

The Escazú Agreement and the Protection of Environmental Human Rights Defenders

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The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, better known as the Escazú Agreement, entered into force on 22 April 2021, coinciding with International Mother Earth Day celebrations. The Escazú Agreement constitutes the first environmental treaty ever concluded under the auspices of ECLAC, and the first in the world to contain specific provisions on human rights defenders in environmental matters. Hopefully, the entry into force of the Escazú Agreement and its implementation at the national level will contribute significantly to the protection of the environment, and environmental, land and indigenous defenders.

Keywords: Escazú Agreement, environmental rights, environmental human rights defenders indigenous people, Aarhus Convention

1. Regional agreements on environmental rights

On 30 October 2021, it will be precisely twenty years ago that the famous UNECE¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters² (hereinafter the Aarhus Convention or Convention) entered into force. Some years after the fall of the Berlin Wall, the Convention was drafted by governments and non-governmental organisations (hereinafter NGOs) to enable the members of the public to play a stronger role in tackling Europe's environmental challenges. Originally, the Aarhus Convention was adopted by 35 countries and the European Community at the Fourth Ministerial Conference "Environment for Europe"³ in the Danish city of Aarhus, on 25 June 1998. As of April 2021, the Convention had 47

¹ The United Nations Economic Commission for Europe (UNECE) is one of the five regional commissions of the United Nations. As a multilateral platform, it brings together 56 member States of the pan-European region, including the member countries of the European Union, and other countries located in non-EU Western and Eastern Europe, South-East Europe, the Commonwealth of Independent States (CIS) and North America. UNECE contributes to enhancing the effectiveness of the UN through regional implantation of outcomes of global conferences, and draws up norms, standards and conventions to facilitate cooperation within and outside the pan-European region.

² 2161 UNTS 447.

³ The process and its Ministerial Conferences have provided a high-level platform for stakeholders to discuss, decide and join efforts in addressing environmental challenges across the 56 countries of the UNECE region since 1991. The idea for a new environmental agreement also emerged from the 'Environment for Europe' process that had already included the members of the public. These discussions served as a backdrop for the two years of negotiations that produced the conclusion of the Aarhus Convention.

Parties: 46 States and the European Union.⁴

The adoption of the Aarhus Convention was the most ambitious venture in the field of environmental democracy under the auspices of the UN. It is a legally binding international instrument, and it provides a wealth of experience based on almost two decades of implementation across a broad spectrum of industrialized, transitional and developing countries. While the standard established by the Aarhus Convention are first and foremost designed to regulate the relationship between government and the public in a state's domestic sphere, Article (3)⁷ of the Convention opened up the opportunity to transpose the principles of public participation to the sphere of international environmental governance.

The Aarhus Convention has its basis in Principle 10 of the Rio Declaration.⁵ In 1992, Principle 10 set out three fundamental rights: access to information, access to participation and access to justice in environmental matters, as key pillars of sound environmental governance.⁶ Over the years, Principle 10 has provided a globally recognized framework for the development of national standards and laws for these 'access rights' or 'environmental rights'. In 2010, the Governing Council of the United Nations Environment Programme (UNEP) adopted voluntary guidelines in Bali, Indonesia, to help national governments put Principle of the Rio Declaration into practice ('the Bali Guidelines'⁷).

In 2012, the Rio+20 Conference re-confirmed Principle 10, and ten countries in Latin America and the Caribbean issued a declaration for the full implementation of Principle 10 at regional level.⁸ They declared their willingness to work towards a regional instrument promoting the application of environmental rights, and requested the support of the UN Economic Commission for Latin America and the Caribbean (ECLAC)⁹ as technical secretariat. ECLAC actively supported the process, which evolved into an international negotiation.¹⁰ After two years of preparatory meetings (2012-2014) and nine meetings of the negotiating committee established in 2014, the Regional

⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en (11 March 2021).

⁵ UNGA A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. The Rio Declaration was adopted at the first Rio Conference (the United Nations Conference on Environment and Development) convened in Rio de Janeiro from 3-14 June 1992.

⁶ "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

⁷ The guidelines have a specific focus on national legislation as they are titled, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters'. They were unanimously adopted by the Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in February 2010. GMEF brings together the world's environmental ministers for high-level meeting in parallel with the Governing Council.

⁸ https://accessinitiative.org/sites/default/files/declaracion_principio_10_english.pdf (22 March 2021).

⁹ ECLAC is another regional commission of the UN; it was established by Economic and Social Council Resolution 106(VI) of February 1948. The headquarters of ECLAC can be found in Santiago, Chile. The original name of the organisation was the Economic Commission for Latin America (ECLA). The scope of the Commission's work was later broadened, and by Resolution 1984/67 of 27 July 1984, the Council decided to change its name to the Economic Commission for Latin America and the Caribbean. The Spanish acronym, CEPAL, has remained unchanged.

¹⁰ The 24 members of the negotiating committee that approved the final text of the Agreement were Antigua and Barbuda, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago and Uruguay.

Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (hereinafter the Escazú Agreement or Agreement) was adopted in Escazú, Costa Rica, on 4 March 2018. Environmental NGOs played a crucial role in the negotiation of the Agreement that resulted in a very high level of democratic legitimacy.¹¹ To make the participation of more than 2000 individuals and organisations possible, ECLAC coordinated a regional public mechanisms to receive information about the process and participate in the meetings of the negotiating committee.¹²

The Escazú Agreement is the only legally binding agreement stemming from the Rio+20 Conference.¹³ It also supports the implementation of the United Nations' 2030 Agenda for Sustainable Development and the Sustainable Development Goals¹⁴ at the regional level. The Agreement was opened for signature by the 33 countries of Latin America and the Caribbean¹⁵ from 27 September 2018 to 26 September 2020. Having met the conditions required under Article 22,¹⁶ the Agreement entered into force on 22 April 2021, coinciding with International Mother Earth Day.¹⁷ At the meetings of the signatory countries to the Escazú Agreement,¹⁸ delegates discussed the strategies to achieve early entry into force of the Agreement, and the items that should be dealt with at the first meeting of the Conference of the Parties, such as the rules of procedure of the Conference, including the modalities for significant participation by the public, and the financial provisions that are necessary for the functioning and implementation of the Agreement.¹⁹

2. The main features of the Escazú Agreement

Whereas most multilateral environmental agreements cover obligations that Parties have to each other, both the Aarhus Convention and the Escazú Agreement go to the heart of the relationship between people and governments, and impose clear obligations on Parties and national authorities towards the public. Their twin protections for environmental and human rights provide a mechanism for holding governments to account in their effort to address environmental challenges.

Above all, the Agreement aims to guarantee the rights of every person to a healthy environment

¹¹ Report of the thirty-eighth session of ECLAC, LC/SES.38/14, 26 March 2021, p. 35. https://repositorio.cepal.org/bitstream/handle/11362/46751/S2100190_en.pdf?sequence=1&isAllowed=y (4 March 2021).

¹² <https://www.civicus.org/index.php/es/component/tags/tag/escazu-agreement> (6 March 2021).

¹³ Twenty years after the first Rio Conference, the 2012 United Nations Conference on Sustainable Development was the third UN conference on sustainable development. Governments adopted innovative guidelines on green economy policies, a 10-year framework of programmes on sustainable production and consumption patterns, and a strategy for financing sustainable development. From 20 to 22 June 2012, the three-day meeting of world leaders culminated in the adoption of the 49-page non-binding document, 'The Future We Want', and called for the development of the Sustainable Development Goals (SDGs), building on the Millennium Development Goals (MDGs), and converging with the post-2015 development agenda.

¹⁴ <https://sdgs.un.org/goals> (9 March 2021).

¹⁵ See Annex 1 of the Agreement

¹⁶ Escazú Agreement, Art. 22(1): "*The present Agreement shall enter into force on the ninetieth day after the date of deposit of the eleventh instrument ratification, acceptance, approval or accession.*"

¹⁷ The State Parties: Antigua and Barbuda, Argentina, Bolivia, Ecuador, Guyana, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Saint Lucia and Uruguay.

¹⁸ The first meeting was held in October 2019 in San José, Costa Rica; the second meeting was held virtually in December 2020 under the auspices of the Government of Antigua and Barbuda.

¹⁹ See Escazú Agreement, Art. 15(4)(a)-(b)

and sustainable development.²⁰ Just like the Aarhus Convention, the Escazú Agreement develops at the international level rules that have long been found at national level. It focuses on interactions between the public authorities and the members of the public, and grants the public rights regarding access to environmental information, public participation in environmental decision-making procedures and access to justice in environmental matters. The effective implementation of all these procedural rights is seen as a condition for realizing the substantive right to a healthy environment. Moreover, the Agreement also aims to combat inequality and discrimination, devotes attention to persons and groups in vulnerable situations²¹ and places equality at the core of sustainable development.

The first three Articles of the Agreement include the objective, the definitions and the guiding principles. They lay down the groundwork for the rest of the Agreement, setting goals, defining terms, and listing the main principles that will guide interpretation and implementation. In implementing the Agreement, each Party shall²² be guided by the following principles:²³

- a) equality and non-discrimination,
- b) transparency and accountability,
- c) non-regression and progressive realization,
- d) good faith,
- e) prevention,
- f) precaution,
- g) intergenerational equity,
- h) maximum disclosure,
- i) permanent sovereignty of States over their natural resources,
- j) sovereign equality of States, and
- k) the principle of *pro persona*.²⁴

Like the Aarhus Convention, the Escazú Agreement is also composed of three pillars:

1. the first one defines the rights for the public to have access to environmental information;
2. the second one establishes the right of the public to participate in decision-making procedures which may have a significant impact on the environment;
3. the third one defines the rights for the public to have access to justice when and if the rights to information and participation mentioned above have not been guaranteed, or when a national law related to the environment has not been respected.²⁵

²⁰ See Escazú Agreement, Arts. 1 and 4(1)

²¹ Under Art. 2(e) of the Agreement, ‘persons and groups in vulnerable situations’ are defined as “*persons or groups that face particular difficulties in fully exercising the access rights recognized*” in the Agreement, “*because of circumstances or conditions identified within each Party’s national context and in accordance with its international obligations*”.

²² As far as the legal nature of obligations stemming from the provisions of the Agreement is concerned, most of them are expressed by the term ‘shall’ which clearly means a binding obligation.

²³ Escazú Agreement, Art. 3

²⁴ Latin American national courts increasingly make use of the ‘favourability clause’ or *pro persona (pro homine)* principle of interpretation, both when dealing with internal and domestic law. The principle enables the judge to depart as much as possible, ‘in a positive sense’, from the core of the human right at hand, in order to construe its widest expression, make the enjoyment of the right more of a reality, and define the positive content of the right in a manner that facilitates its implementation. See A. Rodiles: *The Law and Politics of the Pro Persona Principle*, in H. Ph. Aust & G. Nolte (Eds.), *The Interpretation of International Law by Domestic Courts – Unity, Diversity, Convergence*, Oxford University Press, Oxford, 2015, pp. 153-174.

²⁵ People power for the planet: How the Aarhus Convention enables citizens’ voices to be heard, European ECO Forum, p. 9.

The pillars depend on each other; public participation cannot be imagined without access to information, as provided under the first pillar, nor without the possibility of access to justice under the third pillar. Furthermore, Article 4(7) makes it clear that the Agreement is a floor, not a ceiling. Parties may introduce measures for broader access to information, more extensive public participation and wider access to justice in environmental matters than required by the Agreement.

Among the more significant issues covered by the Agreement's final provisions are its coming into force, the Conference of the Parties (hereinafter COP), secretariat, capacity-building, compliance review and settlement of disputes. It is worth mentioning that under Article 18 of the Agreement, the "*Committee to support Implementation and Compliance*" will be set up, as a subsidiary body of COP to promote the implementation of the Agreement and to support the Parties in that regard. The rules relating to the structure and functions of the Committee shall be determined by the first COP. The Committee shall be of a consultative and transparent nature, non-judicial and non-punitive, and shall review compliance of the provisions of the Agreement and formulate recommendations, in accordance with the rules of procedure established by the COP. These rules must ensure "*the significant participation of the public*", allowing members of the public to bring issues of compliance before an international body, and pay "*particular attention to the national capacities and circumstances of the Parties*".²⁶ The experiences of the Aarhus Convention Compliance Committee can show some good practices regarding the effective implementation of the rights established by the pillars of the Aarhus Convention.²⁷

2.1. Access to environmental information

Access to information is a form of transparency, and depends fundamentally on the type of information desired and the technologies and resources available to collect it.²⁸ The Agreement establishes basic obligations for the Parties to ensure that competent authorities²⁹ and, in some cases, private entities, are required to make available information relating to the environment to the members of the public.

In Article 2(c) a broad definition of environmental information is given: "*any information that is written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as*

²⁶ Escazú Agreement, Art. 18(2)

²⁷ Art. 15 of the Aarhus Convention envisaged the establishment of a committee to review compliance with the provisions of the Convention. The first Meeting of the Parties to the Convention, in Lucca (Italy) in October 2002, adopted Decision I/7 on the Review of Compliance, establishing the Compliance Committee. Since 2004 this Committee has become one of the most active compliance mechanisms in existence, despite of the fact that the normative character of the Committee and its rulings play an auxiliary in the process of ensuring compliance with the provisions of the Convention. See in that effect, G. Samvel: Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice, *Transnational Environmental Law*, Vol. 9, Issue 2, July 2020, p. 231.

²⁸ See A. Pánovics, *Access to information and transparency*, in: L. Krämer & E. Orlando (Eds.), *Principles of Environmental Law*, Edward Elgar Publishing, Cheltenham, 2018, p. 363.

²⁹ Under Escazú Agreement, Art. 2(b), 'competent authority' means any public body that exercises the powers, authority and functions for access to information, including independent and autonomous bodies, organizations or entities, owned or controlled by the government, whether by virtue of powers granted by the constitution or other laws, and, when appropriate, private organizations that receive public funds or benefits (directly or indirectly) or that perform public functions and services, but only with respect to the public funds or benefits received or to the public functions and services performed.

to environmental protection and management".³⁰ Articles 5 and 6 govern access to environmental information. Article 5 sets out the right of access to information upon request, also known as "passive" access to environmental information. Article 6 sets out the duties of the competent authorities to collect and disseminate information on their own initiative, also known as "active" access to environmental information. The Agreement's preamble, Article 1 on the objective, Article 3 on the guiding principles and Article 4 on general measures support the provisions of Articles 5 and 6.

Once a member of the public has requested environmental information, Article 5 establishes criteria and procedures for providing or refusing it. As a general principle, each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.³¹ The Agreement recognizes the right to have access to information held by competent authorities without mentioning any special interest or explaining the reasons for the request.³² The members of the public shall be informed whether the requested information is in possession or not of the competent authority receiving the request, and be informed of the right to challenge and appeal when information is not delivered.³³

The refusal of access to information must be communicated in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal. Article 5(6) outlines the circumstances when the Parties *may* allow their competent authorities to refuse requests for information,³⁴ even in cases where a Party does not have a domestic legal regime of exceptions. Exception regimes shall favour the disclosure of information,³⁵ the reasons for refusal shall be legally established in advance and be clearly defined and regulated, taking into account the public interest, and be interpreted restrictively; the burden of proof lies with the competent authority.³⁶ When applying the public interest test, the competent authorities shall weigh the interest of withholding the information against the public benefit of disclosing it.³⁷

The last part of Article 6 covers conditions applicable to the delivery of information, including the obligation of the competent authorities to guarantee that the environmental information is provided in the format requested by the applicant (if available), and to respond to requests as quickly as possible and within a period not longer than 30 working days from the date of receipt of the request (or less if so stipulated in domestic legislation).³⁸ As a main rule, the disclosure of the information requested must be free of charge. When its reproduction or delivery is required, such costs shall be applied in accordance with the procedures established by the competent authority, be reasonable

³⁰ See Escazú Agreement, Art. 2(c)

³¹ Escazú Agreement, Art. 5(1)

³² Escazú Agreement, Art. 5(2)(a)

³³ Escazú Agreement, Art. 5(2)(b)-(c)

³⁴ Parties may apply the following exceptions:

(a) when disclosure would put at risk the life, safety or health of individuals;

(b) when disclosure would adversely affect national security, public safety, or national defence;

(c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species;

(d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.

³⁵ Escazú Agreement, Art. 5(7)

³⁶ Escazú Agreement, Art. 5(8)

³⁷ Escazú Agreement, Art. 5(9)

³⁸ Escazú Agreement, Art. 5(11)-(12)

and made known in advance.³⁹

According to active access to environmental information, each Party shall guarantee, to the extent possible, that the competent authorities generate, collect, publicize and disseminate environmental information in a systematic, proactive, timely, regular, accessible and comprehensible manner, periodically update this information and encourage its disaggregation and decentralization at sub-national and local levels.⁴⁰ Furthermore, provides a legal basis for the Parties to develop pollutant release and transfer registers⁴¹ that will be established progressively and updated periodically. It also must be guaranteed that in case of an imminent threat to public health or the environment, the relevant competent authorities immediately disclose and disseminate through the most effective means all pertinent information in its possession that could the public take measure to prevent or limit potential damage.⁴² Parties shall publish and disseminate at regular intervals, not exceeding five years, national reports on the state of the environment, encourage independent environmental performance reviews, and promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources.⁴³ Finally, public and private companies, particularly large companies, shall be encouraged to prepare sustainability reports that reflect their social and environmental performance.⁴⁴

2.2. Public participation in environmental decision-making

Public participation stands as the second pillar of the Escazú Agreement. It relies upon the two other pillars for its effectiveness; the first pillar ensures that the members of the public can participate in an informed fashion, and the third pillar guarantees that participation happens in reality.

The regulation of the second pillar is less straightforward than in the case of access to environmental information. Article 7(1) requires open and inclusive public participation in environmental decision-making processes based on domestic and international legal frameworks. The level of involvement in a particular process depends on a number of factors, including the expected outcome, its scope, how many members of the public will be affected, and so on.⁴⁵ The now considerable experience gained in the implementation of the Aarhus Convention has shown that if any one of these elements is missing, effective public participation cannot take place.

Environmental decision-making ranges from decisions concerning specific activities, installations, and substances to decisions concerning plans, programmes, policies, and even the adoption of laws and executive regulations.⁴⁶ Article 7(2) generally applies to ‘projects and activities’ and ‘other processes for granting environmental permits that have or may have a significant impact on the environment’. Parties are also required to promote participation public participation in other decision-making processes, revisions, re-examinations or updates, such as land-use planning, policies, strategies, plans, programmes rules and regulations, which have or may have a significant impact

³⁹ Escazú Agreement, Art. 5(17)

⁴⁰ Escazú Agreement, Art. 6(1)

⁴¹ Pollutant release and transfer register (PRTR) is a database or inventory containing information on emissions of pollutants to the environment from individual industrial facilities.

⁴² Escazú Agreement, Art. 6(5)

⁴³ Escazú Agreement, Art. 6(7)-(9)

⁴⁴ Escazú Agreement, Art. 6(13)

⁴⁵ Aarhus Convention Implementation Guide, Second edition, UNECE, 2014, p. 119.

⁴⁶ J. Ebbesson: *Public Participation*, in D. Bodansky, J. Brunnée & E. Hey (Eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2007, p. 696.

on the environment.⁴⁷

Each Party shall adopt measures to ensure that the public can participate from the early stages of the decision-making process. There is no obligation, however, to incorporate literally all the observations expressed by the members of the public. The Parties shall adopt measures to ensure that due consideration is given to the observations and weigh them in the light of the various interests at issue.⁴⁸ Information shall be given, through appropriate means, and in an effective, comprehensible and timely manner, on the type or nature of the environmental decision under consideration, the authority responsible for making the decision and other authorities and bodies involved, the procedure foreseen for the participation of the public, and the public authorities involved from which additional information on the environmental decision under consideration can be requested.⁴⁹

The public authorities shall make efforts to identify the public directly affected by projects and activities, and promote specific actions to facilitate their participation.⁵⁰ Once a decision has been made, the public must be informed in a timely manner thereof and of the grounds and reasons underlying the decision. The decision and its basis shall be made public and accessible.⁵¹

2.3. Access to justice in environmental matters

Access to justice provide the foundation of the environmental rights, as it facilitates the ability of the members of the public to enforce their right to be informed, to participate, and to hold public authorities and polluters accountable for environmental harm. The third pillar of the Agreement enforces both the first and second pillars in domestic legal systems. Access to justice ensures that standards for implementation of the other two pillars will be fostered and upheld in a fair, judicious and effective manner.⁵²

Access to judicial and administrative mechanisms must be ensured to challenge and appeal, with respect to substance and procedure, any decision, act or omission related to access to environmental information,⁵³ and to participation in environmental decision-making processes.⁵⁴ Moreover, Article 8(2)(c) provides a mechanism for the members of the public to enforce environmental law directly.⁵⁵

Parties are required to make special efforts in order to guarantee the right of access to justice in accordance with the guarantees of due process.⁵⁶ To guarantee the right of access to justice, there is a need for:

- competent State entities with access to expertise,

⁴⁷ Escazú Agreement, Art. 7(3)

⁴⁸ Escazú Agreement, Art. 7(7)

⁴⁹ Escazú Agreement, Art. 7(6)(a)-(d)

⁵⁰ Escazú Agreement, Art. 7(16)

⁵¹ Escazú Agreement, Art. 7(8)

⁵² Putting Rio Principle 10 into Action, An Implementation Guide, United Nations Environment Programme, October 2015, p. 12.

⁵³ Escazú Agreement, Art. 8(2)(a)

⁵⁴ Escazú Agreement, Art. 8(2)(b)

⁵⁵ "(...) any other decision, act or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment."

⁵⁶ Escazú Agreement, Art. 8(1)

- effective, timely, public, transparent and impartial procedures that are not prohibitively expensive,
- broad active legal standing,⁵⁷
- the possibility of ordering precautionary and interim measures;
- measures to facilitate the production of environmental damage;
- mechanisms to execute and enforce judicial and administrative decisions in a timely manner;
- mechanisms for redress.⁵⁸

In order to facilitate access to justice, Parties shall establish:

- measures to minimize or eliminate barriers to the exercise of the right of access to justice;
- means to publicize the right of access to justice and procedures to ensure its effectiveness;
- mechanisms to systematize and disseminate judicial and administrative decisions;
- the use of interpretation or translation of languages other than the official languages when it is necessary to the exercise of the right of access to justice.⁵⁹

3. The protection of environmental human rights defenders

People all over the world strive for the realization of human rights according to their circumstances and in their own way. *'Human rights defender'* is a term used to describe people who, individually or with others, act to promote or protect human rights in a peaceful manner. Human rights defenders are identified above all by what they do and it is through a description of their actions and of some of the contexts in which they work that the term can best be explained.⁶⁰ The term has been used increasingly since the adoption of the Declaration on human rights defenders in 1998.⁶¹ In order to ensure the right to participate in public affairs, it is of central importance that persons and organisations exercising their rights are not persecuted, penalized or harassed for their involvement.⁶²

Environmental human rights defenders are individuals and groups who strive to protect and promote human rights relating to the environment.⁶³ Many people often act as human rights defenders outside any professional or employment context. They come from many different backgrounds and work in different ways. For example, an inhabitant of a rural community who coordinates a campaign or demonstration by the members of the community against environmental degradation of their farmland could also be described as a human rights defender. Broad categories of defenders advocating for the environment are often characterized as 'land and environmental rights defenders', 'environmental rights defenders' or just 'environmental activists'.

In March 2012, the Human Rights Council decided to create, for the first time, a mandate on human

⁵⁷ In contrast with Art. 9(2) of the Aarhus Convention, the Agreement does not require having a sufficient interest or, alternatively, maintaining the impairment of a right in order to have legal standing.

⁵⁸ Escazú Agreement, Art. 8(3)(a)-(g)

⁵⁹ Escazú Agreement, Art. 8(4)(a)-(d)

⁶⁰ <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx> (1 March 2021).

⁶¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Right and Fundamental Freedoms, A/RES/53/144, 8 March 1999, Art. 3(c)

⁶² See Art. 3(8) of the Aarhus Convention

⁶³ Report of the Special Rapporteur on the situation of human rights defenders, A/71/281, 3 August 2016, para. 7.

rights and the environment. It quickly became clear that while many aspects of the relationship between human rights and the environment are important, none is more urgent than the need to protect environmental human rights defenders.⁶⁴ Latin America is, by far, the most dangerous regions of the world for environmental human rights defenders, although the level of risk varies from country to country. Attacks on human rights defenders are common and include threats, online and offline attacks, killings, arbitrary detention, judicial harassment and criminalisation.⁶⁵

According to the international environmental organization Global Witness, 2019 saw a total of 212 killings of land and environmental defenders – an average of more than 4 people a week. That's more than 2018, making 2019 the deadliest year on record.⁶⁶ Because of the difficulties in reporting and verifying, these numbers only represent the tip of the iceberg. Over two-thirds of killings took place in Latin America, which has consistently ranked the worst-affected region since Global Witness began to publish data since 2012.⁶⁷

Threats and/or reprisals against environmental human rights defenders and their families or communities include physical threats or reprisals, such as assault, death threats, sexual assault and kidnapping, as well as non-physical threats and reprisals, such as defamation and stigmatisation. The extreme nature of these threats and reprisals are mostly attributed to the strong economic interests at stake coupled with a high level of corruption and lack of rule of law. Mining, agribusiness and logging are the deadliest sectors, and the biggest industrial drivers of this conflict. The problem is worsening in large part because competition for access to natural resources is intensifying, and more people are finding themselves on the frontline to defend their environment from corporate or State abuse, and from unsustainable exploitation. Indigenous people are the most vulnerable because many development projects are located on their land. When governments disregard appropriate consultation procedures, the result is often conflict, forceful displacement, environmental degradation, and human rights violations.⁶⁸

Effective recognition and enforcement of environmental rights can reduce the number of human rights violations against environmental human rights defenders and provide remedies for them. However, all the countries in the region have legal frameworks to evaluate environmental impacts of certain projects that include formal information and public participation instances, as well as mechanisms to access to justice in case of rights violations. Notwithstanding, projects' environmental assessments traditionally has not explicitly contemplated a human rights approach, which would help special attention to specific persons, groups or organisations, guarantee substantive consultations to those who are potentially affected and effective reparation mechanisms in case of human rights violations.⁶⁹

At the moment the Escazú Agreement is the sole instrument that protects human rights defenders

⁶⁴ John H. Knox, *Environmental Human Rights Defenders, A global crisis*, Policy brief, Universal Rights Group, February 2017, p. 2.

⁶⁵ Report of the Special Rapporteur on the situation of human rights defenders (Addendum), A/HRC/43/51/Add.3, 24 February 2020, p. 18. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/046/56/PDF/G2004656.pdf?OpenElement> (4 March 2021).

⁶⁶ *Defending Tomorrow*, The climate crisis and threats against land and environmental defenders, Global Witness, July 2020, p. 6.

⁶⁷ *Ibid.* 10.

⁶⁸ *A Deadly Shade of Green*, Threats to Environmental Human Rights Defenders in Latin America, ARTICLE 19, 2016, p. 4. https://www.article19.org/data/files/Deadly_shade_of_green_A5_72pp_report_hires_PAGES_PDF.pdf (7 March 2021).

⁶⁹ *Recommendations for incorporating a human rights-based approach in environmental impact assessment of mining projects*, FIO-GIZ-ECLAC, Santiago, Chile, 2019, p. 4.

in environmental matters.⁷⁰ It sends a clear signal that it is impossible to protect the environment without protecting those who defend it. The commitments related to the protection of environmental defenders are set forth in Article 9. This article, titled “*Human rights defenders in environmental matters*”, specifies that each Party shall guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity. Furthermore, each Party is obliged to take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles, and the basic concepts of its legal system.⁷¹ Under Article 9(3) of the Agreement, each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders may suffer while exercising the rights set out in the Agreement.

4. Conclusions

Public participation is recognized as a key element in the context of environment and health issues. The success of the landmark 1998 Aarhus Convention in providing a mechanism for holding governments to account through its twin protections of environmental and human rights served as a model for other regions of the world, such as Latin America and the Caribbean. The adoption of the Escazú Agreement affirms the value of the regional dimension of multilateralism for sustainable development, and the importance of the involvement of civil society and the wider public in the negotiations.

Once an international agreement comes into force, the tasks of implementation still lie ahead. Implementation to bring national laws in compliance with the sometimes abstract provisions of the Agreement will be a great challenge for the Parties. Ultimately, the effective implementation of the Agreement depends on the willingness of the Parties to implement its provisions fully and in a progressive manner. While any practical implementation of the provisions of the Agreement as well as any future regulatory developments in this field will need to be based on national and local specifics, government agencies and other stakeholders in the ECLAC region can learn from the relevant experience in other regions, such as UNECE.

Hopefully, the most vulnerable persons and groups will be the true beneficiaries of the Agreement: indigenous peoples, Afro-descendant populations, women and children. The protection of persons and groups in vulnerable situations is a concept that runs throughout the Escazú Agreement.⁷² Furthermore, by fostering access rights, the Agreement can support the safeguarding of the rights of the public in the context of climate change. While the impacts of climate change and vulnerability of the poorest communities may vary, on the whole climate change will aggravate existing vulnerabilities. Climate change is a threat multiplier, disproportionately accentuating its impacts on countries and those segments of the population that are already at a disadvantage. The poor tend to be worst affected by disasters and may also find it particularly hard to respond to the effects of

⁷⁰ Report of the fourteenth session of the regional conference of women in Latin America and the Caribbean, LC/CRM.14/7, 3 August 2020, p. 25. https://repositorio.cepal.org/bitstream/handle/11362/45870/S2000518_en.pdf?sequence=1&isAllowed=y (14 March 2021).

⁷¹ See Escazú Agreement, Art. 9(2)

⁷² See Escazú Agreement, Arts. 4(5), 5(3)-(4), 5(17), 6(6), 8(5) and 10(2)(e)

climate change.⁷³ Those groups that are already marginalized and living in vulnerable situations, as a result of pre-existing inequalities and inequities, are even more affected and have less favourable conditions or reduced capacities to adapt and to mitigate the consequences of climate change.⁷⁴

Finally, the procedural environmental rights introduced by the Agreement will facilitate the shaping of an 'Escazú space' in which human rights and environmental protection will be able to interact in Latin America and the Caribbean. The process for signatures and ratifications has continued advancing despite the current health situation stemming from the COVID-19 pandemic.⁷⁵ The swift entry into force of the Agreement and its implementation at the national level will contribute significantly to the protection of the environment, and environmental, land and indigenous defenders in the region. Human right defenders and other members of the public can have great hopes in Latin America and the Caribbean that the Escazú Agreement will be a milestone on the road to ending the region's environmental conflicts.

⁷³ Planning for sustainable territorial development in Latin America and the Caribbean, LC/CRP.13/7, United Nations, 2019, p. 51.

⁷⁴ Climate change and human rights: contributions by and for Latin America and the Caribbean, ECLAC/OHCHR, LC/TS.2019/94, Santiago, 2019, p. 11. https://www.cepal.org/sites/default/files/publication/files/44971/S1900999_en.pdf (18 May 2021).

⁷⁵ Strikingly, Brazil, Colombia, Chile and Costa Rica – even though those latter two led the negotiations from the start – have not ratified it.