such as Cameroon and South Africa; Indonesia, Thailand, and Taiwan in Asia; and Costa Rica in Central and Latin America.[90] Particularly interesting is also a special law on climate change relatively recently adopted by Mexico, which provides for a number of public participation mechanisms such as public consultation in the drafting of climate change policies.[91]

It would go too far for the purposes of this article to discuss these national laws in detail. It can be observed however that although the procedures and content of the participation may be different among the various States, the overall principle that guides these procedures and their content is public participation.[92]

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87. Richardson & Razzaque, *supra* note 41, at 168.

88. Benjamin Richardson & Stepan Wood, *Environmental Law for Sustainability*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER, *supra* note 15, at 1, 7-8.

89. Shelton, Bankobeza & Ruis, *supra* note 40, at 87.

90. BLANCO & RAZZAQUE, *supra* note 73, at 162; Dan Ogolla, Eva M. Duer & Rossana S. Repetto, *Biological Diversity*, *in* UN ENVIRONMENT PROGRAM TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 7, at 193, 201; Simeon Kedogo Imbamba & Jane Dwasi, *Desertification*, *in* UN ENVIRONMENT PROGRAM TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 7, at 258, 266; Adriaan Bedner, *Access to Environmental Justice in Indonesia*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY, *supra* note 76, at 89, 93; Thawilwadee Bureekul, *Access to Environmental Justice and Public Participation in Thailand*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY, *supra* note 76, at 271, 276-77; J. Mijin Cha, *Environmental Justice in the United States: Embracing Environmental and Social Concerns to Achieve Environmental Justice*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY, *supra* note 76, at 317, 334; Jean-Jacques Paradissis & Michael Purdue, *Access to Environmental Justice in United Kingdom Law*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY, *supra* note 76, at 289, 299, 307; Shui-Yan Tang, Ching-Ping Tang & Carlos Wing-Hung Lo, *Public Participation and Environmental Impact Assessment in Mainland China and Taiwan: Political Foundations of Environmental Management*, 41 J. DEV. STUD. 1, 12, 17-18 (2005).

91. Ley General de Cambio Climático [LGCC] art. 7(III), 8(IV), 51, Diario Oficial de la Federación [DOF] 06-06-2012 (Mex.).

92. Shelton, Bankobeza & Ruis, *supra* note 40, at 86; David Banisar, Sejal Parmar, Lalanath de

In addition, as set out above, the principle of public participation contains three elements. A study of nine different States by the World Resources Institute nevertheless shows that national laws on public participation do not evenly address every element of the principle.[93] This issue will be further addressed in section V, subsection A. For now, it suffices to remark that most States have satisfactory environmental information distribution mechanisms, both in law and practice, but that there are concerns about public participation in decision-making and access to administrative and judicial proceedings.[94]

B. *Public Participation in International Environmental Instruments*

Public participation in international environmental law consists of two types: international instruments can call for public participation on the national level, and they can also provide for public participation on the international level by establishing participation opportunities within a treaty mechanism.

Public participation initially appeared in non-legally binding international instruments, or soft law instruments (see above in section III, subsection A). Among the first soft law instruments that explicitly mentioned public participation was the U.N. World Charter for Nature. A decade later Rio Declaration Principle 10 set out the principle of public participation as it is still commonly understood, reflecting a political consensus on the principle.[95]

The principle of public participation gradually found its way in legally binding international environmental instruments. Shelton and Kiss observe that almost all recent environmental treaties emphasize that public participation is essential in dealing with environmental issues and contain provisions on public participation.[96]

The first type of public participation, provisions in international environmental instruments that require State parties to guarantee public participation on the national level, is quite well developed within international environmental law, although like within the national legal order, the extent and degree varies for the three different elements of public participation. Public participation in decision-making and access to information are actually more widely incorporated in international

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Silvia & Carole Excell, *Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice*, 12 SUSTAINABLE DEV. L. & POL'Y 8, 8 (2012).

93. HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 4.

94. *Id.* at 4-5.

95. HUNTER, SALZMAN & ZAELKE, *supra* note 3, at 466.

96. KISS & SHELTON, *supra* note 5, at 222, 676.

environmental agreements than the element of access to judicial and administrative proceedings.[97]

Prominent international environmental treaties that contain provisions on public participation in environmental decision-making at the national level are the CBD and the U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereinafter 'Desertification Convention').

The CBD mainly focuses on the participation of indigenous peoples in decision-making. The convention is particularly interested in the traditional knowledge of indigenous peoples and its value for the conservation and sustainable use of biodiversity, which are the objectives of the convention.[98] The territories of indigenous peoples often are treasure-houses of biodiversity and in many instances indigenous peoples manage these areas according to their vast body of knowledge of these areas, which generally is aimed at the sustainable use of natural resources.[99] The drafters of the CBD acknowledged this role of indigenous peoples. As a result, the preamble of the CBD recognizes the "close and traditional dependence of many indigenous and local communities" on biological resources, and four CBD provisions directly refer to indigenous peoples. Under CBD articles 8(j) and 10(c), for instance, State parties are to create partnerships with indigenous peoples, and should ensure the consultation and participation of indigenous peoples in the planning and management of projects aimed at the conservation of biodiversity and biological resources.[100]

The Desertification Convention explicitly obliges State parties to facilitate participation. It can be argued that this convention is essentially based on the concept of public participation.[101] It emphasizes that the full participation of men and women, NGOs, and "other major groups" is crucial for the effectiveness of the efforts to combat and mitigate desertification and its effects.[102] Article 3(a) of the convention mentions the participation of

97. Shelton, Bankobeza & Ruis, *supra* note 40, at 82.

98. Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79; 31 I.L.M. 818 [hereinafter CBD].

99. Juanita Chaves, *The Andean Pact and Traditional Environmental Knowledge*, *in* ACCESSING BIOLOGICAL RESOURCES: COMPLYING WITH THE CONVENTION ON BIOLOGICAL DIVERSITY 223, 235 (Natalie P. Stoianoff ed., 2004); ANDREW GRAY, BETWEEN THE SPICE OF LIFE AND THE MELTING POT: BIODIVERSITY CONSERVATION AND THE INPUT OF INDIGENOUS PEOPLES 13 (1991); John Woodliffe, *Biodiversity and Indigenous Peoples*, *in* INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY 255, 256-57 (Michael Bowman & Catherine Redgwell eds., 1996).

100. *E.g.*, Conference of the Parties of Convention on Biological Diversity, *Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, annex III, Decision V/16 - Article 8(j) and Related Provisions, Task 1, 2, 4, UNEP/CBD/COP/5/23 (May 15-26, 2000), https://www.cbd.int/decision/cop/default.shtml?id=7158.

101. KISS & SHELTON, *supra* note 5, at 675.

102. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa Preamble ¶¶ 21-22, Oct. 14, 1994, 1954

local populations and communities as one of the principles of the convention. Similarly, cooperation between the government, local communities, NGOs, and landholders form part of the fundaments of the convention. The aim of this cooperation is to obtain insights in the functioning and sustainable use of nature, the value of land and water resources in those areas affected by desertification.[103] Article 5(d) furthermore prescribes that State parties endorse the involvement of local populations in their desertification and drought mitigation measures. The article stresses the participation of women and youth in particular, and foresees an important supporting role for NGOs.

Another key provision of the Desertification Convention is Article 19, which is entirely dedicated to capacity building, education, and public awareness. Article 19(a) for instance demands State parties to promote capacity-building through the full participation of local people and cooperation with NGOs and local organizations. In short, the Desertification Convention acknowledges the importance of public participation in combating desertification and builds upon the knowledge, experiences, and capacities of local stakeholders.

The Paris Agreement under the United Nations Framework Convention on Climate Change (hereinafter 'Paris Agreement')[104] also contains provisions on public participation. Its preamble mentions the importance of public participation and public access to information to the climate change issues covered by the Agreement, and also acknowledges that it is essential that both States and non-State actors are involved in these issues.[105] This is repeated in Article 6.8(b), which specifies that the role of private actors in the implementation of national climate change measures should be strengthened. Article 7.5 furthermore stipulates that public participation is to be included in adaptation measures, which should address vulnerable groups and communities. The Agreement also calls upon State Parties to cooperate, "as appropriate", in strengthening public participation and public access to information.[106]

Most of the well-known international environmental instruments also provide for public participation at the international level. As indicated above, only NGOs can partake in the various international participation mechanisms

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U.N.T.S. 3 [hereinafter Desertification Convention].

103. *Id.* art. 3(c).

104. Paris Agreement under the United Nations Framework Convention on Climate Change art. 20.1, 21.1, *opened for signature* Apr. 22, 2016 [hereinafter Paris Agreement]. The Agreement has been open for ratification since Apr. 22, 2016. It will enter into force one month after it has been ratified by at least 55 States.

105. *Id.* at Preamble.

106. *Id.* art. 12.

established under international environmental agreements.[107] Individuals and private corporations do not form part of such mechanisms, unless they are organized in NGOs.

Chapter 27.9(b) of Agenda 21 for instance calls upon the bodies of the U.N. system to enhance or set up mechanisms and procedures to cooperate with NGOs in the drafting of policies, their implementation, and their evaluation. Examples of international environmental agreements providing for observer status to NGOs at their supervisory mechanisms are the Climate Change Convention,[108] the Convention on the International Trade on Endangered Species (hereinafter 'CITES'),[109] the CBD,[110] the Convention for the Protection of the Ozone Layer (hereinafter 'Ozone Layer Convention'),[111] and the Paris Agreement.[112] NGOs with an observer status are usually permitted to attend plenary meetings, to submit memorandums to State representatives, and to receive the agenda and public documents before the start of plenary meetings.[113] They normally cannot, however, issue verbal statements,[114] nor do they have a right to vote at these meetings.[115]

At *ad hoc* international environmental law meetings, there is, however, more room for participation of non-State actors other than NGOs. At the 2002 Summit in Johannesburg for example, about 8,000 representatives of not only various NGOs, but also of communities, businesses, and other civil

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107. NGOs can usually obtain observer status upon application, unless one-third of the State Parties objects to this. *E.g.,* CBD, *supra* note 98, art. 23.5; The Convention on the International Trade on Endangered Species of Wild Fauna and Flora art. XI(7), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]; United Nations Framework Convention on Climate Change art. 7.6, May 9, 1992, 31 I.L.M. 849, 1771 U.N.T.S. 107 [hereinafter Climate Change Convention]; Vienna Convention for the Protection of the Ozone Layer art. 6.5, Mar. 22, 1985, 26 I.L.M. 1529, 1513 U.N.T.S. 323 [hereinafter Ozone Layer Convention]; Paris Agreement, *supra* note 104, art. 16.8.

108. Climate Change Convention, *id*. art. 7.6.

109. CITES, *supra* note 107, art. XI(7).

110. CBD, *supra* note 98, art. 23.5.

111. Ozone Layer Convention, *supra* note 107, art. 6.5.

112. Paris Agreement, *supra* note 104, art. 16.8.

113. U.N. ECON. COMM'N FOR EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at 216, U.N. Doc, ECE/CEP/72/Rev.1, U.N. Sales No. E.13.II.E.3 (2014) [hereinafter AARHUS CONVENTION GUIDE].

114. Meetings under the CBD are an exception. At these meetings NGOs may be called upon to issue a verbal statement to express their views. Guidelines for the Participation of Representatives of Observer Organizations at Meetings of the Conference of the Parties of the Convention on Biological Diversity and Its Subsidiary Bodies art. 14 (Sept. 16, 2010), https://www.cbd.int/doc/meetings/cop/cop-10/other/cop-10-guidelines-observer-en.pdf.

115. *E.g.*, CITES, *supra* note 107, art. 7(b); Conference of the Parties of Convention on Biological Diversity, *Report of the First Meeting of the Conference of the Parties to the Convention on Biological Diversity*, annex III: Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity Rule 7.1, UNEP/CBD/COP/1/17 (Feb. 28, 1995); UNITED NATIONS ENV'T PROGRAMME, HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER 457, Rules of Procedure for Meetings of the Parties to the Montreal Protocol Rule 7.2 (7th ed. 2006); Conference of the Parties of United Nations Framework Convention on Climate Change, *Organizational Matters: Adoption of the Rules of Procedure, Rule 6.2*, FCCC/CP/1996/2 (May 22, 1996).

society groups participated.[116] At the 2012 Rio 20+ Earth Summit, representatives of civil society were given the opportunity, among others, to make statements and to participate in the preparatory meetings and specific "dialogue meetings".[117]

The element of access to environmental information can also be found in various environmental treaties. In one of the first international environmental agreements, the Convention concerning the Protection of the World Cultural and Natural Heritage,[118] information-related provisions were already included. Article 27.2 demands State parties to offer the public comprehensive information on threats to the cultural and natural heritage and on the actions they undertake to comply with the convention.

Under the Desertification Convention, State parties are to draw up national programs which include facilitating the access of local communities to information concerning desertification and its effects.[119] Similarly, the Climate Change Convention and the Kyoto Protocol call upon State parties to promote and facilitate public access to information on climate change and its effects.[120] Finally, the Cartagena Protocol on Biosafety to the CBD (hereinafter 'Biosafety Protocol') requires that State parties ensure public access to information on genetically modified organisms (GMOs).[121]

On the international plane, the element of access to environmental information is not yet fully developed. As mentioned in section III, subsection B, currently only the World Bank, the UNDP and the WTO have (environmental) information disclosure systems. Because the World Bank and the UNDP are closely involved in financing and facilitating development projects that may affect the environment,[122] it is important that they provide such systems.

The element of access to judicial and administrative proceedings is much less codified in international environmental agreements than the other

116. Ebbesson, *supra* note 44, at 682.

117. *Frequently Asked Questions (FAQs) - Major Group Accreditation and Pre-Registration at CSD Meetings*, U.N CONFERENCE ON SUSTAINABLE DEV. (2011), http://www.uncsd2012.org/majorgroups_faq.html#32; NGO MG Organizing Partners, Participation and Access Passes, U.N CONFERENCE ON SUSTAINABLE DEV (June 4, 2012), http://www.uncsd2012.org/content/documents/612Participation%20and%20Access%20PassesFINAL%20FINAL%20V.pdf.

118. United Nations Economic, Scientific, and Cultural Organization, Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 1037 U.N.T.S. 151.

119. Desertification Convention, *supra* note 102, art. 10.2(e).

120. Climate Change Convention, *supra* note 107, art. 6.a(ii); Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 10.b.ii(e), Dec. 11, 1997, 2303 U.N.T.S. 148.

121. Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 20, 23.2-3.3, Jan. 29, 2000, 2226 U.N.T.S. 208, 39 I.L.M. 1027.

122. *See* Saladin, *supra* note 55. Other international organizations are usually not that strongly involved in development projects at the national level, so arguably there is no pressing need for setting up environmental information systems under these organizations.

two elements of the principle of public participation. It can mainly be found in agreements on liability for damage caused by specific activities,[123] such as the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal.[124] Pursuant to article 17 of this protocol, States should guarantee that their national courts have the competence to rule on claims for compensation for damage caused by certain types of activities.

The U.N. Convention on the Law of the Sea (hereinafter 'UNCLOS') is not a typical "liability for damage agreement", but nonetheless provides that States should guarantee that prompt and adequate compensation can be obtained through their judicial procedures in case natural or juridical persons who fall under their jurisdiction provoke damage by polluting the marine environment.[125]

International environmental agreements furthermore set up settlement procedures when disputes arise between State parties on the interpretation and application of agreements,[126] but there are no such provisions that include judicial review procedures accessible to non-State actors, nor is there a specific environmental law court at the international level.[127]

C. *Public Participation in Regional Environmental Instruments*

The principle of public participation can also be found on a regional level, in regional environmental agreements. It is particularly well-developed in European environmental law, which includes the law of the E.U. Most (Western and Northern) European countries have a strong democratic tradition and a well-developed civil society, which might explain why the public participation principle is prominent within this region.

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123. Shelton, Bankobeza & Ruis, *supra* note 40, at 82.

124. Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, *Report of 9th Meeting*, UN Doc. UNEP/CHW.1/WG/1/9/2. (Dec. 10, 1992).

125. United Nations Convention on the Law of the Sea art. 235.2, Dec. 10, 1982, 1833 U.N.T.S. 3; 21 I.L.M. 1261.

126. *E.g.*, Climate Change Convention, *supra* note 107, art. 14.

127. This gap nevertheless is principally filled by the availability of human rights bodies such as the ECtHR, which can examine complaints from non-State actors about violations of their environmental human rights. *See supra* Section III, under F. In addition, the WTO's Appellate Body seems to be open to some form of participation by NGOs in dispute settlement proceedings. In *United States – Import prohibition of certain shrimp and shrimp products*, in which India, Malaysia, Pakistan and Thailand jointly challenged an import ban on their shrimp products by the U.S., it admitted submissions made by environmental NGOs on the protection of sea turtles because the U.S. expressly adopted them in its main submission to the Body. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 2, 5-6, 79, 90-91, WT/DS58/AB/R (adopted Oct. 12, 1998). *See also* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 203 (2006).

The most important convention concerning public participation applicable within Europe is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which is better known as the Aarhus Convention. It has been ratified by almost all European States and some Central-Asian States such as Azerbaijan and Kazakhstan, and the E.U. is a party as well.[128] As a result, the E.U. has developed legislation that is implemented in the E.U. Member States and the convention also applies to the governing bodies of the E.U., such as the Commission, the Parliament, and the Council.[129]

The Aarhus Convention is the only environmental agreement that is completely dedicated to public participation.[130] It is essentially based on the principle of public participation as described in Principle 10 of the Rio Declaration (see section III, subsection A)[131] and it therefore includes all three elements of the principle of public participation.

The Aarhus Convention obliges State parties for example to facilitate public participation in the drafting of "plans, programmes and policies relating to the environment", and during the preparation of "executive regulations" and/or "generally applicable legally binding normative instruments".[132] It also regulates access to information[133] and State parties should guarantee access to and provide judicial review for matters that fall within the scope of the convention before a court or "another independent and impartial body established by law".[134]

The Aarhus Convention furthermore regularly holds a "Meeting of the Parties" to discuss the implementation of the Convention.[135] NGOs are allowed to participate in these meetings as observers.[136] They do not have a right to vote, but they may be granted the opportunity to make an oral statement.[137] Similarly, NGOs can be represented as observers in the Convention's subsidiary bodies (currently the Working Group of the Parties and three "Task Forces" on Access to Information, Public Participation, and

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128. U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (last visited Feb. 21, 2015).

129. BLANCO & RAZZAQUE, *supra* note 73, at 159; Richardson & Razzaque, *supra* note 41, at 176.

130. Richardson & Razzaque, *supra* note 41, at 174.

131. The 2nd paragraph of the preamble of the Aarhus Convention explicitly 'recalls' Principle 10 of the Rio Declaration.

132. The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 7, 8, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

133. *Id.* art. 4, 5.

134. *Id.* art. 9.

135. *Id.* art. 10.1-2.

136. *Id.* art. 10.5.

137. AARHUS CONVENTION GUIDE, *supra* note 113, at 215.

Access to Justice, respectively).[138]

Another interesting European environmental agreement, which has also been ratified by Canada and some Central-Asian States,[139] is the Convention on Environmental Impact Assessment in a Transboundary Context, also simply called the Espoo Convention (after the city in Finland where the convention was signed), which stipulates that State parties should facilitate public participation within the environmental impact assessment procedure that it prescribes.[140]

The Espoo Convention stipulates that the State Parties periodically convene meetings to review implementation issues.[141] According to the Rules of Procedure of these meetings, non-State actors ("the public") are free to attend these meetings as observers.[142]

The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, or the Lugano Convention, furthermore contains the public participation elements of access to information and access to judicial and administrative proceedings. Articles 14 to 16 of this convention set out terms and conditions for access to environmental information, and articles 17 to 23 establish rules on judicial proceedings for claiming compensation for environmental damage and requesting injunctions.

The Lugano Convention provides for the participation of NGOs as observers in the meetings of its supervisory body,[143] the Standing Committee. NGOs nonetheless can only attend these meetings on the Committee's express invitation.[144]

In other regional environmental agreements public participation in decision-making processes is not common. Information on environmental agreements applicable in Africa[145] or Oceania[146] that include public

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138. *Id.* at 212.

139. *See* U.N. TREATY COLLECTION, *supra* note 128.

140. United Nations Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context art. 2.2, 2.6, Feb. 25, 1991, 1989 U.N.T.S. 310.

141. *Id.* art. 11.1-2.

142. United Nations Economic and Social Council, *Report of the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context on Its Fourth Meeting, Held in Bucharest from 19 to 21 May 2008, Decision IV/2, annex IV, Operation Rules of the Implementation Committee Rule 17*, ECE/MP.EIA/10 (July 28, 2010).

143. Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art. 27, June 21, 1993, 32 I.L.M. 1228.

144. *Id.* art. 26.5.

145. The closest to some form of public participation within African regional treaties is article 4.7 of the Lusaka Agreement on Co-Operative Enforcement Operations Directed at Illegal Trade in Flora and Fauna, Sept. 8, 1994, 1950 U.N.T.S. 35. This article encourages States parties to set up public awareness campaigns on illegal trade in animal and plant products, which promote, among others, public reporting of such trade. No more substantive provisions can be found in African regional environmental agreements.

146. However, a number of the Pacific island-states, such as the Fiji Islands and Samoa, and

participation provisions could not be found. In Asia, South America, Central America, and North America[147] however, there are some agreements that refer to public participation.

The Association of Southeast Asian Nations (hereinafter 'ASEAN') Agreement on the Conservation of Nature and Natural Resources (hereinafter 'ASEAN Conservation Agreement') and the ASEAN Agreement on Transboundary Haze Pollution are the only Asian environmental agreements that include provisions that provide for public participation.

The ASEAN Conservation Agreement is a pre-Rio Declaration document which calls upon its Parties to provide for, as far as possible, public participation in the planning and implementation of measures aimed at conservation.[148]

The ASEAN Agreement on Transboundary Haze Pollution concerns the hazardous smoke caused by land and/or forest fire.[149] One of the principles of the agreement is the involvement, if appropriate, of local communities, NGOs, farmers, and private companies in dealing with transboundary haze pollution.[150] More specifically, the agreement obliges States parties to adopt measures that strengthen community participation in fire management in order to prevent land and/or forest fires and the haze pollution caused by such fires.[151]

Note however that the ASEAN Member States are limited to the South-Eastern Asian region,[152] for instance Indonesia and Thailand, and do not include dominant Asian States such as China and India. Besides, neither of these agreements explicitly provides for the participation of non-State actors at the meetings of their supervisory bodies.

South American and Central American States[153] and the Netherlands

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Australia and New Zealand are Member States of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. This convention's monitoring body, the Western and Central Pacific Fisheries Commission, allows NGOs to participate in the meetings of the Commission and/or its subsidiary bodies. To facilitate their effective participation in these meetings, NGOs also are to be provided with relevant information. *See* Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 21, Sept. 5, 2000, 2275 U.N.T.S. 43.

147. North America, excluding the Central American region, actually consists only of three States (Canada, the United States, and Mexico).

148. ASEAN Agreement on the Conservation of Nature and Natural Resources art. 16.2, July 9, 1985, 15 E.P.L. 2.

149. ASEAN Agreement on Transboundary Haze Pollution art. 1.6, June 10, 2002.

150. *Id*. art. 3.5.

151. *Id*. art. 9(e).

152. *ASEAN Member States*, ASEAN.ORG, http://www.asean.org/asean/asean-member-states (last visited Aug. 9, 2015).

153. The current State parties are Argentina, Belize, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, the Netherlands (Antilles), Panama, Peru, the United States, Uruguay, and Venezuela. *See Party Countries*, IACSEATURTLE.ORG, http://www.iacseaturtle.org/paises-eng.htm (last visited Aug. 9, 2015).

(that is, the Netherlands Antilles) and the United States concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles (hereinafter 'Inter-American Sea Turtle Convention'). This convention stipulates that State Parties should try to involve the participation of government institutions, NGOs, and the general public in the protection, conservation and recovery of sea turtle populations and their territories.[154] Specialized organizations and individuals are permitted to participate at the meetings of the Convention's COP and subsidiary bodies upon application.[155] If authorized, they may also make oral statements at these meetings.[156] Other than this agreement, there is no specific regional environmental agreement containing provisions on public participation that applies to the South American region.[157]

The Regional Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations (Spanish: *Convenio Regional para el Manejo y Conservación de los Ecosistemas Naturales Forestales y el Desarrollo de Plantaciones Forestales*) is applicable within Central America[158] and contains a provision which obliges the Member States to promote the participation of all interested parties, in particular the inhabitants of forest regions, in the planning, execution, and evaluation of national policies on forest management and conservation.[159]

In North America, one of the objectives of the North American

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154. Inter-American Convention for the Protection and Conservation of Sea Turtles art. IV.2(g), Dec. 1, 1996, 2164 U.N.T.S. 29, 37 I.L.M. 1246.

155. *Id*. art. V.6; Conference of the Parties of Inter-American Convention for the Protection and Conservation of Sea Turtles, *Rules of Procedure for Meetings of the Parties to the Inter-American Convention for the Protection and Conservation of Sea Turtles Rule 11.2, 11.4, 11.8*, CIT-COP1-2003-R4-Rev.1 (June 3, 2011) [hereinafter Inter-American Sea Turtle Convention Rules of Procedure].

156. Inter-American Sea Turtle Convention Rules of Procedure, *id*. Rule 11.8.

157. The Declaration of Santa Cruz +10 (Dec. 5, 2006), a soft law document, reaffirms the commitment of the OAS Member States (its 35 Member States cover basically the entire American continent and the Caribbean, www.oas.org) to the principles set out in the Rio Declaration and Agenda 21, including public participation (at ¶8 and ¶10). *See* First Inter-American Meeting of Ministers and High-Level Authorities on Sustainable Development, *Declaration of Santa Cruz +10*, OEA/XLIII.1, CIDI/RIMDS/DEC.1/06 rev.1 (Dec. 5, 2006). The OAS also adopted the *Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-making,* OEA/Ser.D/XXIII.1 (2001).

158. The most important environmental agreement between the Central American States is the Convenio para la Conservación de la Biodiversidad y Protección de Areas Silvestres Prioritarias en América Central [Convention for the Conservation of Biodiversity and Protection of Wilderness Areas in Central America], June 5, 1992. Its article 35 only generally recognizes the importance of public participation. The Convenio Regional sobre Cambios Climáticos [Regional Convention on Climate Change], Oct. 29, 1993, contains a similar provision (art. 12(e)).

159. Convenio Regional para el Manejo y Conservación de los Ecosistemas Naturales Forestales y el Desarrollo de Plantaciones Forestales [Regional Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations] art. 5(a), Oct. 29, 1993.

Agreement on Environmental Cooperation (hereinafter 'NAAEC') is public participation.[160] The Commission for Environmental Cooperation set up under the agreement has to promote public participation in decision-making and access to environmental information.[161] The NAAEC furthermore requires that the three State parties (Canada, the United States, and Mexico) guarantee the availability of judicial, quasi-judicial, and administrative proceedings for the enforcement of its domestic environmental legislation.[162]

The Canada – United States Agreement on Air Quality[163] is the other North American environmental agreement that includes public participation. Under article IX.1, the agreement's supervisory mechanism is to organize public hearings on the implementation of the agreement.

V. RECOGNIZING PUBLIC PARTICIPATION AS A PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW

A. *The Current Status of Public Participation in International Environmental Law*

Taking into consideration the foregoing sections on the features of principles of law and how public participation is currently present in national, regional, and international environmental law, I can now draw up a balance of the current status of public participation in international environmental law. As will be argued in this section, public participation should be considered as a principle of international environmental law even though its manifestation in the international and national legal system is flawed.

The most important reason to qualify public participation as a principle of international environmental law is that it is clearly endorsed by the international community at the domestic, regional, and international level. In a wide variety of States, domestic laws are in force facilitating public participation, and even though the content and procedures of public participation may differ for each of these States, public participation is the principle that guides this content and these procedures and their ongoing development.

Although States have acknowledged the importance of public participation, it is nonetheless reported that the implementation of the provisions on public participation in domestic law meets significant

160. North American Agreement on Environmental Cooperation art. 1(h), U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1480.

161. *Id.* art. 10.5(a).

162. *Id.* art. 5.2, 7.

163. Canada – United States Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676.

difficulties.[164] In practice, each of the three elements of public participation is crippled by considerable flaws.

To begin with, the legal provisions on public participation in decision-making generally are not satisfying and often are not applied in decision-making about licenses or concessions to private entities. Furthermore, State authorities tend to only consult individuals and communities likely to be affected in the final stages of the decision-making, when the most important parts of the decision-making have already occurred.[165]

A lack of familiarity with the specific laws and mechanisms also hinders public participation in decision-making, as well as access to environmental information and administrative and judicial proceedings.[166] In many States, it is not clear for instance which government body is responsible for providing information, how information can be requested, and which information should be provided – which gives government officials the possibility to withhold information.[167] This has a negative impact on the effectiveness of public participation.

Access to environmental information is usually adequately guaranteed by the laws of most States, but a problematic issue is that information can be complex. An example is a highly technical environmental impact report in an environmental impact assessment procedure. Participants may find such information difficult to understand and thus cannot critically assess the concerns at stake.[168] For effective public participation, it therefore is important that environmental information is not only *physically* accessible, but also *mentally* accessible, that is, intelligible for the average citizen.

A difficulty concerning access to administrative and judicial proceedings is standing. Most national administrative and judicial procedures are not accessible for environmental cases, because they require that a personal interest is at stake. In many environmental cases however, such personal interests are absent.[169] Proceedings furthermore can be very costly financially, which makes it hard for economically disadvantaged individuals and groups to effectively use the legal mechanisms that are available.[170] The costs of lawyers, fees, and other procedural costs are often simply too high for the low income individuals involved.

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164. Shelton, Bankobeza & Ruis, *supra* note 40, at 86; Banisar, Parmar, de Silvia & Excell, *supra* note 92, at 8.

165. Banisar, Parmar, de Silvia & Excell, *supra* note 92, at 11.

166. Harding, *supra* note 76, at 8.

167. HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 7.

168. Richardson & Razzaque, *supra* note 41, at 193.

169. *Id.* at 189; Harding, *supra* note 76, at 9; Shelton, Bankobeza & Ruis, *supra* note 40, at 87.

170. Harding, *supra* note 76, at 9; HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 7. This is particularly problematic because these individuals and groups, such as indigenous peoples, are the most vulnerable to environmental degradation.

Other problems concerning access to administrative and judicial proceedings that arise in practice include corruption and lack of a truly independent judiciary, and legal provisions that limit providing and admitting evidence.[171] There are also problems concerning the execution of court decisions on environmental issues, and deficits in legislation.[172]

Since the elements of public participation are interconnected and mutually enforce each other, the shortcomings set out above substantially weaken public participation. It indeed has been observed that the problems concerning the implementation of public participation provisions have limited their impact on environmental decision-making. Professor Jona Razzaque for instance notes that including public participation at the national level has not yet lead to sustainable development, connecting the two concepts, although it did improve the quality of decisions on environmental issues. She thinks that the reason for this is that public participation standards do not bring about real change to existing political institutions, because these standards are applied *within* the institutional framework. They do not challenge the power and authority of such institutions to influence the decision-making procedures and the final decisions. Institutions therefore have the possibility to only consider the views of the public if these views are in conformity with the authorities' own interests and concerns.[173] Giving full and unconditional effect to public participation provisions may impact State sovereignty and governance and existing institutions and structures of power that States are not willing to accept.

It has been observed that the controversial character of public participation leads to a reluctance to (explicitly) recognize it as a principle of international environmental law.[174] This does not mean however that public participation cannot be considered as a principle – explicit recognition by States is not a requirement for qualification as a principle of law – and the incorporation of public participation in national and international legal instruments indicates that States in fact have acknowledged public participation (see below).

Neither do the difficulties to putting the legal provisions on public participation in practice affect its status as a principle of international

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171. Harding, *supra* note 76, at 9; HENNINGER, PETKOVA, MAURER, IRWIN, COYLE & HOFF, *supra* note 43, at 7.

172. Bedner, *supra* note 90, at 95; Amanda Perry-Kessaris, *Access to Environmental Justice in India's Garden City (Bangalore)*, *in* ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY, *supra* note 76, at 59, 70.

173. Richardson & Razzaque, *supra* note 41, at 172; Jona Razzaque, *Information, Public Participation and Access to Justice in Environmental Matters*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 50, at 137, 151.

174. Ebbesson, *supra* note 44, at 683.

environmental law, even though it is for this reason that some authors explicitly exclude public participation from the catalogue of principles of international environmental law. Woodhouse for instance has maintained that for public participation to be such a principle, it should be applied more uniformly and continuously at the domestic level.[175] It should be remembered however that although uniform and continued State practice is a strong indication that a particular concept is a general principle of law (see section II, subsection C),[176] State practice is not a fundamental condition to qualify as such.[177] At the same time, it needs to be stressed that there clearly is room for further development and improvement in the practice of public participation, both nationally and internationally. As a principle of international environmental law, public participation can actually guide this process and fill in existing gaps.

In this regard it can also be observed that principles of international environmental law that may be considered to be firmly settled have not been consistently applied either. Sustainable development for instance has been expressly recognized as a principle of international environmental law by the ICJ in *The case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*,[178] but it certainly is far from safe to argue that sustainable development is currently the dominant model of economic development of the majority of the international community.

Not only at the national level has public participation been accepted, but also at the regional and the international planes. At the regional level, public participation is particularly well-developed within Europe and to an extent also within North America. In this regard, it is important to note that regional environmental law in general arguably is most strongly developed within Europe. E.U. law in particular governs environmental issues such as air pollution and waste management in the Member States through various specific directives and regulations.[179] In other regions, public participation is less likely to form part of bi- or multilateral environmental agreements, but the laws of individual States in these regions (for instance Cameroon, Costa

175. Woodhouse, *supra* note 4, at 147, 165, 180.

176. State practice is crucial in determining if State behavior qualifies as a norm of customary law. Sometimes it can be hard to make the distinction between a principle and a customary norm. *See*, *e.g.*, Dupuy, *supra* note 19, at 461 (who observes that arguably the only distinction between a principle and a customary norm is how they are formulated. In addition, a customary norm may actually be inspired by one or more general principles of law); *Separate Opinion of Cançado Trindade*, *supra* note 9, at 132.

177. CHENG, *supra* note 19, at 24; DE SADELEER, *supra* note 34, at 242-43.

178. Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25).

179. *See Summaries of EU Legislation: Environment and Climate Change*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW, http://europa.eu/legislation_summaries/environment/index_en.htm (last visited Aug. 9, 2015), for an overview of E.U. environmental law.

Rica, and Indonesia, see section IV, subsection A) actually do facilitate public participation in environmental affairs.

Internationally, many, though not all, multilateral environmental agreements contain provisions on public participation at the national and international level,[180] as set out below in section IV, subsections B and C. Public participation is furthermore repeatedly included in soft law documents, which often are the result of high-level international meetings such as the 1992 U.N. Conference on Environment and Development in Rio de Janeiro. Public participation is also deemed essential for achieving the aims of, for instance, the Desertification Convention. This is proof that the international community endorses public participation, even though the elements of access to environmental information and access to judicial and administrative proceedings are not fully developed on the international level.[181]

Public participation moreover is firmly embedded within the framework of international environmental law through its links to other principles of international environmental law such as sustainable development and the duty to execute environmental impact assessments. It certainly is difficult to imagine international environmental law without the participation of civil society. Public participation is also clearly connected to democracy and democratization procedures, issues that recently have been dominating the world scene (for example, the Arab Spring and the civil protests in Brazil, Venezuela, and Taiwan).

It nevertheless needs to be pointed out that the principle of public participation currently only opens up international environmental law to non-State actors to a limited extent. Their participation still very much takes place within the confinements of the State-dominated setting of international law. They can usually only participate at international environmental law meetings if arranged by an NGO, and the most common form of participation is that of being an observer at review reunions of treaty supervisory mechanisms. They are only entitled to being present at meetings, and cannot make any substantial contributions[182] and do not have a final say through voting (see section IV.B and section IV.C). Consequently, they are not able to substantially influence or challenge the decision-making of international bodies and States at international reunions. Indeed, there seems to be a feeling among private individuals and communities that their interests and concerns are not being duly addressed at international environmental

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180. KISS & SHELTON, *supra* note 5, at 222, 676.

181. As we have seen *supra* Section IV, under A, this is similar at the national level. *See also supra* note 119 and 124.

182. The CBD, the Aarhus Convention, and the Inter-American Sea Turtle Convention are notable exceptions. *See supra* Section IV.B, C.

decision-making meetings, in spite of their presence at these meetings.[183]

To challenge the possible status of public participation as a principle of international environmental law, it has been put forward that the provisions on public participation in international environmental treaties are too abstract to warrant such status.[184] It is true that provisions on public participation in international and regional environmental agreements are usually limited to prescribing State parties to incorporate public participation within their legal systems. They do not set out the procedures to be followed and the consequences of public participation in environmental decision-making.

It should nevertheless be reiterated that general principles of law tend to be formulated in imprecise terms and to be devoid of a clear content as explored above. Rather, firmly established principles of international environmental law such as the precaution principle are not very well-defined either, but grant States considerable liberty to incorporate the concept within their domestic legal system.[185]

The ambiguous formulation of general principles of law may lead to different understandings among States about their implications. In the *Pulp Mills* case for example, Argentina and Uruguay agreed that the inhabitants of the communities potentially affected by the establishment of pulp mill factories at the Uruguayan side of the Uruguay River, which flows between the two States, should be consulted. They had a different view on the content, results, efficiency, and evaluation of this consultation.[186] Their disagreement on procedure and outcome however did not affect their common understanding that public participation was required[187] and that its applicability had certain, yet contested, consequences for the decision-making process (although neither of the States considered public participation a separate principle, but rather an essential component of the duty to carry out impact assessments, see below).

It is also important that the majority of the international environmental agreements are framework conventions, which do not set out detailed standards, but merely give guidance for the establishment of environmental protection regimes at the national level. Under international environmental law States traditionally are given wide discretion to design and adopt domestic legal provisions and framework conventions are the preferred type of international agreement. They cannot be directly applied into the judicial

183. *See, e.g.*, Vidal & Slavin, *supra* note 1; Richard Black, *Rio 20+: Agreement Reached, Say Diplomats*, BBC (June 20, 2012), http://www.bbc.com/news/science-environment-18507602.

184. Ebbesson, *supra* note 44, at 683.

185. *See also* DE SADELEER, *supra* note 34, at 339.

186. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 215 (Apr. 20) [hereinafter *Pulp Mills* case]; Pulp Mills on the River Uruguay (Arg. v. Uru.), Dissenting Opinion Judge ad hoc Vinuesa, 2010 I.C.J. Rep. 266, ¶ 59 (Apr. 20) [hereinafter Vinuesa].

187. *See also* Vinuesa, *id.* ¶ 61.

order of a State but need to be elaborated further by the national law-making authorities.[188] The supervisory bodies of international environmental agreements nevertheless tend to provide guidance to the implementation of the agreement, for instance through the adoption of specific guidelines.[189]

In sum, the provisions on public participation in international and regional environmental agreements are deliberately loosely drafted, and this is both a feature of general principles of law and of international environmental law.

Finally, an important limit to the scope of the principle of public participation as it currently appears in international environmental law can be inferred from the *Pulp Mills* judgment. The ICJ observed in that judgment that '(. . .) no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina'.[190]

Argentina argued before the ICJ that the 1975 Statute of the Uruguay River (Spanish: *Estatuto del Río Uruguay*) between Argentina and Uruguay, which regulates the use of the Uruguay River, should be interpreted in accordance with general principles of international environmental law. Accordingly, any activity at the river should be in conformity with these principles.[191] One of the principles invoked by Argentina was the principle to perform an environmental impact assessment.

Argentina claimed that Uruguay had not duly consulted the communities affected by the construction of the pulp mill factories,[192] which according to Argentina forms a crucial part of the duty to carry out a (transboundary) environmental impact assessment:[193] public participation

188. ELLI LOUKA, BIODIVERSITY AND HUMAN RIGHTS: THE INTERNATIONAL RULES FOR THE PROTECTION OF BIODIVERSITY 117 (2002); Marc Weller, *Conclusion: The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights*, *in* THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES 609, 633-34 (Marc Weller ed., 2005).

189. A good example are the *Akwé: Kon Guidelines Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities* drafted within the CBD supervisory framework, http://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

190. *Pulp Mills* case, *supra* note 186, ¶ 216.

191. Memorial of Argentina, Pulp Mills on the River Uruguay (Arg. v. Uru.), ¶¶ 3.161-62, 3.176, 3.187 (Jan. 15, 2007), http://www.icj-cij.org/docket/files/135/15425.pdf [hereinafter *Memorial of Argentina*].

192. *Id.* ¶ 5.61.

193. *Id.* ¶¶ 3.206-08; Reply of Argentina, Pulp Mills on the River Uruguay (Arg. v. Uru.), ¶¶ 4.101-02, 4.105 (Jan. 29, 2008), http://www.icj-cij.org/docket/files/135/15429.pdf [hereinafter *Reply of Argentina*]; Counter-Memorial of Uruguay, Pulp Mills on the River Uruguay (Arg. v. Uru.), ¶¶ 4.97-4.100 (Jan. 20, 2007), http://www.icj-cij.org/docket/files/135/15427.pdf [hereinafter *Counter Memorial of Uruguay*]; Rejoinder of Uruguay, Pulp Mills on the River Uruguay (Arg. v. Uru.), ¶¶ 5.73, 5.78, 5.85-.86 (July 28, 2008), http://www.icj-cij.org/docket/files/135/15432.pdf [hereinafter *Rejoinder of Uruguay*], and

"caractérise le principe de l'EIE"[194] (*Évaluation de l'Impact sur l'Environnement*, environmental impact assessment). Argentina did not claim that public participation is an independent, separate principle of international environmental law.[195] To substantiate its position Argentina referred to the Espoo Convention, the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (hereinafter 'the ILC's Draft Articles'), the practice of the World Bank, guidelines of the U.N. Environmental Program (hereinafter 'UNEP'), and human rights law.[196]

Uruguay did not contest that an environmental impact assessment should take place. It asserted that it "conducted an EIA [*Environmental Impact Assessment*] of the (. . .) plant in accordance with its own law and with customary international law",[197] but argued that there is no prescribed content under international law for transboundary impact assessments, and that there is no international legal basis for including a duty of public participation in such procedures.[198]

The ICJ examined public participation within the context of the duty to carry out a (transboundary) environmental impact assessment and the instruments mentioned by Argentina. It noted that neither Argentina nor Uruguay is a party to the Espoo Convention. It also found that the UNEP guidelines do not have a binding force, and do not contain specific details on the content of the environmental impact assessment.[199] It thus concluded that these instruments do not impose a legal duty on Uruguay to consult communities affected by the construction of the pulp mill complex. It did nonetheless, perhaps superfluously, assess the consultation of the affected communities by Uruguay and found that consultation of both Uruguayan and Argentinean communities had taken place.[200]

The ICJ assessed in this case if a duty existed for Uruguay to facilitate the participation of, not only potentially affected communities within its borders, but also those at the Argentinean side of the river. The ICJ explicitly limited itself to the instruments presented by Argentina during the proceedings. It did not examine if, beyond these instruments, such principle

also ¶ 5.72 (Uruguay held that conducting an environmental impact assessment forms part of customary international law.).

194. *Reply of Argentina*, *id.* ¶ 4.105.

195. *Memorial of Argentina*, *supra* note 191, ¶¶ 3.206-08; *Reply of Argentina*, *supra* note 193, ¶¶ 4.101-02, 4.105; *Counter-Memorial of Uruguay*, *supra* note 193, ¶¶ 4.97-4.100; *Rejoinder of Uruguay*, *supra* note 193, ¶¶ 5.73, 5.78, 5.85-.86, and also ¶5.72 (Uruguay held that conducting an environmental impact assessment forms part of customary international law.).

196. *Memorial of Argentina*, *supra* note 191, ¶¶ 3. 206-08; *Reply of Argentina*, *supra* note 193, ¶¶ 4.101-02, 4.114.

197. *Rejoinder of Uruguay*, *supra* note 193, ¶ 5.72.

198. *Id.* ¶¶ 5.73, 5.78, 5.85-.86; *Counter-Memorial of Uruguay*, *supra* note 193, ¶¶ 4.97-4.100.

199. *Pulp Mills* case, *supra* note 186, ¶ 205.

200. *Id.* ¶¶ 217-19.

(or customary norm) could be identified in regional or international environmental law. For this reason, the significance of the ICJ's decision should probably not be overstated.[201] Further research by the ICJ however would not have changed the ICJ's ruling on this point, since there are no important international environmental instruments that stipulate public participation should be included in a transboundary environmental impact assessment.[202] The Espoo Convention applies only within mainly the European region.[203]

Provisions on the participation of non-State actors in environmental decision-making concerning cross-border environmental issues, either as part of an environmental impact assessment or not, are extremely scarce in international environmental law.[204] Only within (mainly) the European region can foreign nationals participate in cross-border environmental affairs, including, but not limited to, transboundary impact assessments.[205] A possible explanation might be that it might go one step too far for States and their sovereign powers to let foreign nationals co-decide over domestic activities, to disseminate specific information to them and to grant them

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201. *Cf.* Duvic-Paoli, *supra* note 3. I do not agree with Duvic-Paoli's assertion that the ICJ "refused . . . to recognize the right to participation as a general principle of law" (Duvic-Paoli, *supra* note 3, at 81). As set out here, the ICJ did not examine this issue, but strictly limited itself to the submissions made by Argentina (as Duvic-Paoli also observes). For this reason, as Duvic-Paoli remarks, *Pulp Mills* does not exclude (future) recognition of public participation as a general principle of law (Duvic-Paoli, *supra* note 3, at 84-85). In addition, it should be kept in mind that the ICJ only examined public participation in the light of the specific circumstances of this case. Neither does the absence of explicit recognition by the ICJ imply that public participation does not qualify as a general principle. Such recognition, although it would be a clear and authoritative confirmation of its status, is not required (*see supra* Section II, under C).

202. In North America, Canada, Mexico, and the U.S. have been working since the 1990s on a draft North American Agreement on Transboundary Environmental Impact Assessment, which includes a provision on participation of the population of a potentially affected State (art. 12; the draft agreement is http://www.cec.org/Page.asp?PageID=122&ContentID=1906&SiteNodeID=366). The negotiations on this agreement however do not seem to have been concluded yet.

203. Within the E.U. Member States, the Strategic Environmental Assessment Directive, Council Directive 2001/42/EC, 2001 O.J. (L 197) 30 (EU) [hereinafter SEA Directive] is in force, which is inspired by the Espoo Convention. The SEA Directive provides for cross-border consultation of populations likely to be affected by an activity taking place in a border region within the context of an environmental impact assessment.

204. The ILC's Draft articles include public participation provisions: art. 13 (on providing information and collecting the views of the public of other potentially affected States) and art.15 (on access to administrative or judicial proceedings for protection or redress to 'significant' transboundary harm).

205. Aarhus Convention, *supra* note 132, art. 3.9, 6.2(e). The Organization for Economic Co-operation and Development [hereinafter OECD], of which most European States, the U.S., Australia, Israel, Japan, Mexico, New Zealand, and South Korea are current Member States, furthermore issued the OECD Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-discrimination in Relation to Transfrontier Pollution, C(77)28/FINAL (May 17, 1977). This document includes specific articles on access to administrative or judicial procedures related to transboundary pollution risks or damage and access to information on transboundary pollution or risks thereto (*See* art. 4-7, 9).

access to domestic courts, even though the State's activities might seriously impact them.[206]

There is however one important exception to this limit of the applicability of the principle of public participation in international environmental law, namely the regulation of transboundary watercourses. The most important international instrument on transboundary watercourses is the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses. This convention grants equal access to judicial and administrative procedures to foreign nationals when they suffer or are likely to suffer harm from activities on an international watercourse.[207]

On the regional level, the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes includes a provision on public access to information on the quality of the water in transboundary watercourses and the nature and effectiveness of certain measures taken concerning these waters.[208]

Regional public participation mechanisms furthermore have been set up for decision-making on the Rhine and the Danube in Europe.[209] In Africa, transboundary public participation mechanisms have been set up in the management of the Okavango River flowing through Angola, Botswana, and Namibia, and the management of the Orange River shared by Botswana, Lesotho, Namibia, and South Africa.[210] The Asian States Cambodia, Laos, Thailand, and Vietnam are cooperating in the Mekong River Commission,[211] which facilitates the participation of stakeholders from these States in the regulation of the Mekong River.[212] An example from North America is the shared control of the U.S. and Canada over the Great Lakes situated at the

206. There are also some obvious practical difficulties in incorporating public participation procedures in transboundary environmental impact assessments, such as the translation of documents (if the language of the two neighboring States is not the same or not widely understood).

207. United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses art. 32, May 21, 1997, 36 I.L.M. 700.

208. United Nations Economic Commission for Europe, Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 16, Mar. 17, 1992, 1936 U.N.T.S. 269, 31 I.L.M. 1312.

209. Ruth Greenspan & Libor Jansky, *Public Participation in the Management of the Danube River: Necessary but Neglected*, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES 101, 109-10 (Carl Bruch, Libor Jansky, Mikiyasu Nakayama & Kazimierz A. Salewicz eds., 2005); Nicole Kranz & Antje Vorwerk, Public Participation in Transboundary Water Management 5-7 (Mar. 30, 2007), http://www.2007amsterdamconference.org/Downloads/AC2007_KranzVorwerk.pdf.

210. Peter Ashton & Marian Neal, *Public Involvement in Water Resource Management within the Okavango River Basin*, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES, *id.* at 169, 181-83; Kranz & Vorwerk, *id.* at 8-10.

211. *History: The Story of Mekong Cooperation*, MRCMEKONG.ORG, http://www.mrcmekong.org/about-the-mrc/history/ (last visited Aug. 9, 2015).

212. Prachoom Chomchai, *Public Participation in Watershed Management in Theory and Practice: A Mekong River Basin Perspective*, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES, *supra* note 209, at 139, 151.

border of both States. Non-State actors are involved in the management of these waters.[213]

B. *Implications of Recognizing Public Participation as a Principle of International Environmental Law*

A concept that has the status of principle of international environmental law fulfills the specific functions of such principles. The principle of public participation thus plays an important role in the democratization of environmental decision-making in several ways.

Given the status of public participation as a widely accepted principle, it will be considered for inclusion during negotiations on new international environmental agreements or in drawing up domestic legislation (such as what happened in Mexico when drafting the climate change law). It also facilitates the actual participation of non-State actors in such negotiations and law-making.[214]

Particularly important is that national, regional, and international courts or judicial bodies can use principles of international environmental law to interpret regional or international environmental agreements. They can also apply principles of international environmental law to situations for which treaty norms or customary norms have yet to be developed. In such instances public participation can help to strike a balance between the various interests at stake in the absence of any regulation and remedy instances in which the public has not been duly involved in the drafting, implementation, and monitoring of environmental decisions. In this regard, further elaboration of the principle of public participation in transboundary environmental decision-making is important, as currently citizens of border regions which can possibly be affected by the activities of a foreign State have only very limited possibilities to undertake action against that State.[215]

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213. Carl Bruch, *Evolution of Public Involvement in International Watercourse Management*, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES, *supra* note 209, at 21, 44-45.

214. Mexican non-State actors such as research institutes, NGOs, and private corporations were for instance involved in the actual drafting process of the Mexican law on climate change, e.g., Cámara de Senadores México D.F., Dictamen de las Comisiones Unidas de Medio Ambiente, Recursos Naturales, y Pesca; de Energía; de Estudios Legislativos; de Estudios Legislativos Primera; y de Estudios Legislativos, Segunda, con Opinión de las Comisiones de Comercio y Fomento Industrial; y Especial de Cambio Climático a Diversas Iniciativas con Proyecto de Decreto Relativas al Cambio Climático. *See* Proyecto de Decreto Por El Que Se Expide la Ley General de Cambio Climático [Draft General Law on Climate Change]18-19, 11-15-2011 (Mex.).

215. For instance, if in the circumstances of the *Pulp Mills* case Uruguay had decided not to consult potentially affected Argentinean communities, these communities would have been deprived of an opportunity to influence the decision-making procedure on the construction of the pulp mills complex while possibly suffering serious consequences from this project.

C. *Limits to the Impact of Public Participation as a Principle of International Environmental Law*

On the other hand, the principle of public participation does not seriously challenge the role of the State, at least not in the form as it is currently commonly understood and applied. Despite the clear developments in international environmental law that enhance the participation of non-State actors, States are still the dominant players, on the national and international plane. They decide if they accept and promote the public participation of other actors in international environmental law, to what extent and under what conditions this public participation takes place, and to what degree the public participation influences the decision-making process.[216] This limits the impact of the principle of public participation on environmental decision-making. In this regard, it is important to keep in mind that, as already noted above in section II, subsection A, principles of law as such do not have any specific content; States need to further elaborate on them.

VI. CONCLUSION

Public participation is a general principle of law that firmly forms a part of the framework of international environmental law. It influences the formation, content, interpretation, and further development of international environmental law. As such, it promotes a democratic process and facilitates the inclusion of non-State actors in environmental decision-making at the national, the regional, and the international level. Its practical implementation nonetheless suffers from serious deficiencies, and it does not yet apply to decision-making concerning transboundary environmental affairs.

The principle in fact is most prominently present within the European region, a region which traditionally strongly adheres to democratic values and is home to States with well-functioning democratic systems, such as the Scandinavian countries, Germany, the Netherlands, and the United Kingdom. This proves the link between public participation and democracy, accountability, and transparency.

It is in States with underdeveloped and/or understaffed authorities however that the principle is particularly useful to guarantee effective implementation of, and respect for, national and international environmental norms. Where the State authorities are too weak or too unwilling to act, the local population can step in. States however eventually have the power to

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216. *Cf.* SANDS, *supra* note 22, at 71.

limit the content and extent of public participation, and may be resistant or unable to fully guarantee all three elements of public participation. This restricts the full force of the principle.

Whereas public participation is a general principle of international environmental law and can be seen as a part of a democratization of the international community, its major defects and limits also show that States continue to be the most important actors in environmental law on the national and international level.

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公共參與作為國際環境法一般原則：公共參與之現狀及現實影響

Jeroen van Bekhoven

摘　要

環境對人類的重要性廣受肯認。純淨的環境有益全人類，且沒有人能逃脱環境汙染的影響。然而，在國際環境法中，一般人能參與環境管理到什麼程度？國際環境法傳統上是設計給國家參與，構成其基礎的基本原則亦然如是。這是否代表我們被排除於影響這個生活中必要部分的政策決定之外？

筆者在本文中透過對國內、區域性及國際性的環境政策手段進行分析，進而檢視國際環境法中公共參與的地位。

結論是，公共參與在環境法中是不可或缺的一般法律原則。公共參與觸發了更多民主監督與影響，因此以各種不同方式影響了國際、國內環境法以及相關政策決定。雖然公共參與的實踐面臨了許多困難，但已經被廣泛接受、並深深鑲嵌在國際環境法的架構之中。不過，國家仍然對此議題維持了高度的控制，決定著公共參與的範圍、內容及影響。因此國家在國際環境法的主導地位，並沒有真正受公共參與的原則所挑戰。

關鍵詞：國際環境法、一般法律原則、公共參與、環境政策決定、環境資訊公開、近用司法與行政程序權