Characterising public participation as an international law norm

Alison Hough*

Senior Lecturer, Technological University of the Shannon

Introduction

This article considers the nature of the right to public participation in environmental decision-making in international law. In doing so it briefly examines the rationales for public participation, its features and the various manifestations of the right in different international law treaties and instruments, as well as jurisprudence on the international scale which deals with it, finally addressing the question of whether the twin requirements for a customary international law, state practice and *opinio juris*, are met.

Public participation enjoyed a huge increase in popularity in the 1990s[1] as set out below, around its potential to enhance climate action and the Rio Declaration 1992. Current media discourses on public participation tend to frame it as in opposition to development and use pejorative terms such as 'NIMBY'[2] to describe those who engage in participation. However, the reality is very different, with participation rates remaining low and with any available evidence showing that the introduction of access rights like access to information, participation and justice does not result in increases in challenges to projects. The available evidence from the UK, Germany and Ireland[3] shows that court challenges ('judicial review') of permitting decisions have not increased very much since the introduction of access rights between 2005 and 2012, and numbers of court cases have remained steady, while overall numbers of applications have increased, showing that in fact the relative number of challenges is reduced in many jurisdictions. However, media and political narratives rarely reflect these facts. Public participation is a key accountability measure against the abuse of state power and as such is essential for the rule of law[4,5] and political stability and indirectly ensures a stable economic environment considered essential for attracting investment.[6] In other words, contrary to received wisdom, public participation may in fact be ultimately good for business, by ensuring more robust governance.

* An earlier version of this research was presented at UCC Law & Environment 2022, and the author is grateful for the thought-provoking comments and feedback received which informed the development of this article. All errors remain the author's own.

1 A Cornwall, 'Historical perspectives on participation in development' (2006) *Commonwealth and Comparative Politics* 44(1), 62–83; DOI:10.1080/14662040600624460.

2 L Ashwood and K MacTavish, 'Tyranny of the majority and rural environmental injustice' (2016) *Journal of Rural Studies* 47, Part A, 271–77; https://doi.org/10.1016/j.jrurstud.2016.06.017. See also Note 30 below.

3 For the UK: J Eriksen, C Day, W Rundle, 'A pillar of justice: the impact of legislative reform on access to justice in England and Wales under the Aarhus Convention' (2019); retrieved from: https://policy.friendsoftheearth.uk/sites/default/files/documents/2020-01/A Pillar of Justice_.pdf.
For Germany: A Schmidt, H Anhalt, M Zschiesche, 'Die Klagetätigkeit der Umweltschutzverbände im Zeitraum von 2013 bis 2016: Empirische Untersuchung zu Anzahl und Erfolgsquoten von Verbandsklagen im Umweltrecht' (2018); retrieved from: https://www.umweltrat.de/SharedDocs/Downloads/DE/03_Materialien/2016_2020/2018_04_Studie_Verbandsklagen.pdf?__blob=publicationFile&v=6
For Ireland: While disaggregated data specifically for environmental judicial reviews are not available, data from the Courts Service Annual Reports shows that the overall rates of judicial review rates (which include environmental/planning judicial reviews) have remained steady, at an annual level of 500 to 600 cases per year since 2012, the year of ratification of the Aarhus Convention by Ireland. See Courts Service Annual Reports at: https://www.courts.ie/annual-report.

4 The role of participation in the rule of law and democracy is a topic worthy of a standalone article, and there are many different views. Public participation links to democracy and the rule of law (conceived as a limitation on government power) in the idea of participation in the government of the country expressed in many instruments and constitutions (for example, IESCR, UDHR). Simultaneously it is linked to the idea of fair procedures in adjudication of legal rights in administrative law, and concepts like the right to be heard (*audi alteram partem*) that are considered core principles of the rule of law.

5 See, for example, the discussion in part 2 of J Mendes, 'Rule of law and participation: a normative analysis of internationalized rulemaking as composite procedures' (2014) *International Journal of Constitutional Law* 12(2), 370–401; https://doi.org/10.1093/icon/mou018.

6 The pollution haven hypothesis traditionally held that FDI would move to countries with lower environmental regulation/weaker environmental governance and enforcement. However, more recent research shows a more nuanced picture with evidence that FDI for services-based industries is attracted by countries with stronger environmental regulation, with corporate tax being a larger indicator of FDI travel than environmental regulation: for example, H Yoon and A Heshmati, 'Do environmental regulations affect FDI decisions? The pollution haven hypothesis revisited (2021) *Science and Public Policy* 48(1), 122–31; https://doi.org/10.1093/scipol/scaa060; M Singhania and N Saini, 'Demystifying pollution haven hypothesis: role of FDI (2021) *Journal of Business Research*, 123, 516–28; https://doi.org/10.1016/j.jbusres.2020.10.007; F Filip De Beule, N Dewaelheyns, F Schoubben, *et al*, 'The influence of environmental regulation on the FDI location choice of EU ETS-covered MNEs' (2022) *Journal of Environmental Management* 321, 115839; https://doi.org/10.1016/j.jenvman.2022.115839.

The seminal piece of research on public participation is Arnstein's[7] much cited work, 'A ladder of citizen participation', which set out a deliberately provocative typology of citizen participation, and formed the foundation for the majority of subsequent research in the field.[8] This publication appeared in 1969, less than a year after the assassination of Martin Luther King and the passing of the Civil Rights Act 1968, and was written during the peak of the civil rights struggles of the 1960s. Unsurprisingly, it addressed the race and identity politics of participation in its opening paragraphs:

> The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you. Participation of the governed in their government is, in theory, the cornerstone of democracy-a revered idea that is vigorously applauded by virtually everyone. The applause is reduced to polite handclaps, however, when this principle is advocated by the have-not blacks, Mexican Americans, Puerto Ricans, Indians, Eskimos, and whites. And when the have-nots define participation as redistribution of power, the American consensus on the fundamental principle explodes into many shades of outright racial, ethnic, ideological, and political opposition.[9]

As debate continues to rage in popular culture around race, gender and (in)equality, it prompts consideration of whether we are any closer to achieving what Arnstein thought is of as 'citizen participation', which goes much further than the usual provision of information and allowing of comment. Arnstein asked: 'What is citizen participation and what is its relationship to the social imperatives of our time?' And answered this question as: 'It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future.'

The Civil Rights Movement in many ways led to the environmental movement[10] as many of the struggles of the movement were and are environmental. Minorities historically have been and continue to be more impacted by environmental harms,[11] and this is true globally. It has become particularly apparent in the climate change debate where many of the countries worst affected by climate change will be in the less developed countries, while the harms are inflicted by and for the benefit of wealthier countries.

Public participation can be a powerful antidote to the 'tyranny of the majority'.[12,13,14] Minority communities risk losing their rights in majoritarian democracies,[15] and public participation can enhance democracy by safeguarding minority rights and interests.

At a more practical level in the area of implementation of permits for projects, participation ensures that those communities affected by the project will have a say in its permitting. This is particularly important when one considers that the research shows that the most harmful projects are usually sited in the most disadvantaged communities,[16,17] a central concern of environmental justice scholars.

Current human rights struggles also take place against the backdrop of unprecedented climate[18] and biodiversity[19,20] crises. In response to the ever-worsening

7 Sherry R Arnstein, 'A ladder of citizen participation' (1969) *Journal of the American Institute of Planners* 35(4), 216–24; DOI: 10.1080/01944366908977225.

8 C Schively Slotterback and M Lauria, 'Building a foundation for public engagement in planning' (2019) *Journal of the American Planning Association* 85(3), 183–97; doi:https://doi.org/10.1080/01944363.2019.1616985.

9 It should be noted that terminology used here, 'Eskimos' and 'Indians', in relation to those North American and circumpolar Indigenous communities were imposed on them by colonisers and were not considered acceptable by those groups either at the time or today. The words 'Inuit' or 'Yupik' are more often used by the circumpolar Indigenous tribes in North America. T Armstrong and H Brady, 'The term Eskimo' (1978) *Polar Record* 19(119), 177–80; DOI: https://doi.org/10.1017/S0032247400001935 . See also M Yellow Bird, 'What we want to be called: Indigenous Peoples' perspectives on racial and ethnic identity labels' (1999) *American Indian Quarterly* 23(2), 1–21; https://doi.org/10.2307/1185964.

10 https://www.thegoodtrade.com/features/intersectional-climate-justice.

11 S A Malin and S S Ryder, 'Developing deeply intersectional environmental justice scholarship' (2018) *Environmental Sociology*, 1–7. Retrieved from https://doi.org/10.1080/23251042.2018.1446711.

12 A de Tocqueville, 'The tyranny of the majority' in *Democracy in America* (1835) Vol 1 ch 7, retrieved from https://www.bard.edu/library/arendt/pdfs/Tocqueville-Democracy2.pdf.

13 T Donovan and S Bowler, 'Direct democracy and minority rights' (1998) *American Journal of Political Science* 42(3),1020–24, retrieved from: https://www.jstor.org/stable/2991742.

14 J V Ocay, 'Tyranny of the majority: Hegel on the paradox of democracy' (2020) *Kritike* 14(2), 6–18; retrieved from https://www.kritike.org/journal/issue_27/ocay_december2020.pdf.

15 D Lewis, 'Direct democracy and minority rights: same-sex marriage bans in the U.S.' (2011) *Social Science Quarterly* 92(2), 364–83; doi: 10.1111/j.1540-6237.2011.00773.x.

16 R Bullard, 'Anatomy of environmental racism and the environmental justice movement' in R Bullard (ed), *Confronting Environmental Racism:Voices from the Grassroots*, (South End Press: Cambridge, MA, 1993) 15–39; retrieved from https://bpb-use2.wpmucdn.com/sites.uci.edu/dist/c/3308/files/2020/03/Bullard_Anatomy-of-Env-Racism-and-the-EJ-Mov.pdf.

17 L Ashwood and K MacTavish, Note 2 above; https://doi.org/10.1016/j.jrurstud.2016.06.017.

18 IPCC Sixth Assessment Report, *Impact, Adaptation and Vulnerability, Summary for Policy Makers* (28 February 2022); retrieved from https://www.ipcc.ch/report/ar6/wg2/resources/spm-headline-statements.

19 IPBES-IPCC *Joint Workshop Report on Biodiversity and Climate Change;* https://ipbes.net/sites/default/files/2021-06/20210609_workshop_report_embargo_3pm_CEST_10_june_0.pdf (H O Pörtner, R J Scholes, J C Agard, *et al,* 2021. IPBES-IPCC co-sponsored workshop report on biodiversity and climate change (IPBES and IPCC, 2021); DOI:10.5281/zenodo.4782538).

20 IPBES, *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (S Díaz, J Settele, E S Brondízio, *et al.* eds, 2019) (IPBES secretariat: Bonn, 2019); https://doi.org/10.5281/zenodo.3553579

climate and biodiversity crises, that have seen widespread disruptive weather events and environmental degradation on an unprecedented scale, as well as producing tens of millions of climate refugees,[21] the 20th century was marked by increasing concern for environmental matters.[22] As environmental degradation continues into the 21st century, so does concern for the environment. This greater awareness and interest in the environment led naturally to an increased demand for public participation in environmental decision-making encapsulated in international law instruments such as the Aarhus Convention.

Public participation has an important role to play in establishing environmental accountability and transparency and ensuring that decision-makers actually fulfil pledges such as those in the Paris Climate Agreement and other international and domestic law instruments. In this way public participation is a key structure in the mechanisms of good environmental governance, providing parallel enforcement. Public participation is an important component of environmental justice, ensuring that publics most affected by programmes or permits have an input into those decisions.

Governments are increasingly failing to act[23,24,25] on the climate crisis with sufficient urgency, possibly finding drastic action difficult to implement when caught in the Bermuda triangle of civil service inertia, lobby groups and the requirement to remain popular and populist to be re-elected. This leads to political 'horse-trading' with various sectors and compromising on climate targets.

Public participation in granular level decisions like project permitting fulfils a number of roles in enhancing the decision-making process.[26]

The Preamble to the Aarhus Convention sets out the following rationales in relation to both access to information and public participation:

- To enhance the quality and the implementation of decisions,
- To contribute to public awareness of environmental issues,
- To give the public the opportunity to express its concerns, and
- To enable public authorities to take due account of such concerns.

Lee and Abbott in 2003[27] highlight a broad spread of rationales for public participation such as improving quality of decision-making, accountability of decision-making bodies, and introducing an element of value judgments into environmental decision-making that are often not captured by the technical and scientific criteria for the decision. They also refer to legitimacy and acceptability of decision-making, by potentially strengthening public support for decision-making.

However, in the 20 years since Lee and Abbot wrote about the positive justifications for public participation, its general acceptance as a public good has been eroded.[28,29] Public participation forms remain contentious. Discourses which associate exercise of public participation rights with opposition to progress or 'NIMBY-ism' are now mainstream in media and politics.[30,31] While the full 'power-sharing' potential of public participation outlined by Arnstein has not been achieved, many state and non-state actors seek to restrict public participation rights in the name of efficient environmental decision-making.

21 UNCHR, *Global Trends*, 2020; retrieved from: https://www.unhcr.org/60b638e37/unhcr-global-trends-2020.
22 V Nanda and G Pring, *International Environmental Law and Policy for the 21st Century* (2nd ed.) (Brill, 2012) at 596.
23 'NECP Tracker reveals: the EU needs better plans to implement the enhanced climate and energy targets' (CAN Europe 5 December 2021); retrieved from https://caneurope.org/necp-tracker-eu-energy-targets.
24 'The world is falling short of its climate goals. Four big emitters show why', *The New York Times* (nytimes.com) 8 November 2022; retrieved from https://www.nytimes.com/interactive/2022/11/08/climate/cop27-emissions-country-compare.html.
25 UNFCC, *Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat* (2022); retrieved from https://unfccc.int/documents/619180.
26 E Petkova, C Maurer, N Henninger *et al.*, *Closing the Gap: Information, Participation, and Justice in Decision-making for the Environment* (World Resources Institute, 2002) at 121.
27 M Lee and Abbott, 'Public participation under the Aarhus Convention' *Modern Law Review* 66(1).
28 M Lee, 'The Aarhus Convention 1998 and the Environment Act 2021: eroding public participation'(2023) *Modern Law Review*; https://doi.org/10.1111/1468-2230.12789.
29 A Wesselink, *et al.*, 'Rationales for public participation in environmental policy and governance: practitioners' perspectives' (2011) 43 *Environment and Planning A* 2688; C Armeniand M Lee, 'Participation in a time of climate crisis' (2021) 48 J Law Soc 549.
30 In Ireland, the government drew criticism for threatening the funding of the foremost environmental NGO, An Taisce National Trust, because they objected to a cheese factory on environmental and climate grounds: 'This is an attack on rural Ireland: Fine Gael TD's call out An Taisce planning appeal'; https://www.wlrfm.com/news/this-is-an-attack-on-rural-ireland-fine-gael-call-out-an-an-taisce-planning-appeal-186401 . Some examples of the media discourse from the US, Ireland and UK using the pejorative term 'NIMBY' to describe those who exercise participation rights, and blaming those who participate for the housing crisis: 'The Next Generation of NIMBY's', *The Atlantic*, 20 July 2022; https://www.theatlantic.com/newsletters/archive/2022/07/the-next-generation-of-nimbys/670590; 'NIMBY's need to realise their objections to new housing harms all of society', *The Irish Examiner,* 26 December 2022; https://www.irishexaminer.com/opinion/commentanalysis/arid-41032490.html; 'NIMBYs are the real reason your children can't buy a house', *The Sunday Times*, 1 January 2023; https://www.thetimes.co.uk/article/nimbys-are-the-real-reason-your-children-can-t-buy-a-house-xphk9cwvz.
31 L Ashwood and K MacTavish, Note 2 above.

This article considers the extent to which public participation in environmental decision-making can be said to be an established or binding norm of international environmental law. This would give it broader applicability than a right confined to the specific contexts where the right is contained in an applicable international legal instrument (for example where a country is a signatory to the Aarhus Convention).

International law instruments relevant to public participation

As mentioned, the growing movement for civil rights in the 1960s led naturally to the concept of public participation as a tool for tackling inequality, and for empowering minorities. It is also deeply rooted in the post-war human rights tradition that begins with the European Convention on Human Rights 1950. The 1948 Universal Declaration on Human Rights mentions the right to participate in the government of the country either directly or through freely chosen representatives.[32]

Since 1990 the number of international treaties which mention participation has dramatically increased,[33] but it is not possible to outline all of them here. This section highlights the most significant developments in terms of threshold moments and expansion geographically.

One of the earliest international law instruments to deal explicitly with public participation is the International Covenant on Civil and Political Rights[34] which was ratified and adopted in 1966. While not focused on environmental rights specifically, Article 19 mentions the right of access to information, and also Article 25 mentions the right to take part in public affairs directly or through representation.

The Covenant also had features later seen in the Aarhus Convention – the obligation to pass laws to give effect to the provisions in the Covenant, and the right to a remedy for breach.

In the same year the International Covenant on Economic, Social and Cultural Rights (IESCR) was signed, which also intimated support for participatory democratic rights.

The link to the human rights tradition can be seen in the 1968 UN General Assembly resolution 'Problems of the Human Environment' (3 December 1968) and the 1969 Declaration on Progress and Development in the Social Arena. Then came the Stockholm Declaration 1972[35] which explicitly references human rights in an environmental context and in turn was explicitly referenced in the Aarhus Convention. Principle 1 of the Stockholm Declaration of Principles states that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Nanda and Pring are of the opinion that this proclamation initiated the formal debate about the relationship between the environment and human rights.[36]

The 1992 Rio Declaration[37]

The Rio Declaration was non-binding but had massive influence on the development of environmental law at international level and at national level. Principle 10 in particular encapsulated the procedural environmental rights, such as the right to public participation and its supporting rights, information and justice. It also emphasised the importance of minority participation of women, youth, and indigenous minorities.

Ebbesson highlights the significance of Principle 10 as representing the development of a consensus on participatory rights among the international community.[38]

The 1991 Espoo Convention[39]

The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) is a UNECE

32 Universal Declaration of Human Rights, 1948; retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf.

33 J Ebbesson, 'Public participation' in *The Oxford Handbook of International Environmental Law* (eds L Rajamani and J Peel) (Oxford University Press: Oxford, 2021).

34 International Covenant on Civil and Political Rights, 1966; retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

35 Declaration of the United Nations Conference on the Human Environment, from Report of the United Nations Conference on the Human Environment, Stockholm, June 1972; http://www.undocuments.net/unchedec.htm.

36 V Nanda and G Pring, Note 22 above, at 598.

37 United Nations, Rio Declaration 1992. Retrieved from UN: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

38 J Ebbesson, Note 33 above, at 354.

39 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) ('the Espoo (EIA) Convention'); https://www.unece.org/fileadmin/DAM//env/eia/eia.htm.

Convention signed in Espoo, Finland in 1991 that entered into force in 1997.

The Convention creates similar impact assessment requirements as those created by the Aarhus Convention, but applicable specifically in a transboundary context (when planning projects or policies which have the potential for adverse effects on other countries). As part of these, it requires public participation in the environmental impact assessment process. Like the Aarhus Convention, it has a compliance committee which adjudicates allegations of breaches of the Convention. One high-profile example of this was the Hinkley power plant.[39a]

The treaty has been ratified by 44 states and the European Union.[40]

The Convention is important as it recognises that environmental threats do not respect borders. It arose out of the Stockholm Declaration 1972, Principle 21, which first floated the idea of states taking responsibility to ensure that their projects did not cause environmental damage in other states or areas beyond the limits of national jurisdiction, and the concept of environmental impact assessment (EIA). In 1982 a Group of Experts on EIA was established under the auspices of the Senior Advisers to ECE Governments on Environmental and Water Problems.

The 1998 Aarhus Convention

The Aarhus Convention[41] arose out of Principle 10 (UNEP) of the Rio Declaration 1992,[42] which states that environmental decisions are best handled with the participation of those concerned. The Convention was unusual in that it was negotiated with NGOs at the table[43] and NGOs remain important actors at the meetings of the parties, with speaking rights. The Convention placed a large degree of importance on including the public in decision-making about the environment. Public participation in environmental decision-making was framed as a fundamental international law right, and increasingly it has come to be framed as a human right.

The Aarhus Convention included other categories of rights in addition to the right of public participation. These include the right to access information about the environment (so that the public would be sufficiently well informed to participate in environmental decision-making), and the right to a remedy in the courts when rights of public participation and information were not fully protected, or environmental laws were breached.

'Access to Justice', as it is known, is a very important plank of the tripartite rights that make up the Aarhus Convention rights in broad terms.

The Convention also provides for environmental impact assessment of projects that have a significant effect on the environment, and high-level plans and programmes affecting the environment (Strategic Environmental Assessment (SEA)), such as government policies and strategies, or county or local development plans. It provides for public participation as an integral part of the environmental impact assessment process of these types of projects. The Parties to the Convention are required to make the necessary provisions (at national, regional or local level) to enable these rights to become effective. The Aarhus Convention has been ratified by 46 State Parties[44] worldwide.

The Bali Guidelines 2010

The guidelines cemented the prevalence of the Aarhus Convention's access principles in international law,[45] exhorting states to provide for access to information, public participation and access to justice.

The 2018 Escazú Agreement

The 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean Adopted at Escazú, Costa Rica, on 4 March 2018',[46] also known as the Escazu Convention, has been described as the Aarhus Convention for Latin America.[47] In truth it goes much further in terms of environmental protection than the Aarhus Convention does, and also incorporates the idea of transboundary impact assessment and transboundary participation, reflecting the Espoo Convention.

39a ACCC/C/2013/91 United Kingdom, available at: https://unece.org/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.14.e.pdf.

40 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en

41 UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998); retrieved (18 November 2019) from http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

42 Rio Declaration 1992, Note 37 above.

43 J Wates, 'The Aarhus Convention and the citizen' (2004); retrieved from www.ec.europa.eu: https://ec.europa.eu/environment/aarhus/pdf/jeremy_wates.pdf.

44 UNECE, Status of Ratification (16 October 2017); retrieved from UNECE: https://www.unece.org/env/pp/ratification.html.

45 Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted by countries at the 11th Special Session of United Nations Environment Program's (UNEP) Governing Council/ Global Ministerial Environmental Forum in Bali, Indonesia, 2010.

46 Available at https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.

47 For example, https://www.clientearth.org/what-can-the-aarhus-region-learn-from-the-escazu-agreement.

The African Charter on Human and Peoples Rights

The Charter similarly recognises the right to participate in political life and government, as well as implied participatory rights in the right to free disposal of natural resource, based on Article 21 of the African Charter on Human and Peoples Rights 21 ILM 58 (1982) (African Charter), as recognised by the African Commission on Human and Peoples Rights (ACHPR).[48]

Other instruments

The International Atomic Energy Agency (IAEA) conventions concerning nuclear activities, while requiring that certain information is made publicly available, are silent on public participation (even the references to environmental assessment do not mention public participation).

The International Law Commission's (ILC) Articles also set out a weaker duty to provide for participation than to provide access to adequate information.

The European Convention on Human Rights and Participation

The Convention and the jurisprudence of the Court of Human Rights have touched upon participation in environmental decision-making as part of the human rights paradigm, finding that failure to provide for participation is a breach of Article 8, the right to respect for private and family life. In *Taskin et al. v Turkey,*[49] the court also considered that the decision-making processes leading to measures of interference must be fair and such as to afford due respect to the interests of the individual safeguarded by the right to respect for privacy and family life. This trend is also apparent in other case law related to the Convention.

Sources of international law

As can be seen from the above discussion, the right to public participation in environmental decision-making has become very widespread as a standalone right, being the subject of binding legal obligations in a vast geographical spread of countries throughout Europe and South America, and also in the US and countries in the African continent. Public participation is a well-established state practice across the Aarhus Convention area of 46 UNECE states, in the EU, the US, and in other countries.[50,51,52] It is very well established in the context of environmental impact assessment and environmental decision-making.

In addition to being widespread as a standalone right, it is also recognised to a similar degree as a component of the prevalent international law obligation to carry out environmental impact assessments. This prevalence points to the possibility of the principle having wider application outside of the strict treaty terms, and being recognised as a norm, a principle or a customary rule of international law. The importance of this would be that the obligation could have broader application than just among the countries which were signatories to the various agreements mentioned, and that other parties could be bound by the obligation despite not having signed or ratified the relevant treaties. The usual starting point for the discussion of the status of a concept in international law is usually the Statute of the International Court of Justice (ICJ).[53,54] Article 38(1) of the Statute[55] identifies four accepted sources of international law:

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.

48 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights/Nigeria, Communication 155/96 (2001), Fifteenth Annual Activity Report of the African Commission on Human and Peoples Rights 31 at para 55 (SERAC).

49 *Taskin and Others v Turkey*, No 46117/99, ECHR 2004-X at para 99 (*Taskin*); https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67401%22]}

50 J Ebbesson, *Public Participation in Environmental Matters – International Human Rights Developments in Europe and Africa*, Faculty of Law, Stockholm University, Research Paper No 58 (2018).

51 A Akerboom and Craig R Kundis, 'How law structures public participation in environmental decision making: a comparative law approach' (2022) *Environmental Policy and Governance*; https://doi.org/10.1002/eet.1986.

52 A Hough, 'Public participation rights in the EU legal framework' (2017) *Environmental Liability* 3.

53 D Rothwell, S Kaye, A Akhtar-Khavari, *et al.*, 'Sources of international law'. In *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press: Cambridge, 2018), 45–109; doi:10.1017/9781316998557.003.

54 G Hernández, ' Sources of international law'. In *International Law* (Oxford University Press: Oxford, 2022); retrieved from https://www-oxfordlawtrove-com.ucc.idm.oclc.org/view/10.1093/he/9780192848260.001.0001/he-9780192848260-chapter-2 (25 January 2023).

55 Available at https://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

From this can be extrapolated different categories of sources of international law which include treaty rules, principles, customs and judicial/academic interpretation of the law. Article 38(1) is widely considered to be inadequate[56,57] to capture the full spectrum and range of international laws and their sources, but provides a rudimentary categorisation of the most common and accepted sources.

Public participation in environmental decision-making is established as a rule of international law via its establishment in the various treaties discussed above, in particular the Aarhus Convention, the Espoo Convention and the Escazú Agreement.

Public participation was enunciated as a principle of international law in the soft law but highly influential Principle 10 the Rio Declaration 1992, where it was positioned as an essential element of the Bruntland Declaration concept of sustainable development. The principle was further fleshed out in Agenda 21 and most recently was included in the 16 Framework Principles of Human Rights and the Environment established in 2016 by the Special Rapporteur on Human Rights, John Knox,[58] and was intended to identify environmental human rights principles which had the status of norms of international law. It is widely recognised in academic discussion as a 'leading environmental principle'.[59]

In order to determine whether this is sufficient in order to declare it an 'principle' of international environmental law, regard must be had to the ILC discussion of what constitutes a principles of international environmental law in its First and Second Reports on Principles of Law[60] where they stated that establishing an international legal principle involves: *'first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal system'*.

'Norms' of international law

A 'norm' of international law is a principle which has acquired the status of a widely accepted legal concept creating a standard for expected behaviour. Kent[61] draws on Sikkink and Finnemore's[62] model to assert that public participation has acquired the status of a norm, and is emerging as a customary rule of international law. He cites the definition of a norm drawn from international relations (IR) literature: 'collective expectations about proper behavior for a given identity', or as a 'standard of appropriate behavior for actors with a given identity'. From review of Sikkink and Finnemore's three-step life cycle of a norm, he is able to conclude that public participation has passed through all the steps to become a norm.

However not all norms are created equal.

Article 53 of the Vienna Convention clearly envisages certain norms will have stronger force of law than others, and elaborates a distinction of what it terms 'peremptory norms' (the *jus cogens*) which are those that have the power to displace other forms of international law where they conflict, even treaties. Article 53 states in relation to peremptory norms:

> Treaties conflicting with a peremptory norm of general international law ('jus cogens') A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

There is no discussion in the literature of whether the right falls into the *jus cogens* but given its relatively recent emergence from soft law it seems unlikely.

Customary international law

Article 38(1)(b) of the Statute of the International Court of Justice equates customary international law with 'general practice accepted as law'.[63]

The ILC Second Report on Principles of General Law goes on to distinguish the two-step process for establishment of an international law principle from the

56 S Besson and J d'Aspremont, 'The sources of international law: an introduction'. In *The Oxford Handbook of the Sources of International Law* (eds S Besson and J d'Aspremont) (Oxford University Press: Oxford, 2017), 1–39.

57 M Shaw, *International Law* (Cambridge University Press: Cambridge, 2021) at 73.

58 UN Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, 37th Sess, 19 January 2018, A/HRC/37/59 para 8; retrieved from https://www.ohchr.org/sites/default/files/FrameworkPrinciplesUserFriendlyVersion.pdf.

59 N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff, 2008) at 198.

60 International Law Commission, *Second Report on the General Principles of Law*, A/CN.4/741 (2020); retrieved from https://digitallibrary.un.org/record/3868897?ln=en.

61 A Kent, 'The evolving concept of public participation: from Rio to Mauritius'. Chapter 4 in *Public Participation and Foreign Investment Law* (Brill Nijhoff: Leiden, The Netherlands, 2021); doi: https://doi.org/10.1163/9789004397668_005.

62 M Finnemore and K Sikkink, 'International norm dynamics and political change' (1998) 52 *International Organization* 887, at/891.

63 J J Paust, 'Customary international law: its nature, sources and status as law of the United States' (1990) 12 MICH. J. INT'L L. 59; available at: https://repository.law.umich.edu/mjil/vol12/iss1/2.

process for establishment of a customary international law:

> 108. In its conclusions on identification of customary international law, taken note of in General Assembly resolution 73/203 of 20 December 2018, the Commission determined, in conclusion 2, that, '[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)'. With respect to the possible forms of practice, conclusion 6 refers to, inter alia, 'legislative and administrative acts', as well as 'decisions of national courts'. Furthermore, as regards the forms of evidence of opinio juris, conclusion 10 includes 'decisions of national courts'.

This traditional two-step approach to establishment of a rule of customary international law is echoed across the literature.[64] For example, Woodhouse[65] highlights the ICJ jurisprudence in the Nicaragua case where the ICJ determined that custom is constituted by two elements, the objective one of a 'general practice' and a subjective one 'accepted as law', reflecting the previously highlighted two-step process for identifying customary rules of international law.

Of the two steps, the general practice of states is easier to establish, being objectively observable. The criterion of *opinio juris* requires an examination of the subjective understanding of the states when carrying out the practice, and it is obviously difficult to demonstrate this for a corporate entity such as a state. It must be shown that the practice was carried out on the understanding it was lawful, and in acceptance of the binding nature of the obligation. This is subjective and paradoxical,[66] requiring that a state act as if an obligation is legally binding before it can become legally binding. As set out by the ILC (above), *opinio juris* includes decisions of national courts.

Roberts[67] emphasised the importance of judicial decision-making in establishing customary law, arguing that although 'the existence and content of custom is usually determined by states and academics … the [International] Court [of Justice] remains the ultimate arbiter in some cases'.

In 2003, Woodhouse[68] did not feel that there was sufficient evidence to support the contention that public participation was a rule of international law, but felt that there was evidence that it had potential to crystalise into one. He states that it is clear from ICJ cases such as the *North Sea Continental Shelf* that a provision contained in a treaty had the potential to crystalise into a customary rule of international law, binding even those states that had not signed up to the treaty.[69]

Duvic Paoli stated (in 2013) that it remains difficult to evaluate whether a norm has become customary.[70] Its appearance in several different legal instruments can be indicative, as can judicial decisions of international courts and tribunals recognising its status.[71]

Kent[72] in 2021 suggests that the threshold has not quite been reached but that the right to public participation in decision-making is approaching the status of a customary law.

Ebbesson,[73] on the other hand, suggests that the threshold has been met when the plethora of treaties, human rights instruments, declarations and jurisprudence dealing with public participation are assessed. He states that this is also supported by intergovernmental policy documents, declarations, decisions, recommendations, guidelines and action plans, which he says are 'fragments of a normative pattern which can be fully depicted only if these documents are studied together with the relevant global and regional treaty regimes and jurisprudence'.

Some examples of the jurisprudence that demonstrates that public participation and other Aarhus principles have become accepted as general rules of international law include the ECHR case of *Taskin v Turkey*.[74] In this case the ECHR found that the Aarhus Convention was the relevant instrument even though Turkey had not ratified it. The application of the Aarhus principles, and public participation requirements in particular, to a country that had not signed up to a treaty containing those principles, is highly suggestive of establishment of a general rule.

Other relevant ECHR decisions which deal with the Aarhus Convention, public participation and other access rights include *Guerra and Others v Italy* (*Guerra*),[75] *McGinley and Egan v UK* (*McGinley*),[76] and *Tatar v Romania* (*Tatar*).[77]

The Inter-American Commission of Human Rights recognised that Article 21 of the American Convention on Human Rights includes a right to public participation in the case of Indigenous peoples.[78]

64 For example, G Hernández, Note 54 above; D Rothwell, S Kaye, A Akhtar-Khavari, *et al.*, Note 53 above.

65 M Woodhouse, 'Is public participation a rule of the law of international watercourses?' (2003) 43(1) *Natural Resources Journal*/ 137.

66 M Shaw, Note 57 above.

67 A Roberts, 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 AJIL 772.

68 M Woodhouse, Note 65 above.

69 *North Sea Continental Shelf Cases,* 20 February 1969, 8 ILM 340.

70 L-A Duvic Paoli, 'The status of the right to public participation in international environmental law: an analysis of the jurisprudence' (2013) *Yearbook of International Environmental Law*, 32(1), 80–105; doi:10.1093/yiel/yvt062

71 ibid, at 83.

72 A Kent, Note 61 above.

73 J Ebbesson, Note 33 above, at 354.

74 *Taskin and Others v Turkey*, Note 49 above.

75 *Guerra and Others v Italy* No 14967/89 ECHR 1998-I at para 60.

76 *McGinely and Egan v UK* No 21825/93 and 23414/94 ECHR 1998-III at para 97.

77 *Tatar v Romania* No 67021/01 ECHR 2009 at para 88.

78 *Maya Indigenous Community of the Toledo District v Belize* Case 12-053 (2004) Inter-Am Comm HR, Report 40/4.

The African Charter on Human and Peoples Rights similarly recognises the right to participate in political life and government, as well as implied participatory rights in the right to free disposal of natural resource based on Article 21 of the African Charter on Human and Peoples Rights 21 ILM 58 (1982) (African Charter), as recognised by the African Commission on Human and Peoples Rights (ACHPR).[79]

In the Pulp Mills case[80] the ICJ was focused more on the provision of information regarding environmental assessment that was not done, but this also implies the right to participate as the information in that case would have been provided in order to facilitate participation.

However, the argument that public participation in environmental decision-making is emerging as a customary rule of international environmental law is further supported indirectly by the recognition of environmental impact assessment as a norm of international law,[81] and this is usually accepted in broad terms to involve an element of public participation. While EIA as an international rule of law does not contain specified general requirements as to its conduct, broad contours of common agreement can be discerned from the common elements of the treaties such as the Aarhus Convention and Espoo Convention, and judgments, such as early assessment of environmental impacts, provision of information to the public concerned, consultation or participation of the public concerned and access to justice. Marsden[82] posits that EIA in the international law context is composed of the obligations of consultation, participation and non-discrimination. As pointed out by many commentators, a customary international law is one that is known, widely accepted and implemented. The public participation principle has not of itself been subject to a wide range of judgments on the international stage, but EIA has been mentioned frequently in the jurisprudence of the international courts.

While the right to public participation is very well established in the international law instruments and the actions of states, development is slower in terms of court decisions dealing with an application of the right.

One area that has received little attention is the link between the establishment of environmental impact assessment and public participation. Environmental impact assessment is a global phenomenon and has broadly similar contours across the globe, including having some form of consultation and/or participation. Therefore, if environmental impact assessment is recognised on a transboundary basis as part of international customary law, then clearly public participation must be included under that umbrella term, establishing a potential alternative basis supporting the arguments for the right.

In summary, customary international law is established by state practice and *opinio juris*[83] and both of these are evident. Public participation is a well-established state practice across the Aarhus Convention area of 46 UNECE States, in the EU, the US, and in other countries.[84,85,86] It is very well established in the context of environmental impact assessment and environmental decision-making.

Conclusion

As can be seen from the above, there appears to be sufficient evidence upon which to base the assertion that public participation is a principle of international environmental law that has gained acceptance as a customary rule and norm of international law. There does not appear to be any basis for asserting it as a peremptory norm, however. Sands *et al*. (2018) highlight that the consequences of the distinction between principles and rules/customary law are that principles embody legal standards in a general sense, and are not commitments that specify particular actions for state actors, whereas rules and customs can do so.[87] As discussed above, the recognition of public participation as a norm of international law would lead to it binding countries even where they were not party to an international agreement containing the right. However, it remains to be seen whether the international courts and tribunals will choose to realise the right as a general customary rule of international law, or whether they will shy away from doing so in light of the general trend of

79 Note 48 above.

80 Pulp Mills on the River Uruguay (*Argentina v Uruguay*) available at https://www.icj-cij.org/en/case/135.

81 N Bremer, 'Postenvironmental impact assessment monitoring of measures or activities with significant transboundary impact: an assessment of customary international law' (2017) *Review of European, Comparative & International Environmental Law*, 26(1), 80–90.

82 `S Marsden, 'Public participation in transboundary environmental impact assessment: closing the gap'. In B Jessup and K Rubenstein (eds) *Environmental Discourses in Public and International Law* (Cambridge University Press: Cambridge, 2012) at 238.

83 P Merkouris, 'Interpreting customary international law - you'll never walk alone'. Chapter 16 in P Merkouris, J Kammerhofe and N Arajärvi (eds) *Part IV - Interpretation of Customary International Law* (online publication, Cambridge University Press: Cambridge, 2022).

84 J Ebbesson, Note 50 above.

85 A Akerboom, and Craig R Kundis, Note 51 above.

86 A Hough, Note 52 above.

87 P Sands, J Peel, A Fabra *et al., Principles of International Environmental Law* (4th ed.) (Cambridge University Press: Cambridge, 2018); doi:10.1017/9781108355728.

governments seeking to restrict access rights Until this happens it is likely to remain contested by countries.

Also, it is important to highlight that recognition through international courts and tribunals establishing the right firmly in the international law frame is not sufficient to ensure that the right is respected and that people are able to avail themselves of the right.

There are weaknesses inherent in the international law system such as its consensus basis (which can be withdrawn at any time). One major weakness is the lack of prospective protection which means that usually rights can only be invoked by individuals suffering harm. The level of harm required to be met is usually defined by the domestic standards of the state concerned, and states are afforded a broad margin of appreciation as to how they implement the edicts of international law, in order to respect their sovereignty (Barstow Magraw, 2014),[88] as long as the authorities making the decision respect domestic environmental laws.

Public participation plays a vital role as an important check and balance on state power in a modern democracy, and in securing the rule of law by ensuring that state power is exercised in forums where it can be observed by the population. In this era of need for urgent action on climate and biodiversity, failure by governments to act, and worsening inequality particularly for minorities, public participation has a key role to play in terms of ensuring action on these problems occurs in a just, fair and distributive manner. The recognition of the right to participate in environmental decisions as a general rule of international law would enhance its status in the eyes of governments, providing a bulwark against the erosion of participatory rights, and protecting the voice of those most affected by environmental degradation and climate change.

88 D Barstow Magraw, 'Public participation: rule of law and the environment' (2014) *Environmental Policy and Law,* 44(1) at 201.