Public Participation in Water Resources Management

Mara Tignino: Platform for International Water Law, Faculty of Law, University of Geneva

Abstract

Individuals and affected communities are often excluded from decision-making processes regarding the use of water resources. However, in the last two decades, non-state actors have been increasingly integrated into water management processes. Some international instruments, such as the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, put emphasis on access to information and transparency in natural resource management. Public participation – encompassing the rights of individuals and groups to have access to information and participate in decision-making processes – is an increasingly common obligation in international agreements. The article identifies some of the main features of public participation in water management, drawing on international instruments and the practice of international actors.

Keywords: Public participation, access to information, environmental impact assessment

Introduction

The management of transboundary water resources has experienced significant transformation over the last two decades. Treaties on international water resources no longer regulate only State-to-State relations; individuals, communities and non-governmental organizations - referred to collectively as “non-State actors” - have also started to gain important roles in the creation, administration and adjudication of these instruments. This is a promising development, given that the involvement of non-State actors has been acknowledged as a crucial factor in the realization of sustainable and integrated water resource management. (Raustiala, 1997) Achieving sustainability is now seen to depend not only on inter-State cooperation but also on the opportunities which non-State actors have to meaningfully participate in decision-making processes.

As a result, access to information, transparency and consultation with non-State actors in planning and decision-making processes are becoming key aspects of international water resources management. This paper will help to define the principle of public participation in water resource management, drawing on obligations under international water law, environmental law and human rights law, and paying particular attention to existing practice which involves non-State actors in decision-making. The analysis aims to contribute to the elaboration of

norms concerning participation of non-State actors in water resource management at the national level.

The role of individuals and communities in the management of transboundary water resources

Provisions extending opportunities for individuals, peoples and NGOs to be involved in natural resources management began to be integrated into international environmental agreements starting in the 1970s (Wengert, 1976; Breckenridge, 1998). The appearance of a duty to carry out an environmental impact assessment ("EIA") was an important precursor for the growing role for participation of individuals in environmental management at the national level.

Signed at the beginning of the 1990s, it was the Rio Declaration on Environment and Development ("Rio Declaration") which can be regarded as the truly catalyzing text of what could be defined as the "international law of public participation" (Ebbesson, 1997). The accompanying plan of action, Agenda 21, not only includes a general provision (Chapter 23, para 23.1) emphasizing the importance of allowing individuals, communities and organizations to participate in decisions which could be environmentally detrimental to their life and work, but also, and more specifically, requires States to aim for "an approach of full public participation, including that of women, youth, indigenous people and local communities in *water management* policy-making and decision-making" (Chapter 18, para. 18.9 (c), emphasis added).

Among multilateral environmental agreements ("MEAs") which put these norms on access to information and participation into practice, the 1998 Convention on Access to Information, Public Participation and Access to Justice ("Aarhus Convention") is a significant landmark. The Convention consolidates the principle of public participation in environmental matters, including water resources management. The Aarhus Convention stipulates the right of citizens to have access to information in environmental matters, not only requiring cross-border notification and negotiation, but also obliging States to adapt domestic consultation practices to meet international obligations (Fluckiger, 2009).

International water law

Access to information on the quality of water resources should be viewed as an essential aspect of effective water governance. Indeed, some agreements explicitly emphasize the relationship between access to information and the prevention of transboundary impact. A case in point is the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("1992 Water Convention"), originally adopted under the aegis of the United Nations

Economic Commission for Europe ("UNECE"). The Convention requires States Parties to provide public access both to water-quality objectives and to water monitoring and assessment results, with the aim of increasing the accountability of efforts to reduce transboundary impacts on water resources (Art.16). In the context of the European Union, the 2000 Water Framework Directive goes even further, stating that "the success of this Directive relies […] on information, consultation and involvement of the public, including users" (Preamble) and requiring river basin management plans to be published and made available to the public for comment (Art. 14).

Moreover some agreements on specific European watercourses – includes provisions on public participation. An example is Article 14 of the 1994 Convention on Cooperation for the Protection and Sustainable Use of the Danube River. The practice of the International Commission for the Protection of the Danube River (ICPDR) also supports the participation of non-State actors, granting NGOs observer status at their annual meetings (Rieu-Clark, 2007).

In South America, some riparian commissions have developed instruments to strengthen the role of the public in the management of transboundary water resources. Though many of the relevant agreements – such as those on the Amazon and the Uruguay Rivers – do not contain explicit norms on public participation, the riparian commissions have developed specific norms to ensure effective consultation with indigenous people and local communities. For example, the 2004 Memorandum of Understanding concluded between the Amazon Cooperation Treaty Organization (ACTO) and the Coordinating Body for the Indigenous Organizations of the Amazon Basin (COICA), proposes that the parties will, *inter alia* "formulate and promote transboundary projects, wherein local populations, including the indigenous one, would participate". Moreover, the Administrative Commission on the Uruguay River developed an Environmental Protection Plan for the River Uruguay with local municipalities of both Argentina and Uruguay in 2002. This plan relies on the coordination and participation of local communities and is inspired by principles contained in the 1992 Rio Declaration on Environment and Development such as the principle of sustainable development (ICJ, CR2009/20, para.10)

Similar to the situation which exists in South America, the practice of consulting affected populations under the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin of 1995 does not derive from explicit terms of the agreement regarding public participation. Yet, in 2007, the executive body of the Mekong River Commission ("MRC") – the Joint Committee, with members from all four signatories to the agreement – recommended "a consultative process with NGOs and representatives of civil society as part of MRC annual meetings (Regional Meeting on Stakeholder

Engagement, 2008). Admittedly, this is only a first step toward the integration of the public in the management of the Mekong River; local communities living along this river have not often been included in decision-making processes (Affeltranger, 2008). Finally, the trend towards the inclusion of the public in the management of transboundary water resources is also reflected in some agreements on international watercourses adopted in Africa. For example, both the Senegal and the Niger River Water Charters include public information and consultation dimensions.

International environmental law

Norms drawn from international water and environmental law should be applied and interpreted coherently, so as to strengthen the rights of individuals and communities in the management of transboundary water resources. All these norms may thereby contribute to the realization of sustainable utilization of water resources.

The dominant model in international environmental law for the inclusion of individuals in the environmental decision-making process is the EIA. The right of the affected public to participate during the EIA process has been highlighted in the 1991 Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") and in the Guidance on Public Participation in Environmental Impact Assessment adopted by the Conference of the Parties of the Espoo Convention in 2004. The Espoo Convention requires that states likely to cause an environmental impact provide opportunities for the public in any State likely to be affected to participate in the EIA process. It explicitly states that these opportunities for participation to be equivalent to those which they would provide to their own citizens (Art. 2.6). The aim of full public participation in transboundary EIA is to make both the process of decision-making on projects with transboundary effects more transparent and give greater legitimacy to the final decisions on such projects. The inclusion of individuals and local communities of riparian States can thereby help reduce the risks both of damage to international watercourses and potential conflicts between States which share water resources (Verschuuren, 2004).

In 2002, the parties to the Aarhus Convention established an innovative mechanism which allows individuals and NGOs to request a review of a party's compliance with their obligations under the Convention. The Aarhus Compliance Committee established under that mechanism has since specified some aspects of the principle of public participation. For example, in the context of a Ukrainian project to build a navigation canal in the Danube delta which passed through an internationally recognized wetland, Romania and a Ukrainian NGO both claimed Ukraine had failed to comply with the provisions of the Aarhus Convention. In their decision, the Committee pointed out that the Convention imposes an obligation to consult with all affected communities during an EIA process – in this case, those of both the Ukraine *and* Romania. The

Committee further underlined that the Aarhus Convention aims "at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective" and recommended to Ukraine "to bring its legislation and practice into compliance with the provisions of the Convention" (Compliance Committee, Seventh Meeting, ECE/MP.PP/C.1/2005/2/Add.3, 2005, para. 27, 32 and 41 (a)). Moreover, the requirement to consult individuals should take place in the early stages of decision-making. In a later case, the Committee made clear that, "once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting" the requirements of the Aarhus Convention (Compliance Committee, Sixteenth Meeting, ECE/MP.PP/C.1/2007/4/Add.1, 2007, para.79). The practice of the Aarhus Compliance Committee thereby clarifies the rights of individuals in water resources management: that the participation of affected individuals must not only be effective and meaningful but must also begin at the early stages of decision-making processes.

Riparian states in Europe are also subject to the obligation to consult local communities as part of the legal framework of the Espoo Convention (which will likely be open to non-European states in the near future). The Espoo Convention defines some facets of this obligation. Concerned States are required to provide EIA documentation "to the authorities and the public of the affected Party in the areas likely to be affected" (Art. 4.2, Espoo Convention). Moreover, the public of the affected Party must have the opportunity, before the EIA is concluded, to "mak[e] comments or objections on the proposed activity and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin." (Art. 3.8). The concerned States have to make sure that these "comments" and "objections" are taken into account in the final decision on the proposed activity (art.6, Espoo Convention).

The duty to consult all affected populations is not limited to the European context. The duty to consult affected groups finds expression in documents of global scope, including in Principle 10 of the Rio Declaration. As former General Secretary of the United Nations, Kofi Annan, pointed out "the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities". He is clearly correct: the Inter-American Court of Human Rights has not hesitated to make reference to the Aarhus Convention in interpreting obligations with respect to the right to information within the framework of the American Convention on

Human Rights (*Claude-Reyes et al. v. Chile*, 2006, para. 81). States outside of Europe have also begun to put these principles into practice. In a case concerning the Pulp Mills on the Uruguay River between Argentina and Uruguay, the International Court of Justice ("ICJ") also had to address the obligation to consult riparian populations in the context of an EIA. Despite finding no obligation to consult under the terms of the 1975 Uruguay River Treaty, it noted that Uruguay had in fact consulted with local populations of both Parties (*Pulp Mills on the Uruguay River*, 2010, paras. 216-219).

The global scope of the obligation to consult affected populations during an EIA process has also been integrated into the policy of international organizations. The World Bank's operational policy on environmental assessment provides that: "For meaningful consultations between the borrower and project-affected groups and local NGOs […], the borrower provides relevant material in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted" (OP 4.01, para. 15). Similar obligations are contained in the Performance Standards adopted by the International Finance Corporation ("IFC") in 2006 and in the operational policies of regional development banks such as the Inter-American Development Bank. While complaints brought by groups of individuals and NGOs before the Inspection Panel of the World Bank and mechanisms of regional development banks allege that IFIs have failed to comply with the consultation obligations contained in operational policies, the cases demonstrate that consultation with affected communities has become an important dimension among the obligations to carry out an EIA in compliance with international standards.

Practices adopted under international human rights mechanisms have also elaborated an obligation to consult local communities. A case in point is *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,* a decision of the African Commission on Human and Peoples' Rights related to the health and environmental impact of the activities of oil companies active among the Ogoni people in the delta of the Niger River. Oil activities had caused water, air and soil pollution as well as short and long-term health impacts. In its decision, the Commission underscored that the rights to health and clean environment affirmed in the African Charter on Human and Peoples' Rights imply an obligation to order "independent scientific monitoring of threatened environments" and to publicize environmental and social impact studies prior to any major industrial development. According to the Commission, there is an obligation to provide information to those communities exposed to hazardous materials and activities and to provide "meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities" (*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 2001, para. 53). In *Claude Reyes v. Chile*, the Inter-American Court of Human Rights held

that international practices points to an obligation to ensure access to information (using the Aarhus Convention as a touchstone). Despite the project's significant environmental impact, Chile denied the right of individuals to have access to information on this project. The Court found that withholding this information violated the rights of the victims to freedom of thought and expression and the right to judicial guarantees embodied in the American Convention on Human Rights.

The obligation to inform local communities about the risks of activities susceptible to health and environmental impacts was also analyzed by the European Court of Human Rights in the *Tatar v. Romania* case, related to the exploitation of a gold mine in Baia Mare in Romania. The Court observed that pollution could interfere with a person's private and family life by harming peoples' well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorising and monitoring of industrial activities, especially activities that were dangerous for the environment and human health. It also underlined the obligation to inform the population living in Baia Mare about the risks of accidents (*Tatar v. Romania*, 2009, paras. 112-125). This judgment draws an explicit link between the protection of the rights enumerated under the European Convention on Human Rights and the right of individuals to be informed of the potential environmental impact of proposed projects.

Conclusion

The growing recognition of the right to water may play a role in strengthening the rights and entitlements of individuals in water resources management. This right underlines the public interest which should inherently underlie the management of water resources. As articulated by the Committee on Economic, Social and Cultural Rights: "The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties" (General Comment No. 15, *The Right to Water* (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, para. 48). The right of individuals and affected communities to participate in the management of transboundary water resources has been increasingly recognized in international law. However, these rights can be strengthened further, especially in the context of the interpretation and application of the right to water. Doing so may aid in the achievement of sustainable utilization of water resources. In parallel, obligations drawn from international water law and environmental law should be taken into account in the development of the content of a human right to water. The right to participate in decision-making process on transboundary

water resources relies on some well-defined human rights obligations such as the freedom of expression and the right to judicial guarantees.

The inclusion of individuals and communities in transboundary water resources management can improve the quality of decisions on the utilization and protection of transboundary water resources. Furthermore, when individuals and communities have access to information and the right to formulate observations and recommend improvements on the activities which are planned on transboundary water resources, the risks of disputes over water resources can be reduced. (Tanzi, Pitea, 2002; Bruch 2005). As such, public participation can be an important factor in the avoidance of water disputes, ensuring consensus between multiple stakeholders in relation to water-related projects, and thereby putting into place a defensive logic which can help to prevent water disputes before they arise.

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