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# Is Public Participation a Rule of the Law of International Watercourses

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## ABSTRACT

*At present the existence of a rule requiring public participation in the law of international watercourses is unclear. Whilst States are party to an increasing number of international agreements, their practice is also influenced by non-binding sources of law. To date, no study has been undertaken to determine such a rule with respect to all recognized sources of international law. This study examines sources of international law recognised in the Statute of the International Court of Justice. Whilst no rule requiring public participation in the law of international watercourses can presently be recognized, it is shown that a rule may crystallize in the future as changes in State practice contribute to the sources of international law and offer a substantive basis upon which to define a general principle of law. Further analysis of subsidiary sources of non-binding law shows that whilst the international community is suggesting that the recognition of a range of different public entities is required to enable effective public participation, binding sources of law for the present only recognize the public as a homogeneous single entity. This is hypothesized to be a key factor preventing State practice from crystallizing public participation as a rule of the law of international watercourses. The means to identify key indicators of change in State practice are identified, which will enable the emergence of a new rule to be monitored; a present course of action is suggested for States seeking to promote public participation in international watercourse management.*


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## ABBREVIATIONS

| | |
|---|---|
| DAC | Development Assistance Committee (of OECD) |
| EBRD | European Bank for Reconstruction and Development |
| EIA | Environmental Impact Assessment |
| ICJ | International Court of Justice |
| ICPR | International Commission on the Protection of the Rhine |
| IFI | International Financial Institutions |
| ILA | International Law Association |
| ILM | International Legal Materials |
| ITCSD | International Centre for Sustainable Development |
| IWRM | Integrated Water Resource Management |
| NGO | Non Governmental Organisation |
| OECD | Organisation for Economic Co-operation and Development |
| REC | Regional Environmental Centre for Eastern and Central Europe |
| SADC | Southern African Development Community |
| SARL | Sustainable Agriculture Rural Livelihoods (Programme of the International Institute for Environment and Development Sussex UK) |
| UNCCD | United Nations Convention to Combat Desertification |
| UNCED | United Nations Conference on Environment and Development |
| UNECE | United Nations Economic Commission for Europe |
| UNED | United Nations Environment and Development Forum |
| UNTS | United Nations Treaty Series |
| WWF | World Wide Fund for Nature (formerly the World Wildlife Fund) |
| Yb IEL | Year Book of International Environmental Law |

## 1. INTRODUCTION

Achieving real public participation in international watercourse management depends to a large extent upon States party to international agreements transforming their written intentions into acceptable practice. A State is likely to be party to a range of treaties containing relevant yet differing requirements, and may also be influenced by non-State stakeholders including international financial institutions (IFIs) and civil society. In the absence of a single system of rules, this can create confusion in the determination of State practice. At present, State practice regarding public participation in international watercourse management is being determined on a piecemeal basis when relevant treaty provisions enter into force. No consolidated attempts have been made to determine State practice regarding public participation consistent with the entire range of international obligations assumed by States. In aiming to enable a State to determine its obligations regarding public participation in a more effective way, this research examines whether in fact a rule requiring public participation in international watercourse management exists and seeks to identify the legal normativity of that rule.

The research is divided into two parts; the first examines international conventions, international custom and recognised general principles of law to determine if a rule of public participation exists. The second part considers subsidiary non-binding sources of law. The first component concludes that a rule of public participation in the law of international watercourse cannot presently be determined. This conclusion focuses the subsequent analysis of subsidiary sources of law upon addressing whether such a rule is presently emerging.

Over the past ten years, State practice regarding public participation in the law of international watercourses has undergone rapid and dramatic change. In the early 1990s States were declaring that "[o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision making"[1] and that "the need for new forms of participation has emerged."[2] Though initially expressed through non-binding instruments such as Agenda 21,[3] adopted by the United Nations Conference on Environment and Development (UNCED) on June 14, 1992, and the Rio

1. Agenda 21, approved June 14, 1992, UN GAOR, UN Doc. A/CONF.151/26/Rev. 1, Ch. 23, ¶ 2, *available at* http://www.un.org/esa/sustdev/agenda21text.htm#pre (last visited Feb. 20, 2003).

2. *Id.*

3. *Id.*

Declaration approved on June 5, 1992,[4] these concerns quickly found more specific and binding expression in a range of environmental treaties.

The 1991 Espoo Convention[5] is concerned with public participation in environmental impact assessment, and the 1992 Helsinki Convention[6] requires transboundary watercourse pollution data to be made available to the public. The 1994 Desertification Convention[7] requires extensive public participation to combat drought and desertification. Regional and multi-lateral river basin conventions such as the 1997 Danube Convention[8] and the 1998 Rhine Convention[9] require increasingly specific forms of public participation, and the European Water Framework Directive of 2000[10] introduced a requirement for public participation across Europe. European member States are presently transposing its requirements into domestic legislation.[11] In 2001 the Aarhus Convention[12] entered into force with some 44 States party to it.[13] Developed under the framework of the Helsinki Convention,[14] the Aarhus Convention elaborates the requirements of public participation in international watercourses still further. However, the global United

4. Rio Declaration on Environment and Development, approved June 5, 1992, 31 I.L.M. 874 [hereinafter Rio Declaration].

5. United Nations: Convention on Environmental Impact Assessment in a Transboundary Context, adopted Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Espoo Convention].

6. United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312 (entered into force Oct. 6, 1996) [hereinafter Helsinki Convention].

7. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, approved June 17, 1994, 33 I.L.M. 1328, 1335 [hereinafter Desertification Convention].

8. Convention on Cooperation for the Protection and Sustainable Use of the Danube River, 1994 (entered into force Oct. 22, 1998), *available at* http://eelink.net/~asilwildlife/DanubeConvention.html (last visited Feb. 19, 2003) [hereinafter Danube Convention].

9. Convention on the Protection of the Rhine, Jan. 28, 1998, *available at* http://www.iksr.org/Convention%20on%20the%20Protection%20of%20the%20Rhine.doc (last visited Feb. 19, 2003) [hereinafter Rhine Convention].

10. Directive 2000/60/EC of the European Parliament and of the Council of Oct. 23, 2000, Establishing a Framework for Community Action in the Field of Water Policy, Doc. No. 300L0060, Official Journal L 327, 22/12/2000 P.0001 (entered into force Oct. 23, 2000), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_327/l_32720001222en00010072.pdf (last visited Feb. 18, 2003) [hereinafter European Water Framework Directive].

11. Rivers, Lochs, Coasts: The Future for Scotland's Waters (Scottish Executive, 2001) (public consultation paper on the transposition of the Water Framework Directive), *available at* http://www.scotland.gov.uk/consultations/environment/ffsw-00.asp (last visited Feb. 19, 2003).

12. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention].

13. *See infra* note 87.

14. *See* Helsinki Convention, *supra* note 6.

Nations Watercourses Convention of 1997,[15] which has yet to enter into force, contains no explicit requirement for public participation.

States party to these treaties are consenting to requirements for participation that vary in purpose, scope, and approach. The Helsinki Convention requires public access to information;[16] the European Water Framework Directive[17] requires public participation in specified stages of river basin planning;[18] the Aarhus Convention[19] requires public access to information, decision making, and justice; whilst the global framework provided by the UN Watercourses Convention[20] has no requirement to provide for public participation. A State may enter into agreements specific to shared river basins or common marine resources, each of which may provide for different forms of public participation.[21]

In addition to this potential for confusion, States are also influenced by guidelines for public participation arising from a number of international organisations. Extensive guidelines have been produced under the Ramsar Wetlands Convention.[22] World Bank procedures[23] on international watercourse projects do not have a specific requirement for public participation, whilst those of the European Bank for Reconstruction and Development (EBRD) do.[24] The World Wide Fund for Nature (WWF) is actively advocating and proposing specific guidance on how public participation is to be conducted[25] and suggests a broad

15. United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 36 I.L.M. 700 [hereinafter UN Watercourses Convention]. As of September 27, 2002, the Parties to the Convention are Finland, Hungary, Iraq, Jordan, Lebanon, Namibia, Netherlands, Norway, Qatar, South Africa, Sweden, and Syria. Signatories are Cote d'Ivoire, Germany, Luxembourg, Paraguay, Portugal, Tunisia, Venezuela, and Yemen. Entry into force requires 35 ratifications.

16. *See* Helsinki Convention, *supra* note 6, art. 16.

17. *See* European Water Framework Directive, *supra* note 10.

18. *Id.* art. 14.

19. *See* Aarhus Convention, *supra* note 12.

20. *See* UN Watercourses Convention, *supra* note 15.

21. Germany, for example, borders nine other States and two seas and shares five major transboundary rivers.

22. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245, 11 I.L.M. 969 (entered into force Dec. 21, 1975), *available at* http://www.ramsar.org/key_conv_e.htm (last visited Feb. 20, 2003) [hereinafter Ramsar Convention].

23. WORLD BANK TECHNICAL PAPER NO. 414, INTERNATIONAL WATERCOURSES, (S. Salman & L. Boisson de Chazournes eds., 1998), OP 7.50, BP 7.50, GP 7.50. 193, *available at* http://lnweb18.worldbank.org/ESSD/essdext.nsf/52DocByUnid/22B996BFA167775B8525 6BD40069B1F6?Opendocument (last visited Feb. 24, 2003).

24. EBRD Public Consultation Procedures, *available at* http://www.ebrd.com/about/policies/pip/pip.pdf (last visited Feb. 24, 2003).

25. A. Harrison et al., *WWF's Preliminary Comments on Public Participation in the Context of the Water Framework Directive and Integrated River Basin Management, available at* http://www.panda.org/downloads/europe/WFD-WWFpart.pdf (last visited Feb. 18, 2003).

role for NGOs in the transposition of the European Water Framework Directive[26] into national law. The Regional Environmental Centre for Eastern and Central Europe (REC) also produces guidelines on public participation on environmental matters.[27] Green Cross International proposes that "[e]ngineering projects on international waterways should be undertaken only after serious consideration for the people and environment of the entire basin."[28] During the Second World Water Forum in The Hague in 2000, NGOs and Trade Union Major Groups issued a statement rejecting the report of the World Water Commission and the vision document produced by the World Water Council. This rejection was due, in part, to a failure to recognise that "[a]ccess to information, as a prerequisite for participation in decision-making processes, is a fundamental right. Legal and institutional mechanisms must be put in place for the empowerment of communities to participate at all levels. Access to justice must be guaranteed."[29]

The International Law Association (ILA) sees the role for public participation in international watercourses as a means of legitimising State actions and believes that "without a sense of legitimacy, attempts to govern will founder on popular resistance, whether active or passive."[30] The Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD) has researched the relationship between participatory development and good governance and recognizes that "investment of development resources in democratic governance will contribute to more accountable, transparent and participatory societies conducive to development progress."[31]

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26. WORLD WILDLIFE FOUNDATION, PUBLIC PARTICIPATION, NGOS AND THE WATER FRAMEWORK DIRECTIVE IN CENTRAL AND EASTERN EUROPE (2001), *available at* http://www.panda.org/downloads/europe/wfd-cee.pdf (last visited Feb. 18, 2003).

27. KAREL VAN DER ZWIEP, PUBLIC PARTICIPATION AND INTERNATIONAL AGREEMENTS, REGIONAL ENVIRONMENTAL CENTRE FOR EASTERN AND CENTRAL EUROPE (REC), *available at* http://www.rec.org/REC/Publications/BndBound/ch3.html (last visited Feb. 18, 2003).

28. GREEN CROSS INTERNATIONAL, NATIONAL SOVEREIGNTY AND INTERNATIONAL WATER COURSES 60 (2000), *available at* http://www.gci.ch/pdf/Sovereignty.pdf (last visited Mar. 19, 2003).

29. UNED Forum, Perspectives on Freshwater: Issues and Recommendations of NGOs, at 7, ¶ 5 (2000), *available at* http://www.earthsummit2002.org/freshwater/Freshwater%20Report.pdf (last visited Feb. 19. 2003).

30. International Law Association, The Revised Helsinki Rules on the Equitable and Sustainable Uses of the Waters of International Drainage Basins, Sixth Draft—With Commentary, Cmt. on Article 47 (Dec. 2001) (working document on file with author) [hereinafter ILA Revised Helsinki Rules].

31. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DEVELOPMENT ASSISTANCE COMMITTEE, FINAL REPORT OF THE AD HOC WORKING GROUP ON PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE 2 (1997) (OECD Synthesis Report), *available at* http://www.oecd.org/pdf/M00003000/M00003000.pdf (last visited Feb. 19, 2003).

Conceptual tools such as Integrated Water Resource Management (IWRM)[32] are increasingly holistic in their approach and identify an ever-widening range of stakeholder inputs that are to be considered in order to arrive at good watercourse management. Identifying State practice with regard to public participation in the management of international watercourses is quite evidently becoming more complex and increasingly important. It is therefore remarkable that no study has yet been undertaken to determine if the range of expressions of requirements for public participation in international watercourse treaties do in fact represent a binding rule upon which compliant State practice could be determined. If the requirements for public participation in international watercourses differ depending upon which treaty provisions the State applies, it is unlikely that effective stakeholder participation will be achieved.[33] A piecemeal approach to the transposition of these requirements into domestic legislation is likely to be an inefficient and costly process;[34] the increasing use of regulatory impact assessments in the European Community is an important tool for streamlining this process.[35]

In order to determine if a rule of public participation in the management of international watercourses is recognised by States, it is essential to establish a clear basis for the identification of acceptable sources of law for that determination. There is considerable misunderstanding as the term "sources of law" has "a technical meaning related to the law making process"[36] and does not imply a physical location such as a treaty collection. Here the use of "source" is analogous to "source of electricity" when we refer to the means of generation. International law can be "generated" by State consent through treaties and conventions, it can be "generated" by the practice of States, which amounts to customary laws, and it can be "generated" from general

32. IRC, INTEGRATED WATER RESOURCE MANAGEMENT IN WATER AND SANITATION PROJECTS, (2002), *available at* http://www.irc.nl/pdf.php3?file=publ/op31e.pdf (last visited Feb. 19, 2003).

33. Whilst it is recognised that the Convention on the Law of Treaties, *infra* note 52, art. 31(3), 32(a) & (b), provides for the resolution of this situation with respect to the validity of treaties, it remains for the State to meet its obligations under those treaties.

34. For example, the Scottish Executive has conducted a number of public consultations regarding water over the past 18 months; consultation on the European Water Framework Directive was conducted subsequent to a consultation on a Water Services Bill, neither of these consultations called for explicit input regarding the Aarhus Convention. *See* http://www.scotland.gov.uk/consultations (last visited Feb. 19, 2003).

35. The Cabinet Office, Regulatory Impact Unit, The Guide to Better European Regulation. (produced by Central Office of Information for Cabinet Office UK (undated) Ref J.99-3777/9907/D80).

36. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 35 (7th ed. 1977).

principles of law at the domestic level. The definition therefore reflects the important fact that international law exists not only as a result of written agreements, but also because the inter relationship between States and established legal principles results in consent to a binding norm of conduct. Other sources may be considered such as judicial decisions and the writings of publicists, but these are subsidiary and cannot on their own determine that a rule of law exists. Thus, the determination of a rule in international law is not possible from examining only a single source. This research therefore adopts those sources of law recognised in the Statute of the International Court of Justice (ICJ).[37] It will be shown that it is not yet possible to determine a rule of public participation in international watercourses using these accepted sources.

Subsidiary sources are examined to question why this is not possible. This second part of the research develops an analytical methodology from posing the simple question of who participates. This question exposes the significant difference between how the public are presently recognised in primary sources of law and the much wider recognition expected by subsidiary sources of law. It is shown that whilst international declarations and "how to" guidelines are proposing that various types of public entities should participate in different ways and at different levels, primary sources of law as yet only recognise the "public" as a homogeneous entity. This mismatch of definitions for recognising the public is suggested as a primary reason for the failure of States to establish consistent practice to enable public participation in the management of international watercourses and thus why no clear international law has yet crystallised.

## 2. DETERMINING A RULE OF PUBLIC PARTICIPATION IN INTERNATIONAL LAW

Relying upon domestic municipal law to create an enabling environment for public participation in a transboundary context will be limited by the jurisdiction of that State. If a framework for participation is to be recognised by all States and international non-State actors, then it must seek its establishment in a separate international system.[38] For example, it cannot be expected that United Kingdom domestic practice

37. Statute of the International Court of Justice, *reprinted in* 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949 1153, 1163, art. 38 (Charles I. Bevans ed., 1969).

38. Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 1957 BRIT. Y.B. INT'L L. 10. Lord McNair's opinion was made with regard to international business organisations that could no longer rely upon domestic jurisdiction to regulation their international activities.

could regulate the participation of a British international NGO such as WaterAid in its activities in Nile Basin States. But the determination of an international rule of law not only recognises the presence of an international legal system, it also establishes that a rule exists because a substantive norm can be identified. Such a rule dealing with " the conduct of States and of international organisations and their relations *inter se*"[39] must therefore be accepted in practice as "legally binding by States...because they are useful to reduce complexity and uncertainty."[40] However, in order to be binding, a rule must establish criteria for compliance if it is to be enforced by a legal system.

### 2.1 Sources of International Law

"The international legal system comprises many norms resulting from acts of will. The will cannot produce any legal effects by itself; an existing norm must endow it with legal effect."[41] Sources of law to be applied in the determination of such norms are established in Article 38(1) of The Statute of the International Court of Justice (ICJ)[42]:

> 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.

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987).
40. *See* MALANCZUK, *supra* note 36, at 7.
41. Christian Dominicé, *Methodology of International Law, in* III ENCYCLOPEDIA OF PUB. INT'L L. 354, 357 (Rudolf Bernhardt ed., 1997).
42. *See* Statute of the International Court of Justice, *supra* note 37.

"There is no generally accepted definition of the methodology of international law,"[43] and thus no implied hierarchy in the sources of law provided in the ICJ statute. A determination must therefore consider all of these sources as they represent not only laws "laid down" through a process of reasoning based upon fact and principles but also sources resulting from observation and recognition by the subject of that law. A conventional "laid down" rule for example may be displaced by a recent practice having become an effective new international custom. For these reasons, an adequate determination of a rule of international law depends not only upon the depth of analysis of a particular source, but also upon the analysis of an adequate scope of sources.

An ongoing project of the International Law Association (ILA)[44] bases its determination of a rule of public participation only upon sources of law found in treaties. The Commentary supporting a proposed article on Public Participation[45] determined that recent treaty provisions for public participation "are so numerous...there can be little doubt that a right of public participation has now become a general rule [sic] of international law." Whilst it can be said that treaty provisions reflect a general will on behalf of nations to enable a process of public participation, it is still necessary to determine if the actual practice of participation qualifies as customary law or a general principle, to determine a norm by which these States would consent to be bound. This problem of analogy [46] can be seen in the context of State practice in Uzbekistan, an evolving democratic nation that inherited a legacy of transboundary water resource mismanagement in the Aral Sea Basin. Its commitment to enabling public participation can be determined from a number of "highly qualified publicists"[47] as well as actual practice.[48] However, Uzbekistan has yet to consent to either the Aarhus or Helsinki Conventions. Given that the establishment of democracy in that State has only been possible in the last decade, the means to "ensure that any

43. *See* Dominicé, *supra* note 41, at 355.

44. ILA Revised Helsinki Rules, *supra* note 30, art. 47 and cmt.

45. *Id.*

46. *See* Dominicé, *supra* note 41, at 334.

47. ISLAM KARIMOV, UZBEKISTAN ON THE THRESHOLD OF THE TWENTY FIRST CENTURY 112 (1998), *available at* http://www.gov.uz/apru/library/uzb21cent.htm (last visited Feb. 19, 2003). Karimov, the President of Uzbekistan, provides three criteria to determine the degree of democracy in society; all are concerned with the extent to which the public can participate in governance.

48. A.A. DJALALOV, NATIONAL COORDINATOR OF GEF PROJECT, IMPLEMENTATION OF THE GOVERNMENT OF REPUBLIC OF UZBEKISTAN, WATER AND ENVIRONMENTAL RESOURCES MANAGEMENT FOR THE ARAL SEA BASIN (2000) (on file with author). This pamphlet launches an unprecedented programme to educate the public on water issues, a necessary prerequisite to enabling access to information and subsequent participation.

person...has access to a review procedure before a court of law"[49] have yet to be developed. It follows that although the Aarhus Conventions provisions on public participation are likely to be recognized by Uzbekistan, they are unlikely to be capable of implementation at the present time. Consequently, it is not possible to suggest that general references to "public participation" in treaty provisions determine a rule of international law, when the normative content of such provisions are not only different but also do not appear analogous to the actual context in which the rule is to be applied. Dominicé suggests that "[o]nly the knowledge of the manner in which these norms might exist or be created can serve as...a guide [to the determination of a rule of international law]."[50] If we accept that our determination has to be based upon a broad choice of recognised sources of international law, then the most widely accepted definition of these sources is to be found in the statute of the ICJ.

## 3. PUBLIC PARTICIPATION IN WATER TREATY LAW

### 3.1 The General Nature of Treaties

In order to determine that a treaty contains a rule of international law, that treaty must first be shown to be "validly concluded and...in force."[51] The Convention on the Law of Treaties[52] provides the means for this determination. However, "it may happen that a conventional rule falls into abeyance as a result of a different practice having become effective and having generated a custom replacing that rule."[53] Therefore, a need for verification also arises. It should also be observed that whilst representing "laid down" law, treaties "are often an instrument of change—a point which is forgotten by those who regard international law as an essentially conservative force."[54] Thus, validity examines the internal nature of a treaty and verification examines its relationship to external changes in customary law. In the case of public participation, verification is a more sensitive test, because it examines whether a new rule may exist. Verification is achieved when international watercourse treaties represent a codified agreement of international custom.

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49. *See* Aarhus Convention, *supra* note 12, art. 9.

50. *See* Dominicé, *supra* note 41, at 336.

51. *See id.* at 336.

52. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (entered into force Jan. 27, 1980), *available at* http://www.un.org/law/ilc/texts/treaties.htm (last visited Feb. 13, 2003) [hereinafter Convention on the Law of Treaties].

53. Dominicé, *supra* note 41, at 357.

54. MALANCZUK, *supra* note 36, at 37.

It should also be observed that

> [i]n recent years, international treaties have been adopted by procedures that include several phases. The technique of "framework conventions" means that a convention of general scope is adopted, proclaiming basic principles on which consent can be achieved. At the same time, the parties foresee the elaboration of additional protocols containing more detailed obligations.[55]

This consideration introduces a further dimension of analysis, since a framework convention can enable more specific requirements to be determined. Such protocols would create a mechanism to monitor change in international custom on a regional basis. As to whether such an occurrence could invalidate the framework convention, the Convention on the Law of Treaties[56] provides that "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."[57]

If we wish to analyse treaties for an international rule, we should restrict our determination to treaties open to all parties. In the contemporary context, such treaties tend to be framework conventions. Multilateral treaties "may definitely constitute evidence of customary law"[58] and are thus considered subsequently, however "great care must be taken when inferring rules of customary law...from bilateral treaties."[59] In adopting this procedure we therefore infer that the will of nations acting internationally through declarations and locally through domestic legislation and bilateral agreements are key drivers for the creation of a new rule of international law.

If we restrict the sources of treaties to those open to all parties, we must acknowledge that any rule for participation they contain is likely to be more general than specific in its substance. As such, the determination must focus upon whether this rule enables subsequent agreements to be specific and analogous to the context in which they are applied.

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55. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 53 (Supp. 1994).

56. *See* Vienna Convention on the Law of Treaties, *supra* note 52.

57. *Id.* art. 30(4)b.

58. MALANCZUK, *supra* note 36, at 40.

59. *Id.* at 40.

### 3.2 Analysis of International Framework Conventions

Both the UN Watercourses Convention[60] and the Helsinki Convention[61] are framework agreements open to all parties. Tanzi discusses the relationship between these two instruments.[62] The UN Watercourses Convention was opened for signature on May 20, 1997, and there are presently twelve States party and eight States signatory to it.[63] The UN Watercourses Convention establishes in international water law the principles of "[e]quitable and reasonable utilization and participation"[64] and the "[o]bligation not to cause significant harm"[65] as substantive rules.[66] The meaning of participation in Article 5, as determined by Article 4(1),[67] is the entitlement of the State party to the convention to participate, and "[s]uch participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof...."[68] The UN Watercourses Convention does not require or define participation beyond that of the States party other than in managerial[69] and arbitral bodies.[70] It is clear, however, that a State is obliged to take into account "the social and economic needs of the watercourse"[71] and "the population dependent on the watercourse"[72] in determining what is reasonable and equitable utilization. As regards the procedure for establishing utilization, "all relevant factors are to be considered together and a conclusion reached

60. *See* UN Watercourses Convention, *supra* note 15.

61. *See* Helsinki Convention, *supra* note 6.

62. ATTILA TANZI, UNECE TASK FORCE ON LEGAL AND ADMINISTRATIVE ASPECTS, THE RELATIONSHIP BETWEEN THE 1992 UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND THE 1997 UN CONVENTION ON THE LAW OF THE NON NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (2000) (report of the UNECE Task Force on Legal and Administrative Aspects), *available at* http://www.unece.org/env/water/publications/documents/conventiontotal.pdf (last visited Feb. 19, 2003).

63. *See* UN Watercourses Convention, *supra* note 15.

64. *Id.* art. 5.

65. *Id.* art. 7.

66. For an analysis of the evolution of these rules in the context of international watercourse law see, Patricia Wouters, *The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*, 42 GERMAN Y.B. INT'L L. 293 (1999).

67. *See* UN Watercourses Convention, *supra* note 15, art. 4(1), at 705 (stating, "[e]very watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations").

68. *Id.* art. 5(2), at 705.

69. *Id.* art. 24, at 711.

70. *Id.* art. 33, at 713-14.

71. *Id.* art. 6(1)(b), at 706.

72. *Id.* art. 6(1)(c), at 706.

on the basis of the whole."[73] The commentary on the draft articles elaborates: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities...the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation..."[74]

Even though the UN Watercourses Convention implies that States should use public participation procedures in a domestic context, it does not recognise that there is a requirement in the international context. This conclusion highlights a fundamental question in international law—whether the right of a State to determine it own practice should prevail over rights determined through international agreements. The absence of reference to the rights of indigenous peoples in the UN Watercourses Convention is also suggestive of domestic rather than international public participation.[75]

The Helsinki Convention[76] entered into force on October 6, 1996, and currently has 35 States party to it.[77] This convention was negotiated under the auspices of the UN Economic Commission for Europe (UNECE) and is open to 54 States. Its parties cannot be said to constitute a single region. The Convention is primarily concerned with "measures to prevent, control and reduce the release of hazardous substances into the aquatic environment."[78] It requires riparian parties to jointly monitor and assess the conditions of transboundary waters, the results of which are to be made available to the public.[79] The Convention does not provide for public participation but does establish an international requirement for public access to information related to environmental impact assessment (EIA).[80] The nature of information to be available in the

73. *Id.* art. 6(3), at 706.

74. Report of the International Law Commission on the work of its forty-sixth session, May 2–July 22, 1994, UNGAOR 49th Session, Supp. No 10, A/49/10ILC, ¶ 6(2), art.7. 2 YB ILC 1994, Part 2 (Jan. 1997), at 103.

75. *See* Agenda 21, *supra* note 1, ch. 26. Agenda 21 establishes international objectives that empower indigenous peoples through partnership arrangements with governments and intergovernmental organisations. Its approach recognises that indigenous community territories are unlikely to be congruent with modern day State boundaries; consequently Agenda 21 promotes public participation in intergovernmental bodies. Its interpretation of public participation cannot therefore be said to be strictly domestic. For an overview of the relationship between international and domestic law, see MALANCZUK, *supra* note 36, at 64.

76. *See* Helsinki Convention, *supra* note 6.

77. For ratification status of the Helsinki Convention see http://www.unece.org/env/water/status/lega_wc.htm (last visited Feb. 19, 2003). *See also infra* note 91 for a listing of these States.

78. *See* Helsinki Convention, *supra* note 6, preamble ¶ 3.

79. *Id.* art. 11.

80. *Id.* art. 11(3).

public domain is concerned with water quality and discharge permits, as well as planned measures and their effects.[81] Public inspection of the material is free of charge, with a "reasonable" charge being permitted for copies of the information.[82] Guidelines for best practices include "[p]rovision of information and education to the public and to users about the environmental consequences of the choice of particular activities and products, their use and ultimate disposal."[83] It is to be noted that provision of education to the public appears in the form of guidance rather than a requirement.[84]

A comparison of these two international instruments does not provide a basis upon which to determine a rule of international law for public participation. Although the Helsinki Convention requires public access to information, the UN Watercourses Convention makes no explicit provision for public participation but implies that it is a domestic requirement. Thus, it is not possible to verify that these treaty provisions represent the agreement of States regarding a rule of international watercourse law.

This analysis does suggest, however, that a requirement for States to put specified watercourse information into the public domain may be increasingly recognised by most States. This requirement is a necessary precursor to effective public participation. Some indication of this change in State practice can be inferred by considering ratification of instruments under the Helsinki framework.

### 3.3 International Agreements Made under Framework Conventions

Two protocols have resulted from the Helsinki Framework. Whilst the Aarhus Convention[85] and the London Protocol[86] are both new sources of international law on public participation, they have been ratified by more States than the Helsinki Convention.[87] Because of their

81. *Id.* art. 16.
82. *Id.* art. 16.2.
83. *Id.* annex II 1(a).
84. *Id.* annex II 1(a).
85. *See* Aarhus Convention, *supra* note 12.
86. UN/ECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 24, 1999, MP.WAT/AC.1/1999/1, *available at* http://www.unece.org/env/water/text/text_protocol.htm (last visited Feb. 19, 2003) [hereinafter London Protocol]. Ratification status available at http://www.unece.org/env/water/status/lega_wh.htm (last visited Feb. 19, 2003).
87. The Aarhus Convention is open to 44 States: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco,

restricted geographical scope, they are not considered here to be strictly global treaties, particularly as it can be argued that they codify regional custom regarding public participation. However, if a significant number of States ratified the Aarhus Convention, it would be indicative of consent in favour of international public participation requirements. If those same States had yet to ratify the Helsinki Convention, the implication would be still stronger. For example, four of the five Aral Basin States have ratified the Aarhus Convention, but only one of them has ratified the Helsinki Convention. (See Table 1.)

**Table 1: Ratificiation under the Helsinki Framework : Central Asia**

| | Helsinki Convention | Aarhus Convention | London Protocol |
|---|---|---|---|
| Kazakhstan | 11-Jan-2001 R | 11 Jan 2001 R | N |
| Kyrgyzstan | N | 1 May 2001 A | N |
| Turkmenistan | N | 25 Jun 1999 A | N |
| Tajikistan | N | 17 Jul 2001 A | N |
| Uzbekistan | N | N | N |
| N = not signed, R = Ratification, A = Accession | | | |

In fact there are 20 States that are signatories to the Helsinki Convention that have yet to ratify it but have already ratified the Aarhus Convention.[88] Within 37 months of it being opened for signature, 44 States[89] had expressed their consent to be bound by the provisions of the Aarhus Convention; its entry into force was largely a result of ratifications from States east of central Europe. This is a strong indication of the willingness of States to consent to rules of public participation. It shows that international custom is therefore emerging with respect to public participation and may account for there presently being different requirements for public participation in international watercourse treaties. It also shows that non-ratification of a framework convention may not be a reflection of public participation requirements per se.

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Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, and the European Community. For Helsinki Convention ratification, see *infra* note 91.

88. These nations are Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden and Switzerland. For Aarhus Convention ratification status, see http://www.unece.org/env/pp/ctreaty.htm (last visited Mar. 20, 2002).

89. The European Community also ratified as a Regional Economic Organisation. *Id.*

Given the provision of the Convention on the Law of Treaties,[90] and that there are 44 States party to the Aarhus Convention and 34 States party to the Helsinki Convention,[91] the more elaborate public participation requirements of the Aarhus Convention are increasingly likely to govern the mutual rights and obligations of the parties. As there is reason to doubt whether international treaties represent a codification of a rule of public participation, it is not possible to determine that such a rule exists in sources of treaty law.

## 4. PUBLIC PARTICIPATION IN SOURCES OF INTERNATIONAL CUSTOM

The "norms of customary international law do not owe their validity to any pre-existing rule. They are norms spontaneously created."[92] However "the determination of spontaneously created rules of law must be supplemented by other considerations supplied by reasoning."[93] In the Nicaragua Case,[94] the ICJ determined that custom is constituted by two elements, the objective one of a "general practice" and a subjective one "accepted as law."[95]

"General practice" is determined by the extent of international practice of States, for which it is possible to consider multilateral treaties,[96] whilst the degree of acceptance is determined from *opinio juris*,[97] or as seen through published material, government statements, and a state's laws and judicial opinions[98] that are indicative of the willingness of a State to accept an international practice. In considering the interplay between these two factors, Weil writes that "while a customary rule may indeed be formed on the basis of consent that,

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90. *See* Convention on the Law of Treaties, *supra* note 52, art. 30(4)b.

91. States party to the Helsinki Convention are Albania, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom and the European Community. *See supra* note 77.

92. Dominicé, *supra* note 41, at 357.

93. *Id.* at 358.

94. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (separate opinion of Judge Ago).

95. *Id.* at 97. *See also* MALANCZUK, *supra* note 36, at 39.

96. *See id.* at 40.

97. BLACKS'S LAW DICTIONARY 1119 (Bryan A. Garner ed., 1999) "*opinio juris sive necessitates* [Latin 'opinion that an act is necessary by rule of law'] *Int'l law.* The principle that for a country's conduct to rise to the level of international customary law, it must be shown that the conduct stems from the country's belief that international law (rather than moral obligation) mandates the conduct."

98. MALANCZUK, *supra* note 36, at 39.

though general does not have to be universal, the scope of normativity attributable to it once formed will likewise be, though general, not necessarily universal."[99] He also clarifies an important point in stating that "[t]he practice that constitutes the corpus of the international customary rule is defined as 'general,' 'consistent,' 'settled,' 'constant and uniform,' 'both extensive and virtually uniform'—but never as 'unanimous' or 'universal.'"[100]

Analysing international custom enables more specific expressions of public participation to be examined as sources of law, since consent to greater detail is more likely between fewer parties. It is therefore a question of whether significant similarity exists in the international custom of public participation in international watercourses and if this is both sufficiently general and accepted to be recognisable as an international rule.

### 4.1 The North Sea Continental Shelf Cases

Reasoning whether a rule agreed by treaty had become international customary law was a critical determination made by the ICJ in its judgement in the North Sea Continental Shelf Cases.[101] Germany contended that as it was not party to the 1958 Continental Shelf Convention[102] and was thus not bound by its equidistance/special circumstances rule[103] in the delimitation of its continental shelf. Denmark and the Netherlands, however, contended that this rule had subsequently become international customary law and was therefore binding upon all States, whether party to the Convention or not.

The reasoning employed in this case is regarded as an authoritative guide to the determination of international customary law.[104] The ICJ established that whilst a rule of customary international law may not be "crystallized"[105] in a treaty provision, such a rule may come into being "partly because of its own impact...and partly on the

99. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 434 (1983).

100. *Id.*

101. I.C.J. Decision in North Sea Continental Shelf Cases, Feb. 20, 1969, 8 ILM 340 [hereinafter North Sea Continental Shelf Cases].

102. Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311, *available at* http://fletcher.tufts.edu/multi/texts/BH366.txt (last visited Feb. 13, 2003).

103. *See id.* art. 6.2.

104. Gunther Jaenicke, *North Sea Continental Shelf Cases*, *in* 3 ENCYCLOPEDIA OF PUB. INT'L L. 657, 659 (R. Bernhardt ed., 1978) (stating, "[t]he considerations of the Court with respect to the process of formation of customary international law on the basis of a treaty provision merit attention beyond this case").

105. *See* North Sea Continental Shelf Cases, *supra* note 101, at 373, ¶ 70.

basis of...subsequent State practice."[106] The Court then went on to reason that a norm creating provision generated by convention can pass into the "general corpus of international law" and be accepted by the *opinio juris* so as to have to become binding even for countries which never have, and do not, become parties to the Convention."[107]

Since it has already been argued that a norm creating provision for public participation in international watercourse law has not yet been generated by convention we must pursue the ICJ's first line of reasoning and determine whether such a norm has been "crystallized" as an international customary rule on the basis of State practice.

The ICJ decision on the North Sea Continental Shelf Cases defines the threshold beyond which State practice can be said to have created a rule of customary international law. This threshold is not concerned with the temporal dimensions of State practice since "the passage of only a short period of time is not necessarily, or of itself, a bar to the formulation of a new rule of customary international law."[108] But " an indispensable requirement would be that within the period in question...State practice...should have been both extensive and virtually uniform...and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[109]

In emphasising the greater importance of States acting "because they felt legally compelled" to do so, the ICJ decision provides that "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it."[110]

Therefore, the means to determine whether there is an international customary rule of public participation in international watercourse law in the context of the present research requires analysis of regional and multilateral treaties to examine whether they show a settled practice and if this practice is required because it is believed to be a legal obligation rather than "being motivated by other factors."[111]

### 4.2 Analysis of International Sources of Customary Law

Much of the literature on international public participation in environmental matters and watercourses in particular comes from non-

106. *Id.*
107. *Id.* ¶ 71.
108. *Id.* at 375, ¶ 74.
109. *Id.*
110. *Id.* at 376, ¶ 78.
111. *Id.*

State sources[112] and is of limited use in determining the actual customary practice of States. Such literature does examine the potential scope for public participation[113] and provides a means to lobby and develop State practice.[114] Indeed, such literature may even have resulted from State funding.[115] Critical analyses by and of a State's public participation practice are less common and do not exist in the specific area of international watercourses. To date, there have been no judgements made on public participation generally or in the field of international watercourses. There is extensive literature concerned with domestic State practice and this will be considered as a source of general principles of law.

Although the Aarhus Convention is concerned with " environmental matters," it is by far the most specific instrument concerned with public participation in international watercourses. Ebbesson[116] provides an extensive analysis of its contribution to international law. The Aarhus Convention "[r]ecognis[es]...that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."[117]

The Convention enables public participation in three discrete areas: access to information,[118] decision making,[119] and access to justice.[120] It also requires public participation in relation to planning[121] and the preparation of legal instruments.[122] It should be noted, however, that access to decision making concerns a specified list of activities related to the production of pulp from timber,[123] inland waterways and ports,[124]

112. There is an ever-growing body of published material about public participation in international watercourses; current examples provided by WWF are particularly good illustrations. *See supra* notes 25, 25.

113. *See, e.g.*, Harrison, *supra* note 25.

114. *See, e.g.*, OECD, Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance: Part 2, Lessons from Experience in Selected Areas of Support for Participatory Development and Good Governance (Paris 1997), *available at* http://www.oecd.org/pdf/M00002000/M00002993.pdf (last visited Feb. 19, 2003).

115. J. ABBOT & I. GUIJT, CHANGING VIEWS ON CHANGE: PARTICIPATORY APPROACHES TO MONITORING THE ENVIRONMENT (1998).

116. Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. INT'L L. 51 (1997).

117. *See* Aarhus Convention, *supra* note 12, preamble.

118. *Id.* art. 4.

119. *Id.* art. 6.

120. *Id.* art. 9.

121. *Id.* art. 7.

122. *Id.* art. 8.

123. *Id.* annex I(7)(a).

124. *Id.* annex I(9)A.

river basin transfers of over 100 million cubic metres of water per year,[125] and impoundments of greater than 10 million cubic metres.[126] The provision of access to justice is also limited to appeals regarding requests for information under article 4.

It is important to note that the Aarhus Convention defines both what it means by the public and what is determined to be the international context: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."[127] "Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment."[128] The Aarhus Convention was also unprecedented amongst international water agreements in containing a requirement for a "review of compliance"[129] for which comprehensive guidance for implementation has been developed with respect to public participation.[130]

The London Protocol[131] was negotiated under the Helsinki Convention Framework, its objective being

> to promote at all appropriate levels, nationally as well as in transboundary and international contexts, the protection of human health and well-being, both individual and collective, within a framework of sustainable development, through improving water management, including the protection of water ecosystems, and through preventing, controlling and reducing water-related disease.[132]

The preamble to the Protocol takes note of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context[133] and

125. *Id.* annex I(11)(a). Note that this is equivalent to a flow of 3.17 cubic meters per second.

126. *Id.* annex I(13).

127. *Id.* art. 2(5).

128. *Id.* art. 3(7).

129. *Id.* art. 15.

130. ECE/UNEP, NETWORK OF EXPERTS ON PUBLIC PARTICIPATION AND COMPLIANCE, WATER MANAGEMENT: GUIDANCE ON PUBLIC PARTICIPATION AND COMPLIANCE WITH AGREEMENTS (W. Kakebeeke, P. Wouters, et al. eds., 2000), *available at* http://www.unece.org/env/water/publications/documents/guidance.pdf (last visited Feb. 19, 2003) [hereinafter UNECE Guidance on Public Participation].

131. *See* London Protocol, *supra* note 86.

132. *Id.* art. 1.

133. Espoo Convention, *supra* note 5.

the Aarhus Convention, from which it draws extensively regarding public participation. It defines the public as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups."[134] Public authority is also defined.[135] Access to information and decision making is expressed as a principle guiding the implementation of the protocol,[136] which requires concern for the "quality" of decision making, public awareness, and expression and broad access to judicial and administrative review in relation to decisions taken.[137]

Public participation is required in reviewing compliance,[138] and further public participation provisions are to be considered at the Meetings of the Parties.[139] The requirements for information to be made available in the public domain are extensively detailed.[140] This information relates to targets and management, surveillance, and the promotion of awareness education training and research. Article 10 elaborates requirements for national legislation to enable access to this information and specifies acceptable reasons for non-disclosure.

The similarity of requirements between the Aahrus Convention and the London Protocol are clear and, although these provisions may be virtually uniform, their practice cannot be said to be extensive. Nor can it be said that there is general recognition by States that they represent a legal obligation. These instruments as yet have only been signed or ratified by States from Europe and Central Asia.

It is also important to consider that the requirements for public participation under the European Water Framework Directive are less extensive and limited by comparison. These provisions are contained within a single article concerned with public information and consultation that reads,

> Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users...a timetable and work programme for the

134. *See* London Protocol, *supra* note 86, art. 2(11).
135. *Id.* art. 2(12).
136. *Id.* art. 5(i).
137. *Id.*
138. *Id.* art. 15.
139. *Id.* art. 16(3)(g). For information regarding the meeting of the parties, see http://www.unece.org/env/water/meetings/calendar.htm#312 (last visited Feb. 19, 2003).
140. *See* London Protocol, *supra* note 86, art. 10.

> production of the plan, including a statement of the consultation measures to be taken...an interim overview of the significant water management issues identified in the river basin...draft copies of the river basin management plan.[141]

The problems of transposing this requirement to "encourage the active involvement of all interested parties" in national legislation is widely reported in the literature.[142] In particular, there is uncertainty as to what degree of encouragement is required by the law and what constitutes recognisable interest. We can, however, compare these instruments with multi lateral watercourse agreements from other parts of the world.

### 4.3 Analysis of Regional Sources of Customary Law

The Mekong Basin Agreement[143] is an enabling agreement to promote cooperation in all fields of sustainable development, utilization, management, and conservation of the river basin waters in four riparian States. It was signed in 1995. The principles of the agreement are concerned with equitable utilization,[144] the maintenance of flows,[145] and prevention and cessation of harmful effects.[146] It makes no specific mention of public participation. The responsibility for cooperative management of the river basin falls upon the Mekong River Commission, which incorporates three bodies: council, joint committee, and secretariat.[147] Ministers and heads of government departments from the participating states staff the Council and Joint Committee.[148] The Joint Committee proposes its own rules of procedure, which are then approved by the Council.[149]

In 1995, the SADC Protocol[150] was signed by 14 southern African States.[151] The Protocol requires that "[m]ember States lying within the

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141. European Water Framework Directive, *supra* note 10, art. 14.

142. Rivers, Lochs, Coast, *supra* note 11, at 2; Peijs, *infra* note 258, at 55.

143. Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, 34 ILM 864, *available at* http://mgd.nacse.org/qml/watertreaty/textdocs/international/36.html (last visited Feb. 13, 2003) [hereinafter Mekong Basin Agreement]. For information on the work of the Mekong River Commission, see http://www.mrcmekong.org (last visited Feb. 13, 2003).

144. *Id.* art. 5.

145. *Id.* art. 6.

146. *Id.* art. 7.

147. *Id.* art. 12.

148. *Id.* art. 15, 21.

149. Mekong Basin Agreement, *supra* note 143, art. 25.

150. Protocol on Shared Watercourse Systems in the Southern African Development Community Region, Aug. 28, 1995, *available at* http://www.fao.org/docrep/W7414B/w7414b0n.htm (last visited Feb. 19, 2003) [hereinafter SADC Protocol].

basin of a shared watercourse system shall maintain a proper balance between resource development for a higher standard of living for their peoples and conservation and enhancement of the environment to promote sustainable development."[152] Its overarching thrust is that of establishing cooperative structures and management systems between State parties. It contains no explicit requirement for public participation except to establish that River Basin Management Institutions have a "function" of "[s]timulating public awareness and participation in the sound management and development of the environment including human resources development."[153]

The Convention on the Protection of the Rhine[154] was signed by the five riparian States in 1998.[155] Under an overall objective of "sustainable development of the Rhine ecosystem,"[156] it adopts the principle of "sustainable development"[157] but does not refer to public participation. It establishes a river commission, the International Commission on the Protection of the Rhine (ICPR),[158] which "informs the public on the state of the Rhine and the results of its work."[159] The Commission can, however, recognise as observers "non-governmental organisations as far as their interests or tasks are concerned."[160] In this regard the Commission can exchange information and consult NGOs[161] before making decisions that might be of particular importance to them. In addition, the Commission informs these organisations of the decisions taken. Observers may present to the Commission any information or report relevant for the targets of the Convention and may be invited to participate in meetings of the Commission without having the right to vote.

The Danube Convention[162]was signed in 1997 by nine basin States of widely differing political and economic status.[163] It covers five

151. These States were Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zimbabwe, and Zambia.

152. *See* SADC Protocol, *supra* note 150, art. 2(3).

153. *Id.* art. 5(b)(iv).

154. *See* Rhine Convention, *supra* note 9.

155. These States were Germany, France, Luxembourg, Netherlands, Switzerland, and the European Community.

156. *See* Rhine Convention, *supra* note 9, art. 3(1).

157. *Id.* art. 4(g).

158. *Id.* art. 1(6).

159. *Id.* art. 8(4).

160. *Id.* art. 14.

161. For a listing of organisations accredited as observers by the ICPR see http://www.helcom.fi/helcom/observers.html (last visited Feb. 19, 2003).

162. *See* Danube Convention, *supra* note 8.

163. These States were Austria, Bulgaria, Croatia, Germany, Hungary, Moldova, Romania, the Slovak Republic, Ukraine, and the European Community.

major rivers and over 165 million people. The Convention's primary objective is "equitable water management."[164] "On the basis of their domestic activities,"[165] States are to establish and report on water monitoring activities to the public. The Convention provides for limited requirements about how the information is to be provided and a list of acceptable reasons for non-disclosure.[166] It contains no other provisions for public participation.

This analysis of regional instruments also finds no basis to suggest an international customary law requiring public participation in international watercourse law. The instruments examined do not show that State practice is either extensive or virtually uniform and there are no grounds to suggest that States believe they have a legal obligation to provide for public participation in this context.

However, to suggest that public participation is not in fact practised in the watercourses of these regions would clearly be a fallacy. The preceding conclusion does not ignore this fact but shows that these States as yet do not have sufficient belief that it is a rule of international law. Consequently, their State practice does not require its expression in international agreements. In a particularly useful document on participation and compliance,[167] UNECE presents five case studies[168] to show how State practice has been influenced by the emergence of public participation where no specific treaty provisions existed.

The Black Sea Convention[169] and the Nairobi–East African Coastal Convention[170] both contain no obligations regarding public participation.

## 5. PUBLIC PARTICIPATION AS A GENERAL PRINCIPLE OF LAW

The phrase "the general principles of law recognized by civilized nations"[171] was inserted in to the statute of the ICJ "to provide a solution in cases where treaties and custom provided no guidance."[172] These

164. Danube Convention, *supra* note 8, art. 2(1).

165. *Id.* art. 9.

166. *Id.* art. 14.

167. *See* UNECE Guidance on Public Participation, *supra* note 130.

168. These studies are from the Aral Sea Basin, the River Meuse Basin, Lake Peipsi, the Baltic States, and the Black Sea States.

169. Bucharest Convention: Convention on the Protection of the Black Sea Against Pollution, signed April 21, 1992, (in force 1994), *available at* http://www.unep.ch/seas/main/blacksea/bsconv.html (last visited Feb. 19, 2003).

170. Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region Nairobi, June 21, 1985, *available at* http://www.unep.ch/seas/main/eaf/eafconv.html (last visited Feb. 19, 2003).

171. *See id.* art 38(1)(c); Statute of the International Court of Justice, *supra* note 37.

172. MALANCZUK, *supra* note 36, at 48.

"general principles" "are not so much a source of law as a method of using existing sources...extending rules by analogy, [and] inferring broad principles."[173] We find them "sanctioned in *foro domestico*...[but we must]...establish the existence of an analogy between the situation considered and that envisaged by the municipal laws which is sufficient to justify the derivation of a rule from them."[174] For this reason, the ICJ provides that persons elected as members of its court "should individually possess the qualifications required, but also that in the body as a whole, the representation of the main forms of civilization and of the principal legal systems of the world should be assured."[175] An example of a general principle that has been transplanted from domestic law to the international level is 'the exhaustion of local remedies.'"

### 5.1 The Analysis of General Principles of Law

In order to consider a general principle as a source of international law by "borrowing principles which are common to all or most national systems of law,"[176] an analysis must not only be comparative but must also involve reasoning. No comparative study of public participation as a general principle of watercourse law has yet been undertaken. Such a study is of considerable importance since it would analyse the dynamic area of domestic State practice, where a basis for the recognition of a new international rule is most likely to arise. However, documents used in this research indicate that the practical undertaking of such a study may prove difficult for two important reasons.

First, if we consider that the general nature of a legal principle rests in it representing an authoritative starting point for reasoning, it is clear that a legal principle must be based upon a settled fundamental truth. Such principles are unlikely to be built upon the "shifting sands" of a process but arise from the settlement of the legal implications of a decisive action. The general principle of estoppel, for example, recognised in domestic and international law, is defined as a doctrine "that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."[177] The substantive basis of the general principle of "good faith" can similarly be defined as "faithfulness to one's duty or obligation...observance of reasonable commercial standards of fair

173. *Id.*
174. Dominicé, *supra* note 41, at 337.
175. Statute of the International Court of Justice, *supra* note 37, art. 9.
176. *See* MALANCZUK, *supra* note 36, at 49.
177. BLACKS'S LAW DICTIONARY 570 (Bryan A. Garner ed., 1999).

dealing...[and] absence of intent to defraud or to seek unconscionable advantage."[178]

Mosler[179] provides a categorization of general principles applicable in international law, which fall under two broad headings: "Principles taken from Generally Recognised National Law" and "General Principles Originating in International Law." Mosler considers that principles taken from both of these categories have an obligatory character: "the term 'principle' as it is generally used in international law means binding law which in most cases may be less precise and more vague than a well defined rule...but which nevertheless has an obligatory character"[180] and is "binding regardless of its recognition by any authority."[181]

Whilst recognising that "[p]rinciples possessing the character of *jus cogens* may not be contracted out of,"[182] "a State may renounce a right based, for example, on its exclusive jurisdiction over natural resources, in favour of a contracting party, which, in return, enters into a joint venture with it for the common exploitation of the resources."[183] It could therefore be possible to contract out of the obligations of a general principle.

Mosler's analysis suggests both the scope for an analysis and some relevant criteria to test the existence of a general principle. A general principle may originate from international relations and could be found as a principle in treaty provisions. Or it may be generally recognised in domestic systems of law, whereby a comparative analysis of a representative sample of such legal systems would be undertaken. Should such analysis identify a possible general principle, then that principle is likely to be recognised when it is obligatory in character, when reasonable grounds to contract out of the obligation exist and when the principle is sufficiently general to be applicable in a range of international contexts.

The scope of the present research does not permit a comparative analysis of a representative sample of domestic legal systems, but it does identify an important concern that such an analysis is likely to encounter.

### 5.2 Public Participation as a Principle of Domestic Law

The fewer the parties to an agreement on public participation the more likely it is that extensive procedural requirements will be

178. *Id.* at 700.
179. Hermann Mosler, *General Principles of Law, in* II ENCYCLOPEDIA OF PUB. INT'L L. 511, 519, 522 (Rudolf Bernhardt ed., 1995).
180. *Id.* at 513-14.
181. *Id.* at 514.
182. *Id.*
183. *Id.*

established. An analysis of domestic legal systems is therefore likely to yield a prospective principle incapable of isolation from a raft of procedural requirements. For example, considerable ambiguity is likely to be encountered when attempting to suggest that the public participation process as practiced in Scotland represents a general principle applicable in Uganda. This research suggests that because public participation has the characteristics of a process rather than a principle, it may not presently be possible to require meaningful and effective public participation without providing a substantive definition of the specific procedures to be followed. Without sufficient definition, the process will not be effective and will not likely be recognised as a general international principle. As the practice of public participation in international watercourse law becomes more extensive, the knowledge of its procedures will be better understood. When such experience has extensively informed customary practice it may be possible to recognise a general principle for public participation that does not require detailed procedural definition. Given the diversity of interpretation and practise of public participation currently present in international watercourse law, it is unlikely that procedures that are both sufficiently general and effective can yet be identified or agreed upon between States.

An example of this situation is provided by the ongoing transposition of the European Water Framework Directives requirements for public participation into Scottish domestic law. Scotland is presently conducting public consultations[184] regarding the transposition of the European Framework Directive. The Scottish Executive's guidance for the consultation states,

> we believe we need to go further than merely allowing comment on a draft plan at certain stages of the process. We believe that effective inclusion requires more than that. For that reason, we propose to require that the lead authority establish a forum in each River Basin District to facilitate dialogue on the RBMP. These fora would act as standing consultative panels for interested parties and stakeholders. It might be appropriate that sub-groups could be set up to seek views on particular issues or problems as they arose. Do you agree that the lead authority should be obliged to consult with and take account of the views of other relevant public authorities and that it be required to establish a consultative forum in each River Basin District? We would be interested in any other view you have on how we might best secure the involvement and ownership in the

184. *See* Rivers, Lochs, Coast, *supra* note 11.

river basin planning process. Is there a role for community planning?[185]

It is not only useful to note here that the public is being involved in the transposition of this Directive but also to observe that the resultant State practice will exceed the Directive's requirements. This further suggests that, for the present, it would not be possible to identify a general principle of law from a comparative analysis of domestic State practice because of the likely disparities to be encountered.

What is currently important then is to recognise that the determination of a general principle will depend upon the continued and more extensive provision for public participation at the domestic level. And whilst this is likely to result in a wide range of local procedural interpretations, the net effect will be to enable agreement to be reached in more general provisions at the international level. Ebbesson considers that "it would be contradictory in international treaty to agree upon the precise manner in which public participation is to be given form in all contexts and legal systems."[186] This would suggest that recognition of a general principle of public participation applicable in watercourse law is likely but is presently constrained by the limited experience of States in its provision at the domestic level.

## 6. PUBLIC PARTICIPATION IN NON-BINDING SOURCES OF INTERNATIONAL LAW

In this part of the research, subsidiary non-binding sources and guidelines are examined to determine their influence upon the emergence of public participation as rule of the law of international watercourses. The Statute of the ICJ provides for "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."[187]

No relevant judicial decisions have yet been made in this regard; however the range of declarations and guideline documents relevant to public participation in international watercourse management is extensive. The very fact that such sources are readily available in the public domain, particularly through the internet, provides certain evidence that public access to information is being practiced. These sources are key expressions of international will and opinion that influence the law. Ebbesson suggests that

185. *Id.* ¶ 3.27.

186. *See* Ebbesson, *supra* note 116, at 59.

187. *See* Statute of the International Court of Justice, *supra* note 37, art. 38(d) ("[j]udicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

> the extent to which national decision-making institutions take into account the internationally agreed provisions is dependant not only on the legal capacity attributed to non-State actors but also on the substantive content of the international provisions, on the manner in which national laws implement international norms, and on the capacity of domestic institutions to consider treaties to which the State is bound but which have not been implemented in specific national legislation.[188]

### 6.1 Key Objectives of Non-Binding Sources that Influence International Law

On the international plane, declarations and guidelines are to be found chiefly arising from the work of the United Nations, international finance institutions (IFIs), multi lateral joint commissions established by treaty, international non-governmental organisations, and international fora.[189] Given Ebesson's view that "it would be contradictory in international treaty to agree upon the precise manner in which public participation is to be given form in all contexts and legal systems,"[190] this examination of non-binding sources of international law will focus upon how these sources seek to influence State practice and the overall enabling framework for public participation rather than how they address specific procedural issues. In the context of the present research such an approach would contribute to an understanding of how the law is emerging rather than be a digression into analysing the procedural requirements which a law once recognised may subsequently require. What the public should participate in and what procedures this entails are therefore seen to be of subsidiary importance. Thus, the present examination seeks to identify how the legal framework is being influenced by non-binding sources of law and how this effect upon State practice may be contributing to the emergence of public participation as a rule of the law of international watercourses.

A number of approaches were considered for this analysis. However, asking the question "Who participates?" was seen to be particularly informative especially when the same question is asked of the binding instruments. Answering this question requires the

188. *See* Ebbesson, *supra* note 116, at 67.

189. *See, e.g.*, UNECE Guidance on Public Participation, *supra* note 130; WORLD BANK TECHNICAL PAPER NO. 414, INTERNATIONAL WATERCOURSES, *supra* note 23; Ramsar Participation Guidelines, *infra* note 196.

190. *See* Ebbesson, *supra* note 116, at 59.

comparison of substantive provisions in the sources of law that identify specific types of public entities recognised as participants.

The European Water Framework, for example, does not differentiate or define what is meant by "public" when it requires "public consultation."[191] Consequently, its procedural requirements for States responding to all types of public organisations are also homogeneous.[192]

Where non-binding sources of law seek to modify such a Directive to require member States to recognise and respond to rural communities or indigenous communities differently, a discernable change in State practice would be required. In order to realise the effective participation of a public sector agricultural organisation, the State may be obliged to enable the organization to participate at the level of a river basin joint committee; however, the effective participation of a local sailing club may be achieved through domestic level participation requiring no change to State practice. Should new State practice emerge in response to such non-binding suggestions, then it would be readily determined in the recognised sources of international law through, for example, treaty provisions, or because States believed there was a legal obligation to act in this way. Such an act would also contribute to the notion that there is a legal principle requiring public participation since the requirements would have found general global applicability in principle rather than as a result of specific local procedural definitions. Thus, where a State believes it is legally compelled to establish new State practice as a result of the influence of binding or non-binding sources of law regarding public participation, this change in practice may serve to determine that an international rule of public participation had emerged. Therefore, whilst the implication of international law recognising different forms of public entity may seem slight, the implications for State practice are particularly significant. The influence of general environmental non-binding sources of law such as Agenda 21 upon international watercourse law with regard to the range of public organisations specifically recognised is likely to be a key indicator that such change is taking place.

The purpose, therefore, in comparing "who participates" as a result of binding and non-binding provisions is to establish whether there is a significant difference that is likely to influence changes in State practice. In making such a comparison now it would be possible to repeat the comparison in the future and thus determine whether public participation has become a rule of the law of international watercourses as a result of the emergence of new State practice.

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191. *See* European Water Framework Directive, *supra* note 10, art. 14.
192. *Id.*

It is also useful to observe that States have a "capacity to enter into relations with other States"[193] without regard to their system of domestic government. Consequently, no association is implied in this analysis between forms of domestic democratic representation and a requirement in international law to recognise the participation of a variety of public entities. A State agreeing to such a rule of international law will determine its own domestic legislation to enable that participation in accordance with its own domestic system of government. Similarly this analysis does not imply that the recognition of public organisations in international law is the result of them having any form of international legal personality, since such organisations have no capacity to make international law.

We can therefore pose the question of "who participates" in the form of a hypothesis reflecting the influence of non-binding sources of international law upon State practice: International Law is not able to determine a rule for public participation because it does not recognise the public as suggested by the international community through non-binding declarations and guidelines.

The means to test this hypothesis are to be found by a comparison of definitions of the public in international watercourse agreements with those definitions put forward through subsidiary non-binding sources. Any changes in State practice over time that serve to address such a difference may then be indicative of the emergence of an international rule of public participation. But before analysing sources of law for specific definitions of the public, it is first necessary to understand whether in general the international legal system can recognise the participation of a purely domestic public entity in a trans-boundary context.

### 6.2 Can the International Legal System Recognise the Participation of Domestic Public Organisations?

If the international legal system is only capable of recognising international NGOs, then it is unlikely that the forms of public recognition expressed in international declarations will influence State practice. As will be seen, a number of international declarations do not perceive the public as either an international or an entirely domestic entity, but as one that has a transboundary identity. To substantiate the established hypothesis, it is necessary to demonstrate that it is possible

193. Montevideo Convention on the Rights and Duties of States, art. 1, 165 LNTS 19 (1933), *available at* http://www.taiwandocuments.org/montevideo01.htm (last visited Feb. 19, 2003).

for the international legal system to recognise domestic public entities before attempting to analyse if it is in fact doing so.

Ebbesson makes the distinction that "public participation in International Environmental Law may refer to involvement of NGOs either before domestic institutions or international institutions."[194] Although there are no grounds to suggest that the participation of domestic public organisations is recognised in the transboundary context as a result of international watercourse agreements, such grounds can be found in international environmental agreements.

The Ramsar Wetlands Convention,[195] whilst establishing the duties of State "contracting parties," has also established and adopted as annexes comprehensive guidelines for those parties to enable public participation regarding both international cooperation[196] and local participation.[197] The scope of such participation is defined more on the basis of the extent of a wetland rather than sovereign parameters. These guidelines suggest that "[t]here is no one level of local and indigenous people's involvement that fits all contexts"[198] and that international cooperation should be promoted by parties pairing Ramsar sites "with [] the intent for sharing information, expertise and resources between the sites involved."[199]

The UN Convention to Combat Desertification (UNCCD) establishes "the full participation at all levels of local people especially women and youth, with the cooperation of non-governmental and local organizations."[200] It also provides that "[t]he Parties shall cooperate with each other and through competent intergovernmental organizations, as well as with non-governmental organizations, in undertaking and supporting public awareness and educational programmes in both affected and, where relevant, unaffected country Parties."[201]

Both Agenda 21[202] and the Rio Declaration[203] strongly suggest that international agreements recognise the participation of both

194. *See* Ebbesson, *supra* note 116, at 54.

195. Ramsar Convention, *supra* note 22.

196. Guidelines for International Cooperation Under the Ramsar Convention Implementing Article 5 of the Convention (adopted as an annex to Resolution VII.19 (1999)), *available at* http://www.ramsar.org/key_guide_cooperate.htm (last visited Feb. 19, 2003) [hereinafter, Ramsar Cooperation Guidelines].

197. Guidelines for Establishing and Strengthening Local Communities' and Indigenous People's Participation in the Management of Wetlands (adopted as an annex to Resolution VII.8 (1999)), *available at* http://www.ramsar.org/key_guide_indigenous.htm (last visited Feb. 19, 2003).

198. *Id.* ¶ 12(a).

199. Ramsar Cooperation Guidelines, *supra* note 196, ¶ 32.

200. Desertification Convention, *supra* note 7, art. 19.1(a).

201. *Id.* art. 19.3.

202. *See* Agenda 21, *supra* note 1.

domestic and international public organisations in a transboundary context. Agenda 21 recommends that "[t]he broadest public participation and the active involvement of the non-governmental organizations and other groups should...be encouraged."[204] In suggesting that "[i]ntegrated water resources management...should be carried out at the level of the catchment basin or sub-basin," Agenda 21 also specifies that "[f]our principal objectives should be pursued [by programmes]...based on an approach of full public participation, including that of women, youth, indigenous people and local communities in water management policy-making and decision-making;"[205] It further endorses this notion, declaring that "United Nations organizations and other international development and finance organizations and Governments should, drawing on the active participation of indigenous people and their communities, as appropriate, take the following measures, *inter alia*...to incorporate their values, views and knowledge, including the unique contribution of indigenous women, in resource management and other policies and programmes that may affect them."[206] The official press release for Agenda 21 suggests that "[the] participation [of indigenous communities] in national and international sustainable development decisions should be strengthened"[207] and that "[n]on-governmental organizations play a vital role in participatory democracy....The United Nations system and Governments should strengthen mechanisms to involve [them] in decision making."[208] Throughout Agenda 21 a number of similar statements are found.[209] The overriding implication is clearly that the international legal system is able to recognise the participation of domestic public organisations.

The Rio Declaration has the specific goal of "establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,"[210] and contains principles establishing that "[i]ndigenous people and their communities and other local communities have a vital role in environmental management....States should recognize and...enable their effective participation."[211]

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203. *See* Rio Declaration, *supra* note 4.
204. Agenda 21, *supra* note 1, preamble ¶ 1.3.
205. *Id.* ch. 18, ¶¶ 18.9, 18.9(c).
206. *Id.* ch. 26, ¶ 26.5.
207. Agenda 21 Press Release, UN Doc No.DPI/1298–Oct. 1992–3M 34 (on file with author).
208. *Id.*
209. *See* Agenda 21, *supra* note 1, ch. 18, ¶¶ 18.12, 18.12(o)(iii).
210. Rio Declaration, *supra* note 4, Preambular Goals.
211. *Id.* principle 22.

The current ILA revision of the Helsinki rules,[212] which draw heavily on the Agenda 21 provisions, suggests that "[a]ny person who proves a recognizable interest and who suffers or may suffer damages from the use in another State of the waters of an international drainage basin shall be entitled in that State to the same extent and on the same conditions as a person in that State."[213]

Guidelines for public participation developed by international NGOs also reflect the understanding of the international communities' declarations. The World Wide Fund for Nature (WWF) guidelines for participation assert that "[i]n order to be effective, public participation in river basin management has to be established at all the different levels of planning and management. Experience shows that NGOs, users and professional associations can be included in some of the higher planning levels by institutional networks."[214]

The writings of highly qualified publicists further support the opinion that the international legal system is moving toward a recognition of the participation of domestic public organisations. Shelton notes that "the democratisation of the international negotiating process reflected in the declaration is a fundamental contribution of the Rio conference,"[215] and Ebbesson considers this important because it "provides an alternative logic and understanding of globalisation"[216] that aims to recognize a true multi-stakeholder constituency for improved decision making and the legitimisation of State practice.[217]

Since it can be established that the participation of domestic public organisations can be recognised by the international legal system, we can now compare the present expression of who these entities are with respect to binding and non-binding sources of law, in order to establish a baseline against which actual change in State practice to enable such recognition may be determined.

## 7. RECOGNITION OF THE PUBLIC IN BINDING INTERNATIONAL INSTRUMENTS

The UN Watercourses Convention,[218] which provides an over-arching global framework agreement containing substantive rules for non-navigational uses of international watercourses, is open to signature by all States. The Convention does not define the term "the public;"

212. ILA Revised Helsinki Rules, *supra* note 30.
213. *Id.* art. 53.
214. Harrison, *supra* note 25; WWF, *supra* note 26.
215. KISS & SHELTON, *supra* note 55, at 13.
216. Ebbesson, *supra* note 116, at 53.
217. *Id.* at 75-81.
218. UN Watercourses Convention, *supra* note 15.

however, it provides that a "watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures."[219]

The Helsinki Convention[220] is consistent with this position and also provides no substantive definition of what is meant by the term "public." No definition of what is understood by the term public is to be found in either the SADC Protocol[221] or the Mekong Basin Agreement,[222] two recent multi-lateral watercourse agreements. The absence of means to recognise different forms of public entity in these agreements represents an important baseline criteria against which to monitor changes in the future.

Current regional binding instruments tend to provide more specific definitions of "public." The European Water Framework Directive refers to "the active involvement of all interested parties,"[223] the Danube Convention requires public authorities to respond to "any natural or legal person"[224] and "a person requesting information,"[225] whilst the Joint Commission established under the Rhine Convention "may cooperate with and address recommendations to non-governmental organisations as far as their interests or tasks are concerned."[226] However, the most marked difference in the recognition of the public found in binding sources of international law are seen in the general agreements made under the framework of the Helsinki Convention.[227]

The Aarhus Convention[228] provides, "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." But the London Protocol[229] provides, "'The public' means one or more natural or legal persons, and, in accordance

219. *Id.* art. 32.
220. Helsinki Convention, *supra* note 6.
221. SADC Protocol, *supra* note 150.
222. Mekong Basin Agreement, *supra* note 143.
223. European Water Framework Directive, *supra* note 10, art. 14.
224. Danube Convention, *supra* note 8, art. 14(1).
225. *Id.* art. 14(4).
226. Rhine Convention, *supra* note 9, art. 14.
227. The Helsinki Convention, *supra* note 6, was done on Mar. 17, 1992, and entered into force on Oct. 6, 1997; the Aarhus Convention, *supra* note 12, was done on June 25, 1998, and entered in to force on Oct. 30, 2001; the London Protocol, *supra* note 86, was opened for signature on Mar. 24, 1999.
228. Aarhus Convention, *supra* note 12, art. 2(5).
229. London Protocol, *supra* note 86, art. 2(11).

with national legislation or practice, their associations, organizations or groups."

In these recent definitions of the public we see that whilst they do not exclude forms of public participation, they do not positively discriminate in favour of under-represented sections of the public. For example, no recognition of "indigenous communities" is found in these agreements. Thus, at present, global and multi-lateral watercourse instruments can be seen to provide no explicit definition of who may participate. Where such definition is provided through more specific regional instruments, they tend to be general and conservative and do not positively discriminate with regard to minority groups of the public. Explicit definition of the public is currently found in the Aarhus Convention and the London Protocol. These definitions represent an important baseline against which changes in State practice may be determined. This range of expression is indicative of emerging State practice.

## 8. RECOGNITION OF THE PUBLIC IN NON-BINDING INTERNATIONAL GUIDELINES

Agenda 21 provides a sharp contrast to the conservative approach to recognition of the public found in binding instruments. It refers to "women, youth, indigenous people and local communities,"[230] to "public' interests,"[231] other relevant organizations as "appropriate,"[232] "users,"[233] "local people,"[234] "rural communities,"[235] and "non-governmental organizations"[236] as stakeholders to be represented in sustainable water resource management. Agreement on Agenda 21 was possible due to a number of preparatory meetings in which the need for such broad stakeholder representation was recognised and practiced. The Dublin Statement[237] arose from such a meeting. The practical implication of recognising such a range of stakeholders in decision making is evident from a checklist of considerations prepared for the

230. *See* Agenda 21, *supra* note 1, ch. 18, ¶¶ 18.9(c), 18.12(n), 18.19, 18.59(e)(v), 18.62, 18.68, 18.68(b).

231. *Id.* ¶¶ 18.9(c), 18.12(g), 18.59(d)(i).

232. *Id.* ¶ 18.27.

233. *Id.* ¶ 18.50(b)(iii).

234. *Id.* ¶ 18.59(c)(iii).

235. *Id.* ¶ 18.73.

236. *Id.* ch. 27, ¶¶ 27.9(d),(e),(f),(g).

237. Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (ICWE), Dublin, Ireland (Jan. 1992), *available at* http://www.wmo.ch/web/homs/documents/english/icwedece.html (last visited Feb. 19, 2003).

implementation of Chapter 18 of Agenda 21.[238] The list is 56 pages long and contains over 230 analytical questions. The document accordingly offers a useful point from which to identify milestone changes in State practice.

UNECE guidelines[239] on participation, prepared in connection with the implementation of the Aarhus Convention, propose that

> [p]ublic participation in the field of water management should take place in a manner that takes full account of the rights and responsibilities of the public and the public authorities. At the national level, States are encouraged to guarantee legal rights for the public on access to information, public participation in decision-making and access to justice in environmental matters.[240]

These guidelines present a comprehensive interpretation of public participation under the Aarhus Convention recommending[241] that

> • Riparian States and joint bodies should provide for the participation of NGOs as non-voting participants in meetings of joint bodies. Conditions for inviting NGOs to participate as observers in meetings of a joint body...should be clear to the public. Riparian States and joint bodies should establish procedures so that the public can have an oversight role in the conduct of transboundary cooperation to protect and use transboundary waters and their catchment areas including the fulfilment of obligations arising from bilateral and multilateral agreements.
>
> • The development of international documents, plans and programmes for specific catchment areas should be open to public participation, including programmes for monitoring the conditions of transboundary waters. Riparian States are encouraged to provide for public participation, including NGOs, in the preparation and development of international water agreements. NGOs could be invited to participate in intergovernmental negotiation meetings. They could be

238. Earth Summit, Checklist of Considerations for the Implementation of Chapter 18, *available at* http://www.earthsummit2002.org/es/national-resources/freshwater.PDF (last visited Mar. 20, 2002).

239. UNECE Guidance on Public Participation, *supra* note 130.

240. *Id.* at 13.

241. *See id.* at 13-31. The recommendations cited above are synthesized from guidance provided throughout paragraphs 13 to 31 of the guidelines.

> requested to comment on draft texts. Due account could be taken of such comments.
>
> • Joint bodies should have the opportunity to receive and consider information from the public. The public should be given the opportunity to submit inquires in writing to the joint body, in order to oversee the work of the joint body and to establish an open dialogue. Joint bodies...should develop a public communication strategy and liaison with non-governmental entities regarding specific trans-boundary catchment areas. Riparian States should jointly provide for public participation in the preparation and implementation of decisions on the protection and use of their transboundary waters.

These guidelines are especially important for this research since they were prepared in relation to existing international conventions drawing upon significant expertise in the area of international water law. The guidelines also include the "Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters,"[242] a unique and significant tool for monitoring change in State practice. The "Geneva Strategy" would be a useful analytical tool to monitor how State practice changes over time with regard to public participation. Additional work under the UNECE includes guidance for procedures to enable access to justice.[243]

The Helsinki Rules[244] are also an example of a non-binding source of international law proposed by the ILA. In the original version there are no requirements for or recognition of public participation. This deficit is presently being addressed through an ongoing project proposing a consolidation of the original rules. The current project includes a new rule on Public Participation,[245] which as currently drafted reads,

> 1. States shall undertake to assure that persons and communities affected by the development of fresh waters and related resources participate directly or through freely

242. *Id.* ch. 2, at 39-50.

243. UNECE, HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION (Stephen Stec ed., 2001), *available at* http://www.unece.org/env/pp/a.to.j/draft.handbook.e.doc (last visited Feb. 19, 2003).

244. INTERNATIONAL LAW ASSOCIATION, THE HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS (Report of the 52nd Conference, Helsinki 1966), *available at* http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm (last visited Feb. 19, 2003).

245. ILA Revised Helsinki Rules, *supra* note 30, art. 57.

> chosen representatives, in making decisions relating to the aquatic environment and affecting their lives and resources.
>
> 2. Public bodies and non-governmental associations established in a State that are or may be affected by the use of waters of a drainage basin are entitled to participate in decisions to the same extent and on the same conditions as individuals pursuant to paragraph 1 of this Article.

The commentary accompanying this draft rule suggests that "[t]he structuring of the right of participation is left to the States to develop, but the procedures adopted must, at a minimum, assure genuine and serious consideration of the views expressed by the public."[246] It observes that "[r]ecognition of a right of public participation is more than a theoretical concern. Many multinational and global institutions suffer from a 'democratic deficit.' This has led to widespread protests and other forms of resistance to such institutions."[247] The commentary qualifies this new provision by proposing that "States shall take reasonable steps to assure that people whose interests are affected by such management or allocation decisions are able to participate in the processes whereby those decisions are made."[248]

A subsequent rule concerned with "National Treatment" proposes that

> "[a]ny person who prove[s] a cognizable interest and who suffers or may suffer damages from the use in another State of the waters of an international drainage basin shall be entitled in that State to the same extent and on the same conditions as a person in that State"[249]

and that

> [p]ublic bodies and non-governmental associations established in a State which are or may be affected by environmental harm caused by the use of waters of an international drainage basin in another State shall be entitled on condition of reciprocity to initiate proceedings or participate in procedures in that other State to the same extent and on the same conditions as public bodies and

246. *Id.* cmt. on art. 47.
247. *Id.* cmt. on art. 3.
248. *Id.* cmt. on art. 3.3.
249. *Id.* art. 53(1).

> non-governmental associations established in that other State.[250]

Given that these recently proposed non-binding rules seek to clearly establish a rule for the recognition of public bodies in general, observation of the response of the international community to these particular provisions will offer a basis to question the existence of the belief that such a rule of law exists in the *corpus* of international watercourse law.

International financial institutions also produce sources of international non-binding guidelines on public participation in environmental projects. For example, the European Bank for Reconstruction and Development (EBRD)

> foster[s] the principles of public consultation...an Environmental Impact Assessment [is required where] those potentially affected will have the opportunity to express their concerns and views about issues such as operation design, including location, technological choice and timing, before a financing decision is made. At a minimum, sponsors must ensure that national requirements for public consultation are met. In addition, sponsors will have to follow the EBRD's own public consultation procedures....The Bank's Board of Directors will take into account the comments and opinions expressed by consultees, and the way these issues are being addressed by sponsors, when considering whether to approve an operation.[251]

Such guidelines are especially significant when monitoring changes in State practice in recipient countries.

As a result of this examination of the recognition of the public in international non-binding guidelines, it is clear that they are proposing a far broader form of recognition of the public than is presently found in international binding instruments. This goes part way toward substantiating the hypothesis that International Law is not able to determine a rule for public participation because its recognition of the public does not correspond to that expressed by the international community through non-binding declarations and guidelines. But it does not enable us to conclude that recognition of the public as expressed by non-binding

250. *Id.* art. 53(2).

251. EBRD Public Consultation Policy *available at* http://www.ebrd.com/about/policies/enviro/policy/main.htm (last visited Feb. 20, 2003). For an example of national policy on public consultation for the UK, see Code of Practise on Written Consultation: Cabinet Office UK 2000, *available at* http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm (last visited Feb. 20, 2003).

guidelines will result in public participation becoming a rule of international watercourse law. This research does, however, provide a basis upon which to determine whether such a rule can be identified at a future point in time as a result of the observation of specific changes in State practice.

In order to complete this examination of non-binding sources of international law, we will briefly consider guidelines produced by NGOs. It is important to include such an examination as domestic government consultation with international and national NGOs is increasingly practiced and represents an important means of lobbying government regarding State practice.

## 9. RECOGNITION OF THE PUBLIC IN NON-GOVERNMENTAL ORGANISATION GUIDELINES

The greatest range of expression providing for recognition of public participation in international watercourse management is to be found in the writings of non-governmental organisations. Reference has already been made to the work of WWF,[252] Green Cross International,[253] REC,[254] and the Hague Declaration.[255] An analysis of these writings is not possible within the confines of the present research, but it is important to be aware that under the mechanisms of the United Nations the writings of NGOs are increasingly contributing toward the thinking and activities of the international community. This form of participation is enabled through a process of accreditation, which presently varies significantly between UN bodies.[256] This disparity in accreditation has been identified as one of the major factors that currently prevents the World Trade Organisation (WTO) from meeting the requirements of the Aarhus Convention.[257] At the regional level we have seen that NGOs are increasingly important consultation partners with governments and international authorities. In Europe, for example, there have been a

252. Harrison, *supra* note 25.

253. GREEN CROSS, *supra* note 28.

254. Zwiep, *supra* note 27.

255. UNED Forum, *supra* note 29.

256. INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT, ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN INTERNATIONAL FORA: A CONTRIBUTION TO THE DEBATE ON WTO AND TRANSPARENCY (1999), *available at* http://www.ictsd.org/html/accreditation.pdf (last visited Feb. 20, 2003).

257. Claudia Saladin & Brennan Van Dyke, Center for International Environmental Law, Implementing the Principles of the Public Participation Convention in International Organisations, (USA) June 1998, at 27 (paper presented at the 4th Ministerial Conference, "Environment for Europe," Aarhus, Denmark June 1998/European Eco Forum), *available at* http://www.ciel.org/Publications/ImplementingPrinciplesofPublicParticipation1.pdf (last visited Mar. 19, 2003).

number of significant meetings between Commission members, Community Members, and NGOs in relation to the implementation of the Water Framework Directive.[258] We have also seen that NGOs are consulted at the national level.[259]

With respect to the present research in which we are considering the recognition of public entities in the context of international law, it is apparent that the international NGO community exercises a significant influence upon State practice in this regard. As in cases where treaties do not expressly provide for the participation of NGOs in, for example, the work of river basin commissions, the mechanism of accreditation provides an alternative means of enabling their participation.[260] Their involvement at such a level, being likely to influence State practice toward broader forms of public participation, is evidently an important contribution to the sources of international law. However, the key to open this alternative means of participation is the process of accreditation, which lacks a consistent approach.[261] A State seeking to broaden the forms of recognition of the public in international watercourse law could therefore enhance its approach by lending its support to the reform of accreditation systems.

## 10. CONCLUSIONS

This research finds no grounds upon which public participation can presently be recognised as a rule of the law of international watercourses. Having adopted an analytical framework for the research based upon sources of law provided by the Statute of the International Court of Justice,[262] international treaties, customary law, and general principles of law were examined. Subsequently, non-binding sources of law representing the writings of highly qualified publicists were also examined in order to arrive at this determination.

In an examination of the UN Watercourses Convention[263] and the Helsinki Convention,[264] these overarching global instruments were seen to provide significantly different requirements for public participation in

258. Martin Peijs, *Necessities and Opportunities for Public Participation in River Basin Management and the Water Framework Directive, in* WORKSHOP ON WATER FRAMEWORK DIRECTIVE: IMPACT AND CHALLENGES FOR THE ENVIRONMENT 53 (World Wildlife Fund & European Environment Bureau eds., 1998) *available at* http://www.panda.org/downloads/europe/wfdreport.pdf (last visited Mar. 19, 2003).

259. *See* Rivers, Lochs, Coast, *supra* note 11.

260. *See* UNECE Guidance on Public Participation, *supra* note 130.

261. ICTSD, *supra* note 256.

262. Statute of the International Court of Justice, *supra* note 37.

263. UN Watercourses Convention, *supra* note 15.

264. Helsinki Convention, *supra* note 6.

international watercourse law. Although the Helsinki Convention requires public access to information, the UN Watercourses Convention makes no explicit provision for public participation. It was not possible to verify that these treaty provisions amounted to a rule of international watercourse law because they do not provide a normative basis upon which to make such a comparison. Thus, it cannot be said that public participation is recognised as a rule of the law of international watercourses on the basis of international treaty provisions.

A range of multilateral instruments was examined to determine whether they represent a rule of customary international law. Such a rule would be determined when State practice is both extensive and virtually uniform and when there is general recognition and belief that a rule of law or legal obligation is involved with regard to public participation. Although it was seen that requirements to enable public access to watercourse information are increasingly general and accepted in multilateral treaty practice, it cannot be said that this represents a settled or virtually uniform practice of public participation. In addition, it was not possible to show that there is a belief amongst States that they are legally compelled to adopt such a rule. Although provision for public participation was seen to be increasingly extensive, in the absence of evidence of a settled practice and the *opinio juris*, a customary international law of public participation in international watercourse law cannot be said to be recognised. But it was evident that multilateral watercourse treaty practice is a particularly dynamic area of international law and increasingly receptive to procedural provisions whose objectives are to make the law more effective. In this regard it is possible that a rule of customary international law could crystallize in the near future. As States respond to the challenge of managing transboundary water resources under conditions of increased water stress, it is suggested that they will increasingly recognise the importance and benefit of involving the public in achieving the reasonable and equitable utilisation[265] of those resources. The growth of such practical experience will inform and influence State practice and is likely to result in State practice that becomes more extensive and more uniform, thus offering a basis upon which to revisit the present analysis.

As a result of the preceding analysis, no general principle requiring public participation in international watercourse law was identified through expression in international treaty provisions. In considering the existence of a general principle arising from a comparative analysis of relevant general principles in systems of domestic law, it was observed that, at present, States more readily

265. *See* UN Watercourses Convention, *supra* note 15, art. 5.

consent to public participation provisions that are defined by specific rules of procedure. Public participation as practiced at the domestic level is therefore more the result of agreement on procedure than on principle. It is suggested that as a result of the widely differing experiences of States in the practice of public participation in international watercourse management globally, there is as yet insufficient common understanding of how a general principle requiring public participation would be applied. In the absence of common experiences in the practice of public participation, States are cautious and seek to moderate their international obligations by adopting procedural rules rather than facing the uncertainties that a global general principle would currently imply. Nonetheless, States are increasingly practising public participation and this is seen to be contributing towards the *opinio juris* and also the identification and understanding of common general procedures, which over time could lead to the recognition of a general principle. It may, therefore, be likely that a general principle of law may emerge requiring public participation in international watercourse law.

Having identified that State practice regarding public participation is currently changing, sources of non-binding international law were examined in order to show what influence they are likely to have upon the recognition of a rule of public participation in international watercourse law in the future. Since sources of non-binding law in this field are increasingly extensive, it was necessary to narrow the field of analysis towards aspects likely to have a particularly significant influence. It was hypothesised that international law is not able to determine a rule for public participation because it does not recognise the public as suggested by the international community through non-binding declarations and guidelines. This hypothesis carries the implication that effective public participation can only be achieved when it is able to establish rights and remedies specific to different public entities and that this will result in informed State practice that enable the normative content of a rule for participation to be identified.

Binding sources of international law were shown to be conservative and lacking in positive discrimination with regard to recognising the public. For example, no recognition was found of "indigenous communities" in international and multi lateral watercourse agreements. This is in marked contrast to the wide range of recognition of the public suggested in non-binding sources of international law. Agenda 21 suggests that "women, youth, indigenous people, users, rural communities and non-governmental organizations"[266] are discrete public

266. *See supra* notes 230–236.

entities that should be recognised by States. UNECE Participation guidelines[267] are of particular significance in that they were developed in relation to existing binding international instruments, with expert legal input. Consequently, they represent an authoritative guide for States intending to realise international public participation obligations.

Subsequent analysis of the recognition of the public in the guidelines of NGOs also strongly suggests that failing to recognise different public entities is a significant reason for the present inability of the international legal system to recognise a rule of public participation in international watercourse law. Recognising "the public" only as a single homogeneous entity establishes a minimum threshold for State obligations to provide for participation; this will yield only limited experience of the implications of participation in practice. Thus, for example, States are presently under no special obligation to provide differently for the participation of the agricultural community, whose effective participation is unlikely to be realised through a procedure of consultation based upon responding to the general public.

This analysis has gone part way in establishing the hypothesis that international law is not able to determine a rule for public participation because its recognition of the public does not correspond to that expressed by the international community through non-binding declarations and guidelines. Whilst it has been possible to show that recognition of the public is significantly different between these sources of international law, it has not been possible to show that changes in State practice that recognised the public, as suggested in non-binding guidelines, would result in the recognition of a rule of international law. The analysis did yield, however, the means to undertake such a determination, in the form of identifying published guidelines from which it would be possible to monitor key changes in State practice that would signify the crystallization of a new rule of public participation.

Therefore, it is concluded that, at present, public participation is not a rule of the law of international watercourses, but it cannot be said that it may not become one. The key factors influencing this process of crystallization of the law are presently the contributions of non-binding sources of law suggesting that public participation is effective when States determine provisions recognising a diversity of public entities, and secondly, the contributions to a global understanding of public participation that result from the growing experiences of enabling public participation at the domestic State level.

267. UNECE Guidance on Public Participation, *supra* note 130.

What course of action does this then suggest for a State or non-State organisation seeking to promote public participation in the management of transboundary water resources?

An awareness of the provisions and status of relevant international treaties is an essential starting point and should be followed by a legal audit of regional and locally specific multilateral instruments. In particular, it is important to consider the Aarhus Convention. More specific guidance upon how to provide for public participation should be obtained through a comparative analysis of existing State practices of the relevant transboundary States, particularly with respect to any published national guidelines. Guidelines provided by international organisations are particularly useful since they can be both specific and informed by expert legal opinion; such guidelines would include those of UN bodies and IFIs. The UNECE guidelines[268] are currently the most useful in this regard. The foregoing actions would constitute the determination of due regard for the provision of public participation in international watercourse law, which would be recognised by a judicial body.

In addition, the accreditation and consultation of civil society organisations is a recommended course of action in the provision of public participation because their work is currently progressive, informed by public opinion, and likely to influence State practice.

268. *Id.*