British Institute of International and Comparative Law

OBJECTIVES OF PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL DECISION-MAKING

NICOLA SHARMAN*

Abstract Public participation in international environmental decision-making can seek to fulfil different goals. This article explains how these goals can affect the design and appraisal of participatory processes and highlights the under-recognised value of law in determining the objectives of public participation in international environmental forums. A doctrinal analysis finds that substantive goals are most prominent in current international environmental law, but that a normative rationale for public participation could be gaining more formal endorsement through the growing legal recognition of linkages between procedural human rights and environmental protection.

Keywords: public international law, Aarhus Convention, Escazú Agreement, international environmental law, public participation, Rio Declaration Principle 10.

I. INTRODUCTION

Public participation in decision-making has come to be widely recognised and endorsed in international environmental law as a means of improving environmental governance. The topic first began to receive political attention around the 1970s,[1] which eventually led to public participation being affirmed as a core principle of environmental protection and sustainable development in Principle 10 of the 1992 Rio Declaration.[2] Two dedicated regional treaties—the 1998 Aarhus Convention and the 2021 Escazú Agreement—have since reinforced Principle 10 in legally binding terms, by characterising public participation in environmental matters as a human right.[3] Reflections of Principle 10 are also found in many issue-specific multilateral environmental agreements (MEAs).

* Doctoral Researcher, University of Eastern Finland, Joensuu, Finland, nicola.sharman@uef.fi. Research for this article was conducted under the Academy of Finland Strategic Research Council project '2035Legitimacy' (Grant No 335559). The author would like to thank Professor Harro van Asselt and Professor Kati Kulovesi sincerely for their guidance and valuable feedback on earlier drafts of this article, as well as the three anonymous reviewers for their constructive comments.

[1] J Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 YIntlEnvL 51, 51.

[2] Rio Declaration on Environment and Development (14 June 1992) UN Doc A/CONF.151/26, Principle 10 (Rio Declaration).

[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161

Despite the need for multilevel governance approaches to many environmental issues, international law and policy on public participation have predominantly focused on domestic contexts. The applicability of a principle of public participation to international decision-making forums dealing with environmental issues, including serious global concerns such as climate change and biodiversity loss, has remained normatively less clear and practically more challenging. How best to approach public participation in these crucial international settings is far from settled and an often contentious question.

This question is further complicated by lack of clarity or agreement on what the objectives of public participation should be. Its proponents have often described public participation as being multi-functional in purpose: it improves the quality of decision-making, it enhances stakeholder buy-in and it fulfils inherent democratic rights or principles based on notions of fairness and justice.[4] However, when conceptualised as distinct goals, these functions may not necessarily be completely compatible with one another because of their potentially differing consequences for how participation processes should be designed, implemented and assessed.[5]

This leads to the central research question of this article: in so far as international environmental law supports the facilitation of public participation in international decision-making processes related to the environment, does it ascribe to it a particular rationale or objective?

The need for this research agenda is driven, first, by a lack of recognition in legal scholarship of the implications of different theoretical models for public participation, despite a strong body of scholarship within the social and political sciences in this area. There is a need to strengthen the bridge between these disciplinary fields and to deepen understanding of the possible impact of the law in shaping participation mechanisms within international environmental decision-making forums. Secondly, empirical studies have shown that divergent views exist amongst various categories of actors on the reasons for public participation. This lack of mutual understanding may be leading, in practice, to unmet expectations, frustrations and scepticism of the merits of public participation as a whole.[6] Again, it is important to understand what role the law has to play in clarifying these issues in the international context. Thirdly, and finally, the facilitation of public participation in international forums involves significant challenges that are

UNTS 447 (Aarhus Convention); Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 21 April 2021) (Escazú Agreement).

[4] Ebbesson (n 1) 62; A Wesselink et al, 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43(11) EnvironPlanA 2688, 2690.

[5] A Fung, 'Varieties of Participation in Complex Governance' (2006) 66(s1) PAR 66, 74; A Stirling, 'Analysis, Participation and Power: Justification and Closure in Participatory Multi-Criteria Analysis' (2006) 23(1) Land Use Policy 95, 96.

[6] Wesselink et al (n 4) 2689.

distinct from domestic decision-making settings. The sheer scale of the affected public and complexity of international issues are substantial practical obstacles to implementation, while there are also fundamental concerns regarding the legitimacy of international decision-making.[7] The role and objectives of public participation in such contexts may therefore resonate differently and, for this reason, warrant separate consideration and study.

Section II of the article begins by examining the different justifications for public participation in environmental governance generally, distinguishing between substantive, normative and instrumental objectives. Section III then focuses on the particular challenges at international levels of decision-making that influence how the purpose of public participation within such contexts has been evaluated. The role that non-governmental organisations (NGOs) have come to play is also examined, before considering how different points of view have evolved and arguably become increasingly polarised over time. Section IV then conducts a doctrinal analysis of relevant international environmental legal instruments to discern to what extent they support public participation in international environmental governance forums and on what basis. This analysis centres on (a) the Rio Declaration and related soft-law instruments, (b) the Aarhus Convention and the Escazú Agreement and (c) issue-specific MEAs. Section V then analyses the results, finding that substantive rationales are most prevalent in existing law but that normative perspectives may be gaining more legal influence, with an expectation that participation processes should be designed to fulfil both legal goals simultaneously. Section VI concludes with some reflections.

II. DISTINGUISHING THE OBJECTIVES OF PUBLIC PARTICIPATION IN ENVIRONMENTAL GOVERNANCE

Public participation in decision-making is understood to improve environmental governance on numerous grounds and generally acts as an umbrella term for any degree of public opportunity to provide input into, influence or control political decisions.[8] In the political science literature, several frameworks have been developed to attempt to understand, according to various criteria, the different possible features and implications of public participation mechanisms in environmental contexts, many of which distinguish between their intended outcomes or objectives.[9] The analysis in this article will rely on the often-cited typology developed by Stirling, which identifies and evaluates three distinct arguments for public participation based on what are described as substantive, normative and instrumental

[7] D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) AJIL 596, 597.

[8] S Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) JAmInstPlann 216, 217.

[9] For an overview, see M Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141(10) BiolConserv 2417, 2418–20.

considerations.[10] Although developed with domestic environmental policymaking settings in mind, Stirling's typology can be applied to any governance level.

First, according to the substantive argument, public participation improves the quality of decisions by integrating additional knowledge and perspectives into deliberations. According to this rationale, public input is crucial to understanding the social interests and values that interact with the technical elements of environmental issues, thus supporting sound problem-solving and better informed decision-making.[11] This is sometimes narrowed to an environmentalist point of view, whereby it is asserted that the public have environmental interests which may otherwise be neglected.[12] Others recognise that measuring decision quality usually must balance a variety of environmental, social and economic factors.[13] In any case, either reasoning follows a functionalist and outcome-orientated approach.

Secondly, according to the normative argument, public participation fulfils fundamental democratic rights. From this point of view, citizen empowerment is an ideological end in itself regardless of outcome, based on principles of procedural equity and justice.[14] It closely accords with arguments that rely on established procedural human rights norms, such as the right to political participation, the right to a fair trial, the right to information and indigenous peoples' rights.[15] Part of the normative argument is thus primarily concerned with ensuring that incumbent power interests can be challenged and countered.[16] This could serve either to temper powerful political forces that would favour corporate interests above environmental or other socio-economic concerns, or to protect against 'green politics' that may lean in the direction of overly authoritarian or technocratic approaches.[17] It can be associated with the concept of environmental democracy.[18]

Thirdly, according to the instrumental argument, public participation contributes to sustaining public trust in institutions and provides a basis for justification of their decisions. It fosters a sense of stakeholder ownership, thus enhancing the acceptability of decisions, reducing resistance to implementation and enforcement, and encouraging public mobilisation to participate in the implementation of decisions.[19] Inclusion of politically

[10] Stirling (n 5). Stirling's typology builds upon earlier work by D Fiorino in: D Fiorino, 'Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms' (1990) 15(2) SciTechnol&HumValues 226.

[11] Stirling (n 5) 96; Fiorino, ibid 227; Reed (n 9) 2420; M Lee and C Abbott, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 ModLRev 80, 84; T Beierle, 'The Quality of Stakeholder-Based Decisions' (2002) 22(4) RiskAnal 739, 747.

[12] Ebbesson (n 1) 63–8.

[13] J Gellers and C Jeffords, 'Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice' (2018) 18(1) GlobEnvironPolit 99, 104–5.

[14] Stirling (n 5) 96; Fiorino (n 10) 227; Reed (n 9) 2420.

[15] Ebbesson (n 1) 69–75.

[16] Stirling (n 5) 97.

[17] Lee and Abbott (n 11) 83.

[18] E Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing 2020) 55.

[19] Stirling (n 5) 96; Fiorino (n 10) 228; Reed (n 9) 2420.

powerful actors in particular can also help decision-makers to understand their interests and may help to and persuade other participants to accept a preferred position.[20] In this sense, instrumental objectives have strong governmental appeal and can be relatively supportive of incumbent powers' interests and agendas.[21]

These purported benefits of public participation can be weighed against its costs and risks. It requires institutional and participant resources and can slow decision-making.[22] Some mistrust the public's ability to act in the common long-term interest over short-term socio-economic benefits, to problem-solve collectively, or to understand and engage with highly complex and technical issues meaningfully.[23] Participation processes can also remain performative and are difficult to protect from risks of capture and exclusion, whether inadvertent or deliberate.[24]

Academic and political support for facilitating public participation in environmental governance, nevertheless, remains strong on the basis of each of Stirling's three categories of rationale.[25] However, Stirling also recognises that appraisals of participatory processes depend on which rationale it is being measured against and may determine what form the process should take in terms of who is involved, how, when and to what extent. For example, substantive objectives justify certain limits on participant selection to those with certain information, proximity to the issues at hand, or who have been pre-determined to add value in some way at appropriate stages in the process. By contrast, normative objectives expect the most inclusive possible forms of participation, of all stakeholders at all stages. Meanwhile, instrumental objectives imply that participants should be involved based on their power to block or implement policies. Each objective therefore arguably points towards a different design of the participatory process.[26] This understanding of the conflict between different objectives of public participation is reinforced by other scholarship and theoretical frameworks.[27] Fung, for example, recognises that different problems connected to effectiveness, justice and legitimacy are addressed to different extents depending on where a participatory process sits within his 'democracy cube'. The cube involves three domains of independent variables concerning who

[20] K Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 (2) HarvEnvtlLRev 537, 563, citing RD Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) IntlOrg 427. [21] Raustiala, ibid 563; Stirling (n 5) 97.

[22] C Armeni and M Lee, 'Participation in a Time of Climate Crisis' (2021) 48(4) JL&Society 549, 558.

[23] ibid; G Rowe and L Frewer, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 SciTechnol&HumValues 3, 5.

[24] Reed (n 9) 2420; Arnstein (n 8) 217; Armeni and Lee (n 22) 557.

[25] Ebbesson (n 1) 62; Wesselink et al (n 4) 2690.

[26] Stirling (n 5) 97. For a summary, see Wesselink et al (n 4) 2691, Table 1.

[27] See, eg, O Renn and PJ Schweizer, 'Inclusive Risk Governance: Concepts and Application to Environmental Policy Making' (2009) 19(3) EPG 174, 180.

participates, how they communicate and their impact on policy decisions, with Fung noting that 'no single participatory design is suited to serving all three values simultaneously'.[28]

Problems may therefore arise where there is disagreement on what the principal objective of public participation in environmental governance should be, which a number of empirical inquiries have shown to be the case in certain domestic case studies.[29] In such instances, frustrations with and scepticism of the value of public participation in environmental governance may thus be rooted not necessarily in the perceived quality of the participation process itself, but in a more fundamental lack of shared understandings and attitudes towards what it is supposed to achieve.[30] Section III will examine how debates on this topic have played out in international levels of environmental governance.

III. THE ROLE OF PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL DECISION-MAKING FORUMS

A. Confronting Challenges of Scale and Legitimacy

Since the early 1970s, following the United Nations (UN) Conference on the Human Environment (the Stockholm Conference), international forums dealing with the normative development and administration of international environmental law have proliferated in number.[31] These international forums take a variety of forms with various functional mandates. They include intergovernmental diplomatic conferences where numerous types of legal agreements may be negotiated. They include international organisations established by treaty, for example the UN General Assembly (UNGA) and its specialised agencies, as well as multilateral institutions stemming from those such as the UN Environment Programme. They include financial institutions responsible for the administration and allocation of resources such as the Global Environment Facility. They also include the multiple treaty bodies stemming from issue-specific MEAs.[32] Attitudes towards the appropriate role of public participation in the decision-making processes of these forums have evolved over time, but they are distinguishable from domestic settings because of the particular characteristics and emerging challenges of the international context regarding scale and legitimacy.

[28] Fung (n 5) 70–4.

[29] See, eg, Wesselink et al (n 4); T Webler and S Tuler; 'Four Perspectives on Public Participation Process in Environmental Assessment and Decision-Making: Combined Results from 10 Case Studies' (2006) 34(4) PolStudJ 699; D Bidwell and PJ Schweizer, 'Public Values and Goals for Public Participation' (2021) 31(4) EPG 257; KL Blackstock and C Richards, 'Evaluation Stakeholder Involvement in River Basin Planning: A Scottish Case Study' (2007) 9 (5) WaterPol 493.

[30] Bidwell and Schweizer, ibid 268; Wesselink et al (n 4) 2689.

[31] T Marauhn, 'The State' in L Rajamani and J Peel (eds), *The Oxford Handbook of International Environmental Law* (OUP 2021) 622.

[32] Ellen Hey, 'International Institutions' in Rajamani and Peel (eds), ibid 633.

First, while scale and complexity can pose practical challenges in domestic decision-making settings where there are many affected interests, international forums inevitably fall at the extreme end of this spectrum, accentuating the costs and risks of public participation mechanisms to the highest degree. Global environmental change interacts with natural, social and economic systems at various spatial and temporal dimensions, involves high degrees of scientific uncertainty and can potentially impact the entire world population and future generations to varying degrees.[33] It becomes increasingly difficult to find ways to incorporate such a breadth of global stakeholder knowledge and perspectives in an efficient and timely way, to make sense of large volumes of information from such a diverse pool of participants and to maintain a high quality of genuine deliberation and collaborative problem-solving.[34] The channels of communication between citizens and political leaders will inevitably become longer and less direct.[35] Fulfilment of values of inclusivity, representation and transparency also becomes far more complicated, raising the risk of simply reinforcing existing inequalities and power asymmetries.[36] These practical challenges may make a significant impact on assessments of how participation mechanisms can feasibly be designed at international scale and what their objectives should be.

Secondly, popular support for international institutions is increasingly being called into question due to perceived shortcomings in their legitimacy, connected to both their procedural deficiencies (input legitimacy) and questionable performance (output legitimacy). In national settings, input legitimacy tends to be connected strongly with the notion of electoral democracy. However, the relative democratic credentials of international law and policy are weak. Those subscribing to a formalistic view would argue that the equal participation of willing and consenting States is sufficient to ensure democratically legitimate decision-making.[37] This argument is unconvincing to democracy theorists, however, given that many countries are undemocratic, they may not adequately represent domestic minorities (who are often the most vulnerable to environmental risks), foreign policy tends to be neglected in democratic debate and there are huge disparities between the population sizes that States represent.[38] Procedural legitimacy concerns are now accentuated by trends in international environmental law, which has

[33] F Biermann, '"Earth System Governance" as a Crosscutting Theme of Global Change Research' (2007) 17 GlobalEnvtlChange 326, 329–31.

[34] M Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law' (2018) 9(2) TLT 147, 155; J Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 PolStud 180, 181.

[35] R Dahl, 'Can International Organizations be Democratic? A Skeptic's View' in I Shapiro and C Hacker-Cordón (eds), *Democracy's Edges* (CUP 1999) 22.

[36] JA Scholte, 'Civil Society and Democracy in Global Governance' (2002) 8(3) GlobGov 281, 296.

[37] Bodansky (n 7) 603–6.

[38] ibid 613–14; A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) Ethics&IntlAff 405, 412–16.

seen law-making processes become increasingly deformalised and influential in realms historically kept solely within the control of national governments.[39]

In terms of output legitimacy of international institutions, this is undermined by their inconsistent record in producing equitable and effective solutions to environmental problems. Some legal regimes, for example the Montreal Protocol governing protection of the ozone layer, are widely deemed to have generated successful outputs and outcomes.[40] However, other international regimes and institutions are severely struggling to address the problems that they were established to deal with. The climate change regime is perhaps the most obvious example which, despite the United Nations Framework Convention on Climate Change (UNFCCC) being adopted over 30 years ago, has so far failed to stem global greenhouse gas emissions sufficiently.[41]

Evidence suggests that public mistrust of international institutions may be rooted in both procedural and performance legitimacy concerns, so finding ways to enhance both of these elements is therefore a crucial project for international environmental law.[42] Public participation could play a key role in this project, but evaluations of which legitimacy components are most important will be a significant factor in deciding what its primary objective should be. Procedural legitimacy concerns require concentrating on normative public participation objectives. In contrast, addressing substantive legitimacy concerns will point towards the prioritisation of substantive public participation objectives.

B. NGOs as Representatives of Public Interests

Civil society NGOs have come to assume numerous roles within international environmental governance, including as activists, expert advisors, educators, implementation partners and enforcers.[43] They also play a role with regards to public participation in decision-making, whereby they can act as

[39] M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907, 913–15; Bodansky (n 7) 597; J Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) LJIL 1, 32–3.

[40] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 (Montreal Protocol). For a discussion see, eg, M Gonzales, 'The Montreal Protocol: How Today's Successes Offer a Pathway to the Future' (2015) 5 Journal of Environmental Studies and Sciences JEnvtlStud&Sci 122.

[41] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107. See, eg, UN Environment Programme, *Emissions Gap Report 2022: The Closing Window* (UN Environment Programme 2022).

[42] LM Dellmuth, JA Scholte and J Tallberg, 'Institutional Sources of Legitimacy for International Organisations: Beyond Procedure Versus Performance' (2019) 45(4) RevIntlStud 627; T Bernauer, S Mohrenberg and V Koubi, 'Do Citizens Evaluate International Cooperation Based on Information About Procedural and Outcome Quality?' (2020) 15 RevIntlOrg 505.

[43] F Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities (2001) 10(2) RevEurComp&IntlL 149,153–61.

representatives or 'surrogates' of public interests.[44] In this sense, they have been understood to act as a transmission belt between international institutions and the public sphere, conveying public concerns to decision-makers while also feeding information back to the public.[45] Individuals largely remain unable to participate directly in international environmental forums, but opportunities for NGO participation have been expanded over a period of time.[46]

History suggests that Stirling's three rationales for public participation have cumulatively emerged with regards to justification of NGO participation. The first arguments appearing as early as the 1900s arguably had a strongly instrumental rationale. NGOs, although not afforded a formal role in intergovernmental conferences at the time, were regarded as capable of acting in partnership with early international institutions to strengthen their effectiveness in facilitating international cooperation, predominantly through lobbying activities of uncooperative governments outside of the official decision-making process.[47]

Following this, around the time of the inception of the UN system in the 1940s, substantive arguments came to the fore, whereby NGOs gained greater recognition for their knowledge, expertise and representation of public opinion. This understanding was reflected in the UN Charter and resolutions of the Economic and Social Council, which formally provided for consultations to be conducted with NGOs on such a basis.[48] Proponents of this understanding highlight their value in the highly technical environmental field to enhance problem-solving capacity, given the fact that internationally active NGOs tend to be organised transnationally, allowing them to pool resources, exchange knowledge and filter information.[49]

Eventually, normative arguments began to attract greater attention around the early 1990s in response to growing concern about the democratic legitimacy deficit of international environmental law.[50] International organisations have increasingly relied on democratic narratives to support their own legitimacy.[51] Supporters of this argument believe that NGOs have the capacity to empower the public and fulfil their right to be heard in

[44] J Ebbesson, 'Public Participation' in L Rajamani and J Peel (eds), *The Oxford Handbook of International Environmental Law* (OUP 2021) 352; Beijerman (n 34) 154.

[45] J Steffek and P Nanz, 'Emerging Patterns of Civil Society Participation in Global and European Governance' in J Steffek, C Kissling and P Nanz (eds), *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (Palgrave Macmillan 2008) 8.

[46] Yamin (n 43) 151.

[47] J von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of the "Most Affected" in International Institutional Law' (2021) 32 EJIL 125, 134–5.

[48] ibid 135–7. See Charter of the United Nations (26 June 1945) 1 UNTS 15, art 71; UN Economic and Social Council, 'Resolution 288(X): Review of Consultative Arrangements with Non-Governmental Organisations' (27 February 1950) UN Doc. E/RES/288(X).

[49] Beijerman (n 34) 151–3; Scholte (n 36) 293–4.

[50] von Bernstorff (n 47) 140–3.

[51] K Dingwerth, H Schmidtke and T Weise, 'The Rise of Democratic Legitimation: Why International Organizations Speak the Language of Democracy' (2020) 26(3) EurJIntlRel 714, 726.

international forums by utilising their resources to act as a representative mouthpiece, particularly emphasising marginalised voices that are otherwise unrepresented or disregarded by States.[52]

Each of these three possible arguments for NGO participation in international decision-making have been routinely recognised by international institutions themselves, but their conflicts are not always clearly acknowledged. The 2004 Cardeso Report commissioned by the UN, which formed part of a reform agenda to better engage civil society in their work, clearly demonstrates this.[53] In a study of the report, Willets identifies three arguments of neo-corporatism, functionalism and democratic pluralism for engaging NGOs in UN policymaking, which more or less reflect Stirling's instrumental, substantive and normative rationales, respectively.[54] The report was generally badly received, which Willets asserts was in part due to the failure of the report to recognise the inherent contradictions between these conceptual purposes for NGO participation.[55]

The reliance on NGOs to represent public interests at the international level also creates an extra layer of obstacles to fulfilling participatory values, or danger of them being undermined. The representative capacity of NGOs is called into question, given that they are generally formed around narrow interests and agendas, which do not evenly represent the public at large or what might be conceptualised as global civil society.[56] Their positions on issues often tend to be uncompromising, casting doubt on their deliberative capacity.[57] Access and attendance is also easier for large and professionalised organisations with more power and resources, which tend to be from the Global North and represent relatively privileged groups and dominant narratives about environmental issues. Empirical data shows much higher numbers of such NGOs attending international conferences.[58] These imbalances can mirror State power structures, leave many perspectives neglected and reinforce structural social inequities, while having a self-perpetuating effect by further discouraging less powerful NGOs from participating at all.[59]

Weak internal participatory processes within NGOs themselves, together with opaque operational practices and lack of accountability mechanisms,

[52] Beijerman (n 34) 151; Scholte (n 36) 293; Raustiala (n 20) 565–7.

[53] UNGA, 'We the Peoples: Civil Society, the United Nations and Global Governance' (11 June 2004) UN Doc A/58/817.

[54] P Willets, 'The Cardeso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?' (2006) 12(3) GlobalGov 305, 311–17.

[55] ibid 317–18.

[56] Beijerman (n 34) 159; Scholte (n 36) 296; K Anderson and D Rieff, '"Global Civil Society": A Sceptical View' in H Anheier, M Glasius and M Kaldor (eds), *Global Civil Society 2004/5* (Sage 2005) 26–39.

[57] Beijerman (n 34) 154; Scholte (n 36) 298.

[58] M Gereke and T Brühl, 'Unpacking the Unequal Representation of Northern and Southern NGOs in International Climate Change Politics' (2019) 40(5) TWQ 870, 878–82; S Oberthür et al, *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience* (Ecologic 2002) 238.

[59] Gereke and Brühl, ibid 882–4; Beijerman (n 34) 156; Scholte (n 36) 296.

also hinder their representative capacity.[60] Many large transnational NGOs are accused of being governed in bureaucratic manners by self-appointed Western-educated elites, thus further detaching such organisations from the interests that they purport to represent, particularly marginalised and disadvantaged groups.[61] The need to enhance their functional capacity and service delivery may also lead some NGOs to form allegiances strategically with certain States, corporations, donors or better-resourced NGOs.[62] This is structurally underpinned by the fact that public-interest NGOs are generally given the same participation opportunities as representatives of the private sector, the political power and economic influence of whom they struggle to match.[63] In the process, NGOs are susceptible to being drawn away from their original values, having their ability to challenge the status quo stifled and becoming co-opted or used as window-dressing while the true influence and interests of these background actors are disguised.[64] These concerns play a significant added role in debates regarding the most appropriate and feasible role of NGOs, as vessels for public participation, in international environmental forums.

C. Weighing the Arguments: Between Democracy and Technocracy

The evolving landscape of international environmental law-making, NGO engagement and legitimacy concerns have caused debates in both political and academic discourse on the role of public participation in relevant forums to shift over time and become, arguably, increasingly contentious and fractured.

One sphere of opinion claims that the need to promote normative values in public participation is indispensable and does not need to come at the expense of effective decision-making. Advocates of this position point towards evidence that consensual democracies outperform other States with regards to environmental policy performance,[65] and argue that models of democracy can and should be adapted to apply to international and global scales.[66] De Búrca argues that while this is a complicated project, at the very least a 'democracy-striving' approach can be pursued, whereby flexible and self-correcting methods which facilitate the fullest possible participation and representation of those affected by an issue can generate more effective

[60] M Beijerman, 'Practice What You Preach? Limitations to Imposing Democratic Norms on NGOs' (2018) 20 ICLR 3, 13–14.

[61] M Roose, 'Greenpeace, Social Media, and the Possibility of Global Deliberation on the Environment' (2012) 19(1) IndJGlobalLegalStud 347, 354–6; J Dryzek, 'Global Civil Society: The Progress of Post-Westphalian Politics' (2012) 15 AnnRevPolSci 101, 106.

[62] N Berny and C Rootes, 'Environmental NGOs at a Crossroads?' (2018) 27(6) EnvtlPol 947, 958; N Banks, D Hulme and M Edwards, 'NGOs, States, and Donors Revisited: Still Too Close for Comfort?' (2015) 66 WorldDev 707, 712.

[63] Beijerman (n 60) 9.

[64] Scholte (n 36) 297; Banks, Hulme and Edwards (n 62) 712.

[65] J Dryzek and H Stevenson, 'Global Democracy and Earth System Governance' (2011) 70 EcolEcon 1865, 1866.

[66] S Besson, 'Institutionalising Global *Demoi*-cracy' in L Meyer (ed), *Legitimacy, Justice and Public International Law* (CUP 2010).

problem-solving.[67] A vibrant body of scholarship exploring how this may be achieved in practice has been cultivated, the leading theory of which is the idea of global deliberative democracy.

Deliberative approaches to democracy are asserted to be particularly well suited to the complexities of environmental governance and have already found promising practical applications in domestic contexts.[68] The central idea is to concentrate on the quality and authenticity of discussion and debate of a representative group of affected civil society, on the basis of equal status and mutual respect, in order to produce genuine reflection and collective reasoning by participants and decision-makers.[69] It is proposed that, with some creativity, deliberative innovations can also be scaled up to international levels in a systemic manner.[70] In global environmental governance systems, this could be effective in confronting complexity, identifying and prioritising common interests, considering the interests of future generations and non-humans, promoting ecological citizenship and stimulating creativity and reflexivity.[71] It has been posited that existing participatory practices amongst representatives of major groups in sustainability governance, including NGOs, to some degree already exemplifies a model of deliberative stakeholder democracy.[72]

Other domains of thought are pessimistic about these democratisation theories. Their application at global scales in a systemic way remains untested and critics are not convinced of the feasibility of any proposal to overcome inherent practical challenges of scale with regards to acceptable standards of inclusivity, equal representation, deliberation and accountability.[73] Many sceptics also have theoretical reservations, including the core question of who exactly should be entitled to participate in international decision-making processes in the first place, otherwise known as 'the boundary problem' or the problem of 'constituting the demos'.[74]

[67] G de Búrca, 'Developing Democracy Beyond the State' (2008) 46 ColumJTransnatlL 101, 129–36.

[68] W Baber and R Bartlett, 'Deliberative Democracy and the Environment' in A Bächtiger (ed), *The Oxford Handbook of Deliberative Democracy* (OUP 2018) 755–8; R Willis, N Curato and G Smith, 'Deliberative Democracy and the Climate Crisis' (2022) 13(2) WileyInterdiscipRevClimChange e759, 3–4.

[69] A Bächtiger et al, 'Deliberative Democracy: An Introduction' in Bächtiger (ed), ibid 2.

[70] See, eg, J Parkinson and J Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (CUP 2012); Dryzek and Stevenson (n 65).

[71] H Stevenson and J Dryzek, *Democratizing Global Climate Governance* (CUP 2014) 13–17, 26–7.

[72] K Bäckstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development' (2006) 12(4) EurJIntlRel 467.

[73] Dahl (n 35) 19–36; D Miller, 'Against Global Democracy' in K Breen and S O'Neill (eds), *After the Nation? Critical Reflections on Post-Nationalism* (Palgrave Macmillan 2010) 153–6; R Tinnevelt and R Geenens, 'The Coming of Age of Global Democracy? An Introduction' (2008) 15(4) EthicalPerspect 427, 434–6.

[74] D Miller, 'Reconceiving the Democratic Boundary Problem' (2020) 15(11) PhilosCompass e12707, 2; RE Goodin, 'Enfranchising all Affected Interests, and its Alternatives' (2007) 35(1) Phil&PubAff 40, 40.

Functioning democracies can be understood to rely on a *demos*, defined as a cohesive political community with shared values, understandings of the world and a sense of shared responsibility for democratic decisions.[75] Many have argued that the existence of a global demos as a distinct political community is a utopian and impossible ideal.[76] Some contend that democratic opportunities at the international level may, in fact, be detrimental to democratic legitimacy in a system based on the equality of States which already offers varying degrees of democratic opportunity at the national level.[77]

This might lead to a conclusion that because NGO representation cannot possibly fulfil normative democratic principles and may primarily speak for only certain civil society interests, models of stakeholder democracy at the international level in fact best serve instrumental objectives.[78] Others conclude that public participation mechanisms should be utilised and designed to compensate for the democratic legitimacy deficit of international institutions by focusing instead on output legitimacy elements and substantive objectives of improved decision quality.[79] The value of concentrating on substantive objectives for legitimacy has empirical support, with research suggesting that institutional performance may have a higher impact than their adherence to democratic standards from a sociological point of view.[80]

Recently, the discourse of ecological modernisation, together with frustrations with the slow international progress to tackle global environmental challenges, has also been making technocratically oriented governance approaches increasingly appealing.[81] While scientific expertise clearly has an important role to play, technocratic arguments question the wisdom and efficiency of lay participation altogether and instead advocate for decision-making to be driven chiefly on the basis of scientific and expert advice.[82] This point of view has increasingly resonated in the field of international environmental governance as the urgent, irreversible, technically complex and existential nature of global environmental crises has come to be

[75] For discussion of the notion of the demos, see L Valentini, 'No Global Demos, No Global Democracy? A Systematization and Critique' (2014) 12(4) PerspectPol 789, 792–4.

[76] See, eg, Miller (n 73) 153–6; RO Keohane, 'Accountability in World Politics' (2006) 29(2) SPS 75, 77. For an overview of these arguments, see Tinnevelt and Geenens (n 73) 437–47.

[77] Beijerman (n 34) 155–6.

[78] N Nasiritousi, M Hjerpe and K Bäckstrand, 'Normative Arguments for Non-State Actor Participation in International Policymaking Processes: Functionalism, Neocorporatism or Democratic Pluralism?' (2016) 22(4) EurJIntlRel 920, 925–6.

[79] De Búrca (n 67) 121–8.

[80] LM Dellmuth and J Tallberg, 'The Social Legitimacy of International Organisations: Interest Representation, Institutional Performance, and Confidence Extrapolation in the United Nations' (2015) 41 RevIntlStud 451; H Agné, L Dellmuth and J Tallberg, 'Does Stakeholder Involvement Foster Democratic Legitimacy in International Organizations? An Empirical Assessment of a Normative Theory' (2015) 10 RevIntlOrg 465.

[81] K Bäckstrand, 'Scientisation vs. Civic Expertise in Environmental Governance: Eco-feminist, Eco-modern and Post-modern Responses' (2004) 13(4) EnvtlPol 695, 696–8.

[82] J Steffek, *International Organisation as Technocratic Utopia* (OUP 2021) 1–3; S Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (2013) 40 BCEnvtlAffLRev 439, 449–51; Armeni and Lee (n 22) 550.

understood. It tends to be accompanied by survivalist narratives, favours quantifiable scientific targets over more value-laden socio-economic concerns and highlights technological solutions.[83] The characterisation of climate change as an emergency, for example, is giving fresh appeal to technocratic viewpoints which prioritise 'hitting the carbon numbers' over participatory opportunities.[84]

There is a sense that these different points of view on the proper role of public participation in international environmental forums are becoming increasingly polarised, with different actors, including negotiators, government representatives, academics, business representatives and NGOs, adopting different opinions or understandings depending on where their interests lie.[85] The role of public participation in international forums thus remains far from settled.

IV. EMBEDDING OBJECTIVES OF PUBLIC PARTICIPATION INTO LAW

Given the lack of consensus on the role of public participation in international forums and the increasingly polarised nature of the debate, it is important to understand the extent to which its purposes have been reflected in law. Several spheres of international environmental law do endorse public participation in international forums to some extent, but the objective ascribed to it typically receives far less scrutiny. This section therefore presents a doctrinal analysis of these instruments pertaining to this question. Three distinct domains of international environmental law are analysed: (1) soft-law instruments that have played a pivotal role in the international environmental and sustainable development agenda; (2) regional procedural environmental rights treaties, namely the Aarhus Convention and the Escazú Agreement; and (3) general trends in how specific MEAs provide for public participation within their own institutions.

A. Sustainable Development Law: The Rio Declaration and Related Instruments

International recognition of the need for public participation in environmental contexts is founded on Principle 10 of the Rio Declaration.[86] The Declaration was almost universally endorsed by States in 1992, setting out a series of 27 core principles guiding governance of the environment and sustainable development. Principle 10 was one of the Declaration's main innovations since the previous 1972 Stockholm Declaration, which had until then been the most significant international instrument concerning environmental protection.[87] The Rio

[83] D Shearman and JW Smith, *The Climate Change Challenge and the Failure of Democracy* (Praeger 2007) 4; Armeni and Lee (n 22) 553.
[84] Armeni and Lee (n 22) 553–4.
[85] Nasiritousi, Hjerpe and Bäckstrand (n 78) 932–3.
[86] Rio Declaration (n 2).
[87] UNGA, 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF48/14/Rev.1.

Declaration was thus a crucial milestone in recognising the merits of public participation and, although a soft-law instrument without legal binding effect, it continues to have considerable influence in the development of international environmental law.

Principle 10 begins by stating that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level'. It then provides further detail on what facilitation of participation entails at the national level, namely provision of information, opportunities to participate in decision-making processes and access to justice. Although Principle 10 does not elaborate on its application to international levels, other instruments related to the Rio Declaration support this being the case by calling for enhanced public and NGO participation mechanisms in international institutions dealing with sustainable development issues. This includes Agenda 21, which was adopted alongside the Rio Declaration as an action plan for its implementation,[88] as well as the 2002 Johannesburg Declaration on Sustainable Development,[89] the outcome document of the 2012 Rio+20 Conference ('The Future We Want')[90] and the 2015 Sustainable Development Goals.[91]

Principle 10 itself does not elaborate on why exactly environmental issues are best handled with public participation. The wording is ambiguous and could accommodate all three of Stirling's arguments. However, the explicit overarching objective of the Rio Declaration is the substantive goal of sustainable development.[92] Other provisions referring to the participation of specific groups such as women, young people and indigenous people suggest this is important because of the roles they can play in achieving sustainable development.[93] Subsequent instruments also suggest that stakeholders should participate on the basis of the value of the inputs that they can bring to the process. For example, The Future We Want states that participation opportunities are 'fundamental for sustainable development' and speaks of the role and contributions of particular groups of stakeholders.[94]

It might be argued that there are also significant traces of normative rationales for public participation in these sustainable development instruments on the basis of several references to the concept of democracy. The Johannesburg

[88] Agenda 21, found in: UNGA, 'Report of the UN Conference on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26, para 27.9(a).

[89] Johannesburg Declaration on Sustainable Development, found in: UNGA, 'Report of the World Summit on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20, para 26 (Johannesburg Declaration).

[90] UNGA, 'The Future We Want' (11 September 2012) UN Doc A/RES/66/288, Annex, paras 43, 76(h).

[91] UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/Res/70/1, Goal 16.7.

[92] Rio Declaration (n 2) Principles 1 and 3.

[93] ibid, Principles 20–22. See also UNGA (n 88) para 27.3.

[94] UNGA (n 90) paras 13, 43–45, 49–51, 53. See also Johannesburg Declaration (n 89) para 26.

Declaration states that 'to achieve our goals of sustainable development, we need more effective, *democratic* and accountable international and multilateral institutions'.[95] The Future We Want also acknowledges that 'democracy … at the national and international levels … [is] essential for sustainable development'.[96] However, most of these references still point to the pursuit of sustainable development as being the overriding reason for the recognition of such democratic principles, rather than their inherent normative value as an end in themselves. The normative rationale accordingly may be interpreted to remain weak and secondary to substantive goals.

B. Procedural Environmental Rights Agreements: The Aarhus Convention and the Escazú Agreement

Since the Rio Declaration, two regional treaties have built upon Principle 10 and enshrined its content in legally binding terms. The first is the 1998 Aarhus Convention, which has a current membership of 47 countries in Europe and Central Asia.[97] The second is the more recent 2018 Escazú Agreement, which has been ratified by 12 countries in Latin America and the Caribbean and entered into force in 2021.[98] Importantly, these two treaties each characterise public participation in environmental matters, as well as the related principles of access to information and access to justice, not only as legal principles but as human rights. Both the Aarhus Convention and the Escazú Agreement are primarily aimed at regulating how procedural environmental rights are facilitated domestically by their Member States. Each instrument recognises NGOs as public representatives to whom the rights are also guaranteed and sets out a series of principles and standards that national governments must adhere to. For public participation, this includes giving the public timely and effective notice of decision-making procedures,[99] involving the public early in the process,[100] incorporating reasonable timeframes[101] and providing reasons for decisions.[102] In its 20+-year history, the Aarhus Convention has developed a rich body of case law through its Compliance Committee and has been highly influential in the region.[103] It is hoped that the Escazú Agreement will have a similarly powerful impact.

While both treaties have only regional memberships,[104] they nevertheless incorporate provisions that also look towards the international dimensions of

[95] Johannesburg Declaration (n 89) para 31 (emphasis added).
[96] UNGA, (n 90) para 10. [97] Aarhus Convention (n 3). [98] Escazú Agreement (n 3).
[99] ibid, art 7(6); Aarhus Convention (n 3) art 6(2).
[100] Aarhus Convention (n 3) art 6(4); Escazú Agreement (n 3) art 7(4).
[101] Aarhus Convention (n 3) art 6(3); Escazú Agreement (n 3) art 7(5).
[102] Aarhus Convention (n 3) art 6(9); Escazú Agreement (n 3) art 7(8).
[103] KP Sommermann, 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 HJIL 321, 322.
[104] Although the Aarhus Convention is open to accession by any nation worldwide, it has failed to attract a wider membership. For discussion, see E Barritt, 'Global Values, Transnational

environmental decision-making. Article 3(7) of the Aarhus Convention obliges its parties to promote the application of its principles in international environmental decision-making processes. This duty is unqualified and described by Dannenmaier as a proactive 'duty of evangelism'.[105] The Escazú Agreement has a similar provision in Article 7(12) which specially requires the promotion of public participation in international forums, although it does not refer to the Agreement's principles as a whole. The Escazú duty also contains extra qualifications compared to the Aarhus Convention, stating that it only applies 'where appropriate' and 'in accordance with the procedural rules on participation in each forum', which could weaken its legal effect. Nonetheless, together these duties provide a convincing legal endorsement, covering a geographical scope of around one-quarter of the world's population, that the principle of public participation in environmental matters should be exported to international levels.[106]

In the case of the Aarhus Convention, the parties adopted the 2005 Almaty Guidelines to elaborate on how the duty could be implemented. The Guidelines recommend a number of general considerations that should be taken into account, such as non-discrimination based on nationality, the possible need for capacity-building and ensuring access is meaningful and equitable.[107] They also provide some more specific suggestions, such as who may be deemed relevant stakeholders, what forms participation could take and some general standards which largely reflect those already in the Convention.[108] However, the Guidelines lack specific detail and do not address how exactly the parties should promote their content in international forums, either collectively or on an individual basis.[109] In practice, the parties have reported using various approaches to date, such as involving domestic stakeholders in the preparation of contributions to international dialogues, promoting public participation within negotiation processes themselves, or supporting international outputs that uphold the Aarhus principles.[110] In the case of the Escazú Agreement, the regime has yet to develop further guidelines or engage in activities that might elaborate on the content of the Article 7(12) duty.

In terms of public participation's ostensible rationale within this sphere of law, a diverse mixture of motives can be located in the texts which are often

Expression: From Aarhus to Escazú' in V Heyvaert and LA Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar 2020) 204–5.

[105] E Dannenmaier, 'A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums' (2008) 43 YIntlEnvL 32, 49.

[106] S Stec and J Jendroska, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2017) 31(3) JEL 533, 533.

[107] Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, found in: Aarhus Convention, 'Decision II/4, Promoting the Application of the Principles of the Aarhus Convention in International Forums' (20 June 2005) UN Doc ECE/MP.PP/2005/2/Add.5, Annex, paras 11–18 (Almaty Guidelines).

[108] ibid, paras 28–39.

[109] Dannenmaier (n 105) 50.

[110] S Duyck, 'Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime' (2015) 24(2) RevEurComp&IntlEnvtlL 123, 137.

not given any clear ranking in terms of importance.[111] The preambular recitals of the Aarhus Convention refer to substantively oriented goals of enhancing the quality of decisions and enabling public authorities to take due account of public concerns, normatively oriented goals of furthering accountability of decision-making and contributing to strengthening democracy, as well as the instrumentally inclined goal of strengthening public support for decisions on the environment. The preambular recitals of the Escazú Agreement refer to both the normative goal of strengthening democracy and the substantive goal of sustainable development.

The main objective articulated by Article 1 of the Aarhus Convention, however, states that procedural environmental rights are protected, '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being …'. This links procedural rights to the substantive right to a healthy environment, although the vague wording has been interpreted to give the substantive right only an aspirational status.[112] It is also unclear what would constitute an adequate environmental standard.[113] Nevertheless, it has been argued that Article 1 places protection of the environment as a substantive goal over other substantive objectives more generally and normative goals, on the basis that the Convention is environmentalist in nature.[114] This environmentalist character is reinforced through its obligations to promote environmental awareness and education and specific recognition of the role of environmental NGOs.[115]

Yet the conceptualisation of public participation as a human right clearly exemplifies a normative rationale. The overarching narrative is arguably more concerned with the empowerment of the public to influence decisions that affect their environment rather than protection of the environment itself, which may be presumed or intended to be an incidental result and on the understanding that environmental protection may be achieved in a variety of ways.[116] This interpretation holds water where cases in which the Aarhus Convention has been successfully invoked to try and prevent renewable energy development projects are considered, for example.[117] The preamble also provides that the Convention's implementation will contribute to democracy in the region; meanwhile, political commentary consistently highlights its contribution to

[111] See, eg, Barritt (n 18); B Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and The Aarhus Convention' (2018) 30(1) JEL 1, 14. [112] Barritt (n 18) 31–2, 154–62. [113] Lee and Abbott (n 11) 86.
[114] ibid; Peters (n 111) 14.
[115] Barritt (n 18) 164–8. See Aarhus Convention (n 3) arts 2(5), 3(3).
[116] Barritt (n 18) 57.
[117] See, eg, UN Economic and Social Council, 'Findings and Recommendations with Regard to Communication ACCC/C/2010/54 concerning Compliance by the European Union (2 October 2012) UN Doc ECE/MP.PP/C.1/2012/12; *Swords v European Union* discussed by M Peeters and S Nóbrega, 'Climate Change-related Aarhus Conflicts: How Successful are Procedural Rights in EU Climate Law?' (2014) 23(3) RECIEL 354, 363–4.

furthering the concept of environmental democracy. UN Secretary-General Kofi Annan described it as 'the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the UN'.[118] Barritt claims that the Convention furthers this purpose by broadening the democratic community and understanding of the common good, creating opportunities for transnational participation based on affectedness and acknowledging the environmental rights of future generations.[119] However, Barritt also notes that because the democratic standards for participation set by the Convention are relatively weak, this could disguise an underlying instrumental objective of legitimising predetermined institutional policy goals.[120]

When it comes to Article 3(7) specifically, the Convention's normative approach seems to become considerably diluted within the Almaty Guidelines. The Guidelines state that 'providing international access opportunities in environmental matters … generally improves the quality of decision-making and the implementation of decisions' and that public participation contributes to this 'by bringing different opinions and expertise to the process'.[121] This quite explicitly conveys a substantive rationale. There are some aspects of the Guidelines that can be interpreted to infer normative rationalisations, such as the advice that participation should be as broad as possible and that special measures should be taken to encourage the participation of the most directly affected who may not have the means to do so without support.[122] However, generally, in contrast to the Convention text, normative language is extremely scarce, as the Guidelines do not anywhere characterise public participation in international forums as a human right, nor mention the concept of democracy.

The Escazú Agreement's objective clause for the most part resembles the Aarhus Convention, with two particular modifications.[123] First, it adds 'the creation and strengthening of capacities and cooperation' as an objective, considered by some to be a fourth pillar of the Agreement.[124] Secondly, as well as the right of individuals to live in a healthy environment, the procedural rights are intended to contribute also to sustainable development, thereby giving greater recognition to socio-economic concerns as well as environmental goals.[125] Similarly to the Aarhus Convention, while substantive purposes are referred to in this objective clause, the primary emphasis is the fulfilment of the normative right to participation. This focus is reinforced by a number of innovations that go considerably beyond the

[118] K Annan, 'Foreword' in UN Economic Commission for Europe, 'The Aarhus Convention: An Implementation Guide' (2000) UN Doc ECE/CEP/72.
[119] Barritt (n 18) 145–8. See Aarhus Convention (n 3) arts 1, 2(5), 3(9).
[120] Barritt (n 18) 150.
[121] Almaty Guidelines (n 107) paras 12, 28.
[122] ibid, paras 14, 15, 30.
[123] Escazú Agreement (n 3) art 1.
[124] Stec and Jendroska (n 106) 542–3.
[125] ibid 537–8.

https://doi.org/10.1017/S0020589323000088 Published online by Cambridge University Press

Aarhus Convention.[126] First, the Agreement specifically characterises itself as a human rights treaty.[127] Secondly, the Agreement contains specific provisions aimed at the protection of environmental human rights defenders, who the parties recognise as playing an important role in 'strengthening democracy, access rights and sustainable development'.[128] Thirdly, the Agreement states that participation should be 'open and inclusive', recognises the need to support vulnerable persons or groups who 'face particular difficulties in fully exercising the access rights' contained in the treaty and incorporates particular duties related to capacity-building.[129] Together, these doctrinal elements demonstrate a focus on normative values of procedural justice and environmental democracy and require greater proactiveness to ensure that such values can be enjoyed by all members of society.

It remains to be seen how the Escazú parties will come to interpret their Article 7(12) obligation. While the Agreement's stronger normative characterisation of public participation in general could be extended to international forums, there are some indications that the parties could, like the Aarhus Convention's Almaty Guidelines, choose to lean into the substantive arguments. The inclusion in Article 7(12) of qualifying language and its failure to refer to the Agreement's broader principles may create a disconnect from the Agreement's otherwise rights-based approach. The Escazú Agreement also restricts its definition of 'the public' to persons or groups that that are nationals of, or subject to the national jurisdiction of, the parties.[130] This sits in conflict with the principle of non-discrimination, which is expressly incorporated into the Agreement, creating a degree of confusion in the text.[131] While the effects of this contradiction remain unclarified, the definition of the public may be indicative of a reluctance among the parties to recognise rights of participation for those who are not their own nationals or citizens in any governance context, including international forums.[132]

C. Multilateral Environmental Agreements: Trends in NGO Access Provisions

Many issue-specific MEAs require their parties to enable public participation at local, national or regional levels in matters relating to the treaty either in general terms[133] or by prescribing more particular duties, for example the use of

[126] For comparative studies between the Aarhus Convention and the Escazú Agreement, see Barritt (n 104); Stec and Jendroska (n 106).

[127] Escazú Agreement (n 3) Preamble.

[128] ibid, preamble and art 9. For a discussion on the provisions relating to environmental human rights defenders, see Stec and Jendroska (n 106) 539–40.

[129] Escazú Agreement (n 3) arts 4.5, 7.1, 7.14, 10. For a discussion on the Escazú Agreement's approach to vulnerability, see Stec and Jendroska (n 106) 541–2.

[130] Escazú Agreement (n 3) art 2(d).

[131] ibid, art 3(a).

[132] Stec and Jendroska (n 106) 543–4.

[133] See, eg, UNFCCC (n 41) art 6(a)(iii); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3, art 19.3(b).

environmental impact assessments.[134] However, participation within the MEA's own institutional decision-making processes is treated separately. Most of the earliest MEAs were silent on the matter or granted very limited access to NGOs.[135] Over time, individual legal regimes have come to incorporate explicit provisions for some form and degree of public participation, primarily through observer accreditation for NGOs. The consistent trend of doing so across multiple MEAs points to a broader legal phenomenon.[136]

One of the most significant milestones in this regard was the 1987 Montreal Protocol. The Montreal Protocol permits organisations 'qualified in fields relating to the protection of the ozone layer' to be admitted to a meeting of the parties as an observer according to the rules of procedure adopted by the parties, unless at least one-third of the parties present object.[137] This phrasing became essentially a template for subsequent MEAs, which have adopted broadly similar provisions and often with a further softening of the substantive access test so that any organisation qualified in matters relating to the treaty in question could be accredited.[138]

The now common practice for MEAs with broad international membership to provide for NGO access mechanisms could be considered to be, to some extent, an endorsement of the principle of public participation in international decision-making forums. However, this claim is weakened on several bases. First, most MEAs do not guarantee NGO access. Although in practice NGOs rarely encounter difficulties in being accredited, they could theoretically be denied without justification if the requisite number of parties were to object.[139] Secondly, opportunities for direct public participation are generally not offered and, as discussed in Section III.B, the claim that NGO representation alone can be equated with direct public participation is dubious. Thirdly, the standard provision typically provides that '[t]he admission and participation of observers shall be subject to the rules of procedure adopted by the Parties', thereby deferring to the parties to develop further details of what privileges observer status actually entails without setting any standards to be contained in such rules. The rules can accordingly vary between different legal regimes and, in practice, generally leave the level and quality of participation to be decided at the discretion of the Chair.[140]

Notwithstanding these shortcomings and limitations, several observations can be made about the rationales and objectives behind the legal provisions for facilitation of observer participation. Generally, they can be interpreted to

[134] See, eg, Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art 14(1)(a).
[135] Raustiala (n 20) 545–8.
[136] Dannenmaier (n 105) 37–8.
[137] Montreal Protocol (n 40) art 11.5.
[138] Raustiala (n 20) 544. See, eg, UNFCCC (n 41) art 7.6; Convention on Biological Diversity (n 134) art 23.5; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 28 ILM 657, art 15(6).
[139] Raustiala (n 20) 543.
[140] Oberthür et al (n 58) 61–3.

reflect a substantive justification for NGO inclusion on the basis of the substantive access test typically present. Although limiting accreditation only to qualified NGOs sets a fairly vague and low bar, it signals that participating NGOs are expected to add value to the decision-making process on the basis of their knowledge or experience of matters relating to the treaty. There is little indication of any normative rationale, given the discretionary and generally restrictive nature of the access opportunities provided for. In practice, the particular rules applicable to meetings of institutional bodies are commonly criticised for not enabling meaningful participation. For example, they often allow for meetings to be closed to observers at the discretion of negotiators, restrict physical attendance or opportunities to make interventions, do not require reasonable notice of meetings to be given, or do not consider how to ensure balanced representation.[141] These restrictions may point towards underlying instrumental motivations.

There are, however, several notable exceptions to these trends. First, the 1972 Convention on International Trade in Endangered Species (CITES) is one of the few treaties pre-dating the Montreal Protocol which does provide for NGO participation in meetings of the parties, containing very similar provisions regarding admission. But CITES also provides that '[o]nce admitted, these observers shall have the right to participate but not to vote'.[142] The reference to participation as a 'right', albeit only once an NGO has been admitted, insinuates an ideological, normative justification for their inclusion. CITES has developed some of the most detailed rules and liberal approaches to participation in practice.[143]

Secondly, more normatively inclined language has reappeared in both the Aarhus Convention and the Escazú Agreement with regard to public participation within their own decision-making forums. The Aarhus Convention, which itself was negotiated with strong levels of NGO participation,[144] states that any qualified NGO which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be '*entitled*' to participate in the absence of the requisite number of objections.[145] The Escazú Agreement, meanwhile, departs from the standard phrasing entirely, stating that, at its first meeting, the Conference of the Parties (COP) 'shall discuss and adopt by consensus its rules of procedure, including the modalities for significant

[141] ibid 76–8. For a discussion of the UNFCCC as an example see, eg, A Martinez Blanco, 'From Stakeholders to Rightsholders: Assessing Public Participation in the International Climate Regime' (2021) 15(4) CCLR 282.

[142] Convention on International Trade in Endangered Species (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243, art XI(7)(b).

[143] Oberthür et al (n 58) 5, 144; Raustiala (n 20) 569.

[144] UN Economic Commission for Europe (n 118).

[145] Aarhus Convention (n 3) art 10(5).

participation by the public'.[146] Not only does the provision refer to the public rather than simply NGOs, but it requires participation to be significant. Such standards were reflected in the Agreement's negotiation process itself, which accommodated substantial NGO participation and engaged two public representatives.[147]

V. DISCUSSION: AN EMERGING LEGAL DUTY TO INTEGRATE SUBSTANTIVE AND NORMATIVE OBJECTIVES?

The value of facilitating public participation in international environmental decision-making has been increasingly recognised in law over time. Since the adoption of the Rio Declaration in 1992, the applicability of Principle 10 to international forums has been consistently reaffirmed in soft-law instruments relating to sustainable development. An obvious trend, or expectation, has also emerged for MEAs to require the establishment of mechanisms to facilitate participation of NGOs representing public interests within their own institutional decision-making processes. Moreover, both the Aarhus Convention and the Escazú Agreement have elevated the status of Principle 10 and its applicability to international forums by imposing a legal duty on their parties to promote public participation in such contexts. While these developments may not amount to the establishment of an international legal principle, they do represent a clear direction of travel within the law.

Those that support more technocratic models of decision-making in international environmental forums are therefore at odds with this legal direction of travel. It involves pushing back against a now well-established track record of international support, entirely contradicts the legal commitments of the parties to the Aarhus Convention and the Escazú Agreement and would entail revisiting and reversing several decades of practice to increasingly engage NGOs in international governance processes. However, despite the discernible legal support for public participation in international forums in general, the legal position with regards to its rationales and objectives is not so obvious or straightforward.

The doctrinal analysis finds that instrumental rationales and objectives are hardly present in any of the legal texts examined. This makes sense given that instrumental arguments are inherently relatively supportive of incumbent interests, by aiming primarily to procure credibility or justification of decisions. This is not something that policymakers would be expected to admit expressly is their main motivation, or that stakeholders would support. However, it is interesting to compare the absence of the instrumental

[146] Escazú Agreement (n 3) art 15(4)(a). For the rules of procedure, see 'Decision I/1: Rules of Procedure of the Conference of the Parties' in UN, 'First Meeting of the Conference of the Parties to the Escazú Agreement' (2 September 2022) UN Doc LC/COP-EZ.1/3, Annex 2, Part XIV.

[147] Barritt (n 104) 206.

objective in the law with empirical evidence suggesting that, in reality, instrumental goals of public participation have considerable, or even the highest, degrees of support in both domestic and international contexts by all categories of actor.[148] A study of a series of UNFCCC COPs, for example, showed this to be case even amongst environmental NGOs themselves.[149] There may be a number of explanations for this, including the fact that, in international environmental governance contexts, better-resourced participating NGOs may already be more likely to endorse dominant discourses, to form tactical alliances with other incumbent political interests, or to be strategically reluctant to agree that their 'competitors' should have equal opportunities to participate.[150] It may also suggest a degree of acceptance of, or submission to, the political and practical realities that this is the way participation processes are probably already institutionally designed and within which participants must inevitably operate.[151] Regardless, these studies demonstrate a discrepancy between the law, open debate and true motivations of decision-makers and stakeholders with regard to public participation.

Substantive goals are the most prevalent expressed goal of public participation in the legal instruments analysed. This can be seen in the Rio Declaration and issue-specific MEAs, which concentrate on the contribution that public participation can make to achieving their substantive environmental goals. However, the Aarhus Convention and the Escazú Agreement have introduced a rights-based approach that blends both substantive and normative rationales. The inherent assumption within both instruments that a right to public participation will lead to better environmental protection makes both conceptualisations of its purpose difficult to disentangle and reflects schools of thought that advocate for greater democratisation of international environmental law. Barritt posits that the purposes of environmental democracy, substantive environmental rights and environmental stewardship that she identifies within the Aarhus Convention are interlinked and mutually supportive of one another.[152]

That being said, the striking lack of normative language in the Aarhus Convention's Almaty Guidelines swings the emphasis back towards substantive environmentalist rationales when it comes to international levels of decision-making. The reason for this may be rooted in a recognition by the Aarhus parties of the challenging conditions of global politics and the practical and conceptual obstacles of applying democratic principles to public participation at the international scale. The Guidelines do clearly allude to practical difficulties, for example recognising that 'the number of members of

[148] Wesselink et al (n 4) 2693–5; Nasiritousi, Hjerpe and Bäckstrand (n 78) 930–5.
[149] Nasiritousi, Hjerpe and Bäckstrand, ibid 930–5.
[150] ibid 937; Wesselink et al (n 4) 2695.
[151] Nasiritousi, Hjerpe and Bäckstrand (n 78) 936–7; Beijerman (n 34) 159–60.
[152] Barritt (n 18) 149.

the public concerned participating in the meetings may be restricted if this is necessary and unavoidable for practical reasons' and that such restrictions 'should aim at ensuring the quality, efficiency and expediency of the decision-making process'.[153] However, the Guidelines also reflect a willingness and commitment to find ways of tackling these practical challenges.[154] The lack of rights-based language in the Guidelines may also reflect a strategic understanding among the Aarhus parties that State support for democratisation of international environmental forums may be tough to generate in other regions with more authoritarian tendencies.[155] Human-rights language has historically been extremely difficult to incorporate into MEAs, with many States being reluctant to accept new human-rights obligations through the back door of other instruments. Overtly democratic agendas could risk push back by other countries.

It has, however, been over 15 years since the Almaty Guidelines were adopted. They have a much more limited legal status than the core Article 3 (7) provision upon which the Guidelines are based and do not preclude a combined substantive and normative approach. The Escazú parties also now have the opportunity to interpret and implement their corresponding Article 7 (12) duty in a way that is more aligned with a rights-based approach. The fact that the Agreement has broadened the geographical scope of countries legally committed to promoting public participation in international environmental forums could, in itself, not only boost political momentum, but strengthen the legal implications and influence of these commitments.[156] Arguably there is an effect of mutual reinforcement, whereby the parties of both treaties would be expected to capitalise on their shared objectives by collaborating and coordinating with one another to that effect.

Other political pushes at the international level to recognise the intersection between protection of the environment and human rights could also be paving the way for integrating a blend of both substantive and normative conceptualisations of the purpose of public participation in relevant international forums. This is exemplified by the recent resolution of the UNGA recognising the substantive human right to a clean, healthy and sustainable environment.[157] Building upon the fact that such a right is already recognised, in some form, within many national laws, constitutions and regional agreements, the resolution elevates it to an international level of recognition and affirms that its promotion requires the full implementation of MEAs under principles of international environmental law.[158] Its preamble also states that protection of the environment depends on the right to effective participation in the conduct of government and public affairs and refers to the

[153] Almaty Guidelines (n 107) para 31.
[154] Dannenmaier (n 105) 62.
[155] M Beeson, 'The Coming of Environmental Authoritarianism' (2010) 19 EnvtlPol 276, 289.
[156] Duyck (n 110) 138.
[157] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (26 July 2022) UN Doc A/RES/76/300, para 1.
[158] ibid, paras 3, 4.

framework principles on human rights and the environment proposed by the former Special Rapporteur, John Knox, which include the right to public participation.[159]

On the one hand, the description of public participation as a human right in conjunction with recognition of the importance of international cooperation on environmental matters potentially lays additional groundwork to support its objective being framed in normative terms at international levels. On the other hand, unlike the Aarhus Convention or the Escazú Agreement which place procedural rights guarantees front and centre, public participation is framed as an ancillary right, which may diminish its normative effect. This is an approach which mirrors human rights court jurisprudence, particularly that of the European Court of Human Rights (ECtHR) which has routinely referred to the Aarhus Convention for interpretative purposes in environmentally related cases invoking procedural rights concerns.[160] However a key differential effect of this ancillary framing, largely unacknowledged by the ECtHR itself, is that a right to participation will only be triggered under the European Convention on Human Rights for individuals where a primary substantive right has been violated. Contrast this with the Aarhus Convention and the Escazú Agreement, which grant procedural environmental rights collectively to both the general public and NGOs, independently of any substantive rights violation.[161]

Amongst all this ambiguity between the expansion of rights-based framings of public participation in environmental governance and the importance of achieving environmental goals, it might be reasonable to conclude that international environmental law requires both normative and substantive objectives to be pursued simultaneously. In her analysis of the Aarhus Convention through purposive interpretation, Barritt notes that legal instruments can be dynamic and that their purposes can emerge and adapt over time to the evolving legal order.[162] Feasibly, this malleability of legal intent could include merging of multiple purposes for public participation in international environmental forums over time, by taking a holistic view of the sum of the legal landscape. According to Stirling's framework, the fundamental tensions between these goals would preclude the design of a participatory process that can pursue both of these objectives to the fullest possible extent. Thus, the shifting orientation of the law may be seen to be creating problematic legal conflicts. Sceptics of democratic approaches at international

[159] UN Office of the High Commissioner for Human Rights, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59, Framework Principle 9.

[160] Eg *Taskin and others v Turkey* App No 46117/99 (ECtHR, 10 November 2004) paras 99, 118; *Tatar v Romania* App No 67021/01 (ECtHR, 27 January 2009) 118; *Grimkovskaya v Ukraine* App No 38182/03 (ECtHR, 21 July 2011) 39, 69, 72; *Lesoochranárske Zoskupenie VLK v Slovakia* App No 53246/08 (ECtHR, 2 October 2012) 55, 80. For a brief discussion of these cases, see Peters (n 111) 9–10.

[161] Peters, ibid 9, 15–25.

[162] Barritt (n 18) 24–5.

levels would warn that attempting to do so would be futile and undermine important and urgent environmental action. However, the evolving research on theories of global deliberative democracy in environmental contexts aims to counter these concerns by showing how such processes could be successfully designed to strive for the fulfilment of both values in a balanced way. Scholarship in this area thus can add momentum to the possible legal shifts being seen.

VI. CONCLUSION

This article has sought to highlight the significance of distinguishing the different possible goals of public participation in international environmental forums and to emphasise the under-recognised role of law in this context. The law has important normative value in defining how the objectives of public participation in international contexts should be prioritised. In turn, by making these objectives explicit, the law could also have considerable sociological value in fixing and harmonising understandings of decision-makers, stakeholders and the public of what public participation in international forums is supposed to achieve and how its successes and failures should be judged and appraised. Moreover, enshrining the objectives of public participation in the law can have essential practical value in steering how the detail of participatory processes should be designed according to its agreed goals. To promote clarity and consistency in these normative, sociological and practical dimensions, the law should attempt to strike a balance between making the objectives of public participation in international environmental forums discernible, while allowing room for flexibility in the specific design of participatory mechanisms and processes to suit the particular governance context, evolving circumstances and changing parameters of participants.

This doctrinal analysis found that relevant existing law in several applicable domains is not particularly explicit, consistent or free from ambiguity. For now, the law in this area appears to remain a moving target with potentially evolving purposes that could affect its application. In particular, while substantive objectives are most prominent in the applicable law analysed, normative and rights-based rationales for public participation in international environmental forums could be gaining more legal influence through the growing recognition of the linkages between procedural human rights and environmental protection. This shifting legal terrain underscores the need to continue to build understanding of whether substantive and normative objectives can be effectively reconciled, as schools of thought advocating for democratisation of international environmental governance contend, and how best to do so from a practical perspective. It also gives rise to questions about what kind of relationship and mutual influence exists between the law in this regard and real-world interpretations and expectations of the role of public participation.

Further valuable avenues of research would therefore include not only additional empirical analysis of relevant institutional, governmental and non-State actors' own attitudes and strategies towards public participation in international environmental forums, but also their understandings of and influence upon law and practice in this area. It should also include continued research on how participation processes at the international level can be made more equitable and protected from co-option by those with the most resources and power. Theoretical research into the concept of global democracy should be supplemented with more practical experimentation and should consider finding ways of engaging affected individuals and groups directly rather than through NGO representation.