From Aarhus to Escazú and the Cross-fertilisation of Ideas and Principles

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Abstract

By operationalising the three-pillar approach of Principle 10 of the Rio Declaration, two regional instruments, the Aarhus Convention and the Escazú Agreement, guarantee the public access to information, participation in decision-making processes, and access to justice. The awarding of the rights aims to enhance the protection of the environment for the benefit of all. Although comparable in many respects, the two instruments embrace the content of Principle 10 with their own style and emphases. As argued in the article, some of the differences can be ascribed to the legal environment into which the instruments were developed, referred to in this article as their broader legal environment. Accordingly, the primary objective of the article is to provide a general overview and a comparison of the main elements of the instruments and to identify the influence of their broader legal environment on their content. In addition to an emphasis on guaranteeing particular rights and assistance to persons or groups in vulnerable situations and providing particular protection to human rights defenders, the Escazú Agreement takes a step further than the Aarhus Convention by ordering its Parties to guarantee a substantive right of every person to live in a healthy environment. Although the Escazú Agreement bases its approach on rights to a greater extent than the obligation-oriented Aarhus Convention, access rights guaranteed to the public are not necessarily of greater legal value under the Escazú Agreement than under the Aarhus Convention.

Keywords: Aarhus Convention, Escazú Agreement, Access Rights, Human Rights, Cross-fertilisation of Ideas and Principles.

1. Introduction

With the entry into force of the Escazú Agreement[1] (2018) on 22 April 2021, the three pillar-approach of access rights[2] have taken firm roots as prerequisites for the furtherance of the protection of the environment in Latin America and the Caribbean. While it resembles another regional treaty focusing on access rights and the three-pillar approach, the Aarhus Convention[3] (1998), the Escazú Agreement provides an even

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[1] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018) C.N.195.2018.TREATIES-XXVII.18 (Escazú Agreement), in this article referred to as the Escazú Agreement or the Agreement. The Agreement had 24 signatories and 12 parties on 15 April 2021.

[2] "Access rights" are defined in Article 2 of the Escazú Agreement, as "the right of access to environmental information, the right of public participation in the environmental decision-making process and the right of access to justice in environmental matters". Although "access rights" is not a concept defined by the Aarhus Convention, in this article the authors will refer to "access rights" when referring to the three types of procedural rights which both instruments are centred around.

[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entry into force 30 October 2001) 2161 UNTS 447 (Aarhus Conven-

closer connection to substantive environmental human rights than the Aarhus Convention.t

The Aarhus Convention was negotiated between 1996 and 1998 under the auspices of the United Nations Economic Commission for Europe (UNECE).[4] At that time, many of the UNECE Member States were also Member States (MS) of the European Union (EU). In addition to its general orientation toward European law,[5] to some degree the Convention reflects several important pieces of EU environmental law which had been adopted when the negotiations took place.

The Escazú Agreement, which was negotiated under the sponsorship of the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC),[6] was carved into the legal environment of Latin America and the Caribbean. As will be discussed below, the regional human rights regime provided for by the American Convention on Human Rights (ACHR or the Convention)[7] appears to have had some influence on the development of the Agreement.

In this context, it should be mentioned that an unequivocal substantive right to a healthy environment is not yet guaranteed by any global human rights treaty.[8] However, such a right is awarded by some regional treaties,[9] including the San Salvador Protocol to the ACHR,[10] Article 11 of which guarantees the right to everyone to live in a healthy environment.[11]

In comparison with the Aarhus Convention, several important novelties are introduced in

tion), cited in this article as the Aarhus Convention or the Convention.

[4] The so-called Sofia Guideline provided the basic premises for the development of the Aarhus Convention, see further UNECE, 'Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making' (23–25 October 1995) ECE/CEP/24 submitted by the ECE Working Group of Senior Governmental Official "Environment for Europe"; and the mandate of the ad hoc working group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making UNECE 'Report on the Special Session' (8 February 1996) ECE/CEP/18.

[5] Even so the Aarhus Convention, in line with its Article 17, is open to States Members of the UNECE, and according to Article 19 of the Convention, any State that is a Member of the United Nations may accede to the Convention. Currently, the Aarhus Convention has 47 Parties, including European States, a few Central Asian States, and the EU.

[6] Preparatory meetings were held from 2012 to 2014 and the Negotiating Committee established in 2014 met nine times before the adoption of the Escazú Agreement. See UNECLAC, 'Report of the first meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean' (10 January 2013) LC/L.3565; UNECLAC, 'Plan of Action to 2014 for the Implementation of the Declaration on the Application of Principle 10 of the Rio Declaration on the Environment and Development in Latin America and the Caribbean and its Road Map' (17 April 2013). See also United Nations Conference on Sustainable Development Rio + 20, 'Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development' (25 July 2012) A/CONF.216/13 which launched the discussions on the possibility of the adoption of a multilateral environmental agreement on Principle 10 in Latin America.

[7] American Convention on Human Rights 'Pact of San Jose', Costa Rica (adopted 22 November 1969, entry into force 18 July 1978) 1144 UNTS 123.

[8] For a further coverage on human rights and the environment in a global and regional context, see, e.g., John H. Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Sciences 79. See also Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.

[9] Including the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) 1520 UNTS 217 (African Charter).

[10] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entry into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

[11] Article 11 reads as follows: "1. Everyone hall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

the Escazú Agreement. Among these is an emphasis on guaranteeing to persons or groups in vulnerable situations rights and assistance in relation to the Agreement.[12] Another novelty is that pursuant to Article 9 of the Agreement, the parties are to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters. This obligation was incorporated into the Agreement by reason of the acknowledgment that Latin America has proven to be a particularly hostile region for the work of human rights defenders, and human rights defenders are defenceless in the absence of State protection.[13]

In their preambles, both instruments (the Escazú Agreement and the Aarhus Convention) refer to the Rio Declaration[14] and its Principle 10. The widely acknowledged Principle 10 underscores each individual's right to appropriate access to environmental information, the opportunity to participate in decision-making processes, and that effective access to judicial and administrative proceedings should be provided.[15] As early as 2001, the Organization of American States (OAS) launched an action plan for the promotion of Principle 10.[16]

Although both the Aarhus Convention and the Escazú Agreement establish vertical obligations upon states vis-à-vis their own citizens and both guarantee environmental access rights to NGOs,[17] the two instruments approach Principle 10 in a different way. Such differences may stem from the legal situation of the region for which the instruments were developed, referred to in this article as their broader legal environment.

Against this backdrop, the primary objective of this article is to provide a general overview and a comparison of the main elements of the two instruments and to draw attention to the influence of their broader legal environment on their content, approach and points of emphasis. In addition, the article offers a few speculative views relating to what kind of rights the instruments contain. Despite some cross-fertilisation of ideas and principles, there are interesting differences between the two instruments. As will be further elaborated below, some of these differences may, at least partially, be explained by the connection of each instrument to its broader legal environment.

2. The Broader Legal Environment

2.1 Introduction

While the Aarhus Convention largely reflects European environmental law already developed when the Convention's text was being negotiated, the Escazú Agreement was carved into the available legal environment of Latin America

[12] Escazú Agreement, Article 2(e); see also Article 4(5); Article 5(3–4, 17); Article 6(6); Article 7(14); Article 8(5); and Article 10(2)(e).

[13] See <https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/> accessed 3 April 2021. See also Ulisses Terto Neto, *Protecting Human Rights Defenders in Latin America: A Legal and Socio-Political Analysis of Brazil* (Springer 2018) 28–30. See also IACHR, 'Integral Protection Policies for Human Rights Defenders Inter-American Commission on Human Rights' (2017) OEA/Ser.L/V/II. Doc. 207, 9, 11–13, 30–31.

[14] UNCED, Rio Declaration on Environment and Development 1992, 31 ILM 874 (1992).

[15] Principle 10 reads as follows: "Environmental issues are best handled with the 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."

[16] OAS, 'Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development' (2001) HC94.Z65 I58 2001.

[17] See Article 2(4–5) of the Aarhus Convention and Article 2(d) of the Escazú Agreement.

and the Caribbean, including the ACHR and the available legal practice of the Inter-American Court of Human Rights (IACtHR or the Inter-American Court or the Court). In this light, the aim of the current chapter is to outline the particular context provided by the legal environment where each instrument came into being. Accordingly, the current chapter briefly addresses two main issues.

First, we discuss the relevant EU environmental legislation in force when the Aarhus Convention was being prepared and its apparent influence on the Convention. As will be briefly addressed below, although the European Convention on Human Rights (ECHR)[18] contains no environmental guarantees, the progressive interpretation of the European Court of Human Rights (ECtHR) read into some ECHR provisions provides some environmental guarantees,[19] thereby creating a new body of environmental human rights, including procedural environmental rights, some of which resemble those guaranteed by the Aarhus Convention.[20]

Second, we describe in broad strokes the human rights legal environment of the Americas, mainly a few principles of the ACHR, the relevant practice of the Inter-American Commission on Human Rights (IACHR or the Inter-American Commission or the Commission), and the Inter-American Court of Human Rights (IACtHR or the Court), and its importance to the Escazú Agreement's emphasis and approaches.

2.2 Some European Perspectives

2.2.1 Generalities

While classical nature conservation legislation has a long history in Europe, the development of modern environmental law as a distinctive body of rules accelerated following the Stockholm Conference 1972.[21] Although no comprehensive research appears to be available into the development of environmental law in the individual European States following the Conference, there is no doubt that the development of this field of law was not restricted to Member States (MS) of the European Economic Community (EEC).[22] In the wake of the Stockholm Conference, and in line with the growing body of international environmental law obligations,[23] other European States, including the Nordic States,[24] began developing their national environmental law accordingly.

A few European States went even further and equipped their constitutions with environ-

[18] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) 213 UNTS 221.

[19] Including, *López Ostra v. Spain* App 16798/90 (ECtHR 9 December 1994) [44] – [58] Article 8 ECHR; *Öneryildiz v. Turkey* App 48939/99 (ECtHR 30 November 2004) [89] – [91] Article 2 ECHR; *Fadeyeva v. Russia* App 55723/00 (ECtHR 9 June 2005) [116] – [134] Article 8; and *Dubetska and Others v. Ukraine* App 30499/03 (ECtHR 10 February 2011) [140] – [156] Article 8, ECHR.

[20] See further, *Guerra and others v. Italy* App No 14967/89 (ECtHR 19 February 1998) [56] – [60] Article 8; *Taşkin and Others v. Turkey* App 46117/99 (ECtHR 10 November 2004) [99], [118] – [126] Article 8; *Grimkovskaya v. Ukraine* App 38182/03 (ECtHR 21 July 2011) [69] – [73] Article 8; and *Di Sarno and Others v. Italy* App 30765/08 (ECtHR 10 January 2012) [107] Article 8. See also Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human rights and the Aarhus Convention' (2018) 30 Journal of Environmental Law 1, 11–13, 15–25.

[21] Declaration of the United Nations on the Human Environment, 16 June 1972, A/Conf 48/14/Rev 1, 3 (Stockholm Declaration).

[22] See, e.g., Celia I. Campbell-Mohn, 'Environmental law' (*Britannica*, 10 May 2002) <https://www.britannica.com/topic/environmental-law> accessed 10 April 2021.

[23] See, *inter alia*, an overview of this development by Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (4th edn Cambridge University Press 2018) 29–51.

[24] See, e.g., Aðalheiður Jóhannsdóttir, 'The Value of Proactive Methodological Approaches for Understanding Environmental Law' (2014) 59 Scandinavian Studies in Law 243, 253–254.

mental rights guarantees.[25] One of these states was Portugal, which as early as in 1976 had in place, in its Article 66, a provision stating the right of everyone to a healthy and ecologically balanced human living environment and the duty to defend it.[26] Some European constitutional provisions,[27] such as Article 112 of the Norwegian Constitution, originally adopted in 1992 as Article 110b, contain both substantive and procedural environmental rights.[28] In the *Norwegian Climate Case* (2020),[29] where questions concerning the legal character of Article 112 of the Norwegian Constitution were addressed, the Norwegian Supreme Court arrived at the conclusion that Article 112 did not generally guarantee individuals a right to a healthy environment, which they could pursue before the courts.[30] Moreover, as noted by the Court, the purpose of Article 112 had not been to limit political leeway.[31]

In another climate related human rights related case, the *Urgenda Case* (2019),[32] where the claimants, *inter alia*, argued that the Dutch State violated its due care obligation, and that by its non-action to take particular preventive action to prevent dangerous climate change, the State was held to have violated Article 2 and 8 of ECHR.[33] The Dutch State, on several grounds, rejected the Court of Appeal's interpretation of Articles 2 and 8 of the ECHR.[34] The Supreme Court of the Netherlands, however, did not hesitate to affirm the Appellate Court's reasoning and methodological approach,[35] and rejected the Dutch State's appeal.[36]

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[25] See, James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014) and their analysis of constitutions of the world containing environmental provisions, in appendixes A–I of their book.

[26] For text, see <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> accessed 31 March 2021. Interestingly, in Iceland, during the 105th legislative assembly 1982–1983, a proposal for a new constitution was submitted to the Althingi (Frumvarp til stjórnskipunarlaga um stjórnarskrá lýðveldisins Íslands, þingskjal 573 – 243. mál, 105. löggjafarþing, 1982–1983, 1–34 <https://www.althingi.is/altext/105/s/pdf/0537.pdf> accessed 1 April 2021.) Article 80 of the proposal contained an environmental provision which seems to have been driven by the need to strengthen the conservation of nature and natural resources and to ensure the public's right to roam. If the proposal had been adopted, Iceland would have been among the first states in the world to insert an environmental provision into its Constitution.

[27] In Norway, the first ideas for an environmental constitutional provision emerged in the late 1980s.

[28] The wording of Article 110b, which became Article 112, was slightly changed with the 2014 constitutional amendments in Norway. See further on the changes of Article 110b, e.g., Ole Kristian Fauchald, 'Hva er konsekvensene av Grunnlovens Miljøparagraf?' (2015) 200 PrivIus, Journal of Private Law 26, 36–39.

[29] Supreme Court of Norway, Natur og ungdom, Föreningen Greenpeace Norden, Naturvernforbundet and Besteforeldrens Klimaaksjon mot Staten v Olje- og energidepartementet¸ HR-2020-2472-P (case no. 20-051052SIV-HRET) Judgment 22 December 2020.

[30] Ibid. [78] – [145], [245]. The decision of the Court is very much in line with views of a Norwegian scholar published much earlier, see, e.g., Inge Lorange Backer, *Innføring i naturressurs- og miljørett* (4th edn Gyldendal Akademisk 2002) 53–56.

[31] Natur og ungdom and others (n 29) [139] – [141].

[32] Supreme Court of the Netherlands, The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda ECLI:NL:HR:2019:2007 Judgment 20 December 2019. See English translation <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 26 March 2021.

[33] Ibid. [2.2.1], [2.2.3]. Interestingly, the decision was not based on Article 21 of the Dutch Constitution, which read as follows: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment." See < https://www.denederlandsegrondwet.nl/9353000/1/j4nvih7l3kb91rw_j9vvkl1oucfq6v2/vkwrfdbpvatz/f=/web_119406_grondwet_koninkrijk_nl.pdf> (Dutch) accessed 7 April 2021.

[34] The State of the Netherlands (n 32) [3.1] – [3.6].

[35] The Hague Court of Appeal, The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation ECLI:NL:GHDHA:2018:2610 9 October 2018. See <https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf> (English translation) accessed 26 March 2021.

[36] Ibid. [9]. Nollkaemper and Burgers have pointed out that the Supreme Court's decision reflects a turning point as the Dutch State was made responsible for harmful effects of climate change, a situation to which

2.2.2 Environmental human rights in Europe

Drawing from his work experience within the ECtHR, Brennan Van Dyke, in 1994, made an interesting remark when he stated that "[t]he notion that human beings have a right to a healthy environment is far more controversial in Europe than it ought to be."[37] It is true that the ECHR does not yet in so many words guarantee the public a right to a healthy environment. Through a dynamic interpretation of some ECHR guarantees,[38] however, the ECtHR has gradually accepted that there is a link between environmental quality and the ability to enjoy established ECHR human rights.[39] By connecting the primary human rights guarantees of the ECHR with environmental quality and dangerous environmental situations,[40] a new body of European environmental human rights, which includes three-pillar procedural rights resembling those of the Aarhus Convention,[41] has gradually been developed.[42] However, this development had only marginally begun when the Aarhus Convention was being negotiated and does not appear to have affected its content.

2.2.3 The European Union

Although the environmental law of the EU had progressively developed since the mid-sixties, it took several years of active environmental legislating before procedural rules benefiting the public became the norm in environmental decision-making and right of the public to access environmental information was assured.[43] Some of

many entities had contributed to. André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (*EJIL: Talk!*, 6 January 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> accessed 26 March 2021.

[37] Brennan Van Dyke, 'A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime' (1994) 13 Virginia Environmental Law Journal 323.

[38] Mainly Article 2, Right to life, and Article 8, Right to respect for private and family life; also Article 10, Freedom of expression; Article 6, Right to a fair trial; Article 13, Right to an effective remedy; and in addition, Article 1, Protection of property, Protocol 1 to the ECHR. See also Heta Heiskanen, 'Afraid of Fragmentation? Keep Calm and Apply the European Convention on Human rights on Environmental Matters' (2018) 2 Nordic Environmental Law Journal 7.

[39] Beginning with López Ostra (n 19), which concerned nuisance (smell, noise, and fumes) originated from illegal polluting activity situated in the vicinity of the applicant's home, the ECtHR acknowledged that there was a connection between the necessary environmental quality and the guarantees provided by Article 8 of the ECHR.

[40] Öneryildiz (n 19), where a methane explosion had triggered a landslide of waste when a mountain of waste erupted and engulfed some ten slum-dwelling situated below it, including the applicant's dwellings. The applicant argued that there had been a violation of Article 2 of the ECHR due to many-sided inaction on behalf of the authorities to resolve the waste situation in the slum. The ECtHR arrived at the conclusion that by not providing for the adequate protection in safeguarding the right to live, Article 2 on the right to live, had been violated.

[41] Beginning with Guerra and others (n 20), where the applicants complained about the authorities' failure to inform the public about the hazards stemming from a factory and had to wait until the operation ceased for essential information that would have enabled them to assess the risks they and their families were faced by at their homes, the State was in breach of Article 8. See also, Grimkovskaya (n 20); Taşkin and others (n 20); and *Karin Andersson and Others v. Sweden* App 29878/09 (ECtHR 25 September 2014).

[42] This development, which will not be covered by this article, has been described, analysed and theorised by many scholars, including Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 Fordham Environmental Law Review 471; Boyle (n 8); Lucretia Dogaru, 'Preserving the Right to a Healthy Environment: European Jurisprudence' (2014) 141 Procedia – Social and Behavioral Sciences 1346; Heta Heiskanen, *Towards Greener Human Rights Protection: Rewriting the Environmental Case Law of the European Court of Human Righs* (Tampere University Press 2018); and Peters (n 20). See also ECtHR, 'Factsheet – Environment and the ECHR' < https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 28 March 2021.

[43] For information relating to the history and development of EU Environmental Law and its legal foundation, see e.g., David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (OUP 2016) 27–34, and Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *Eu-*

that legislation was available when the Aarhus Convention was being negotiated and it is fair to say that this legislation had a decisive influence on the content and structure of the Convention, in particular on its first two pillars.

Beginning with the 1985 EIA-Directive,[44] the EEC adopted minimum rules relating to an environmental impact assessment (EIA) procedure for projects likely to have significant environmental impact. The closely related Espoo Convention on Transboundary EIA was concluded a few years later in 1991,[45] the EC[46] acceding to the Convention on 24 June 1997.[47] The EIA-Directive aimed to ensure that before consent was given, projects (Annex I and Annex II projects) likely to have significant effects on the environment be made subject to an EIA.[48] A part of the EIA-procedure was to make available to the public the information gathered by the developer in relation to the impact assessment procedure;[49] the public concerned was given the opportunity to express an opinion before a project was initiated;[50] and when a decision to allow a project had been taken by the competent authority, the public concerned was to be informed of the decision, any conditions attached thereto, and the reasons and considerations on which the decision was based.[51] Rules on the participation of the public in EIA-procedures were further developed by the 1997 EIA-Directive amendments,[52] which included, fuller and more detailed rules on the environmental information to be submitted by the developer;[53] moreover the duty of the competent authority to inform of the content of the decision, along with its reasons and conditions, was broadened and no longer confined to the public concerned but applied to the public in general.[54] In line with Directive 2003/35/EC,[55] the EIA-Directive was adjusted as necessary to implement the Aarhus Convention, in particular its Article 6 along with Article 9(2) and (4).

Moreover, in accordance with the SEA-Directive of 2001,[56] certain plans and programmes stemming from MS authorities[57] were made subject to an environmental assessment proce-

ropean Environmental Law (Cambridge University Press 2017) 1–8.

44 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment OJ [1985] L175/40.

45 Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entry into force 10 September 1997) 1989 UNTS 309 (Espoo Convention).

46 The European Community.

47 See also the declaration made by the EU upon signing and confirmed upon the approval of the Espoo Convention <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&clang=_en#EndDec> accessed 17 March 2021.

48 Directive 85/337/EEC (n 44) Article 2.

49 Ibid. Article 4–6.

50 Ibid. Article 6.

51 Ibid. Article 9.

52 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ [1997] L73/5. The EIA-Directive currently in force is Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), OJ [2012] L26/1, with amendments pursuant to Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ [2014] L124/1.

53 Directive 97/11/EC (n 52) Article 1(6–8).

54 Ibid. Article 2(11).

55 See further Article 3 and recital 11 of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/85/337/EEEC and 96/61/EC, OJ [2003] L156/17.

56 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ [2001] L197/30. The proposal for the Directive was presented by the Commission on 4 December 1996, see COM (96) 511 final, OJ C 129, 25 April, 14.

57 Directive 2001/42/EC (n 56) Article 2.

dure.[58] Part of the procedure is to make available to the authorities and the public any draft plan or programme and an environmental report,[59] and to allow for public participation and effective opportunities for the public to express their opinion on the drafts and the report before their adoption.[60] Finally, the MS are to ensure that when a plan or a programme is adopted the public is informed of the plan or programme as adopted, along with other relevant information.[61] The SEA-Directive was aligned with the Aarhus Convention with Directive 2003/35/EC.[62] Related to the SEA-Directive is the SEA-Protocol of 2003[63] to the Espoo Convention, to which the EU acceded on 12 November 2008.[64]

Decision-making procedures for polluting activities were also developed further in relation to permitting procedures and public access to information on applications for permits. Pursuant to the original IPPC-Directive of 1996,[65] the MS were, *inter alia*, to take the necessary steps to ensure that applications for permits for new installations or for substantial changes were made available to the public, to enable it to comment on them before the competent authority reached its decisions.[66] The IPPC-Directive was adjusted to the Aarhus Convention by Directive 2003/35/EC.[67]

Although the EU did not deposit its approval until 17 February 2005,[68] the relevant EU law was made consistent with the Convention after the entry into force of the Aarhus Convention 30 October 2001.[69]

With the adoption of the Environmental-Information-Directive of 1990,[70] the public was, upon request, and without having to prove an interest,[71] awarded a freedom of access to environmental information.[72] In addition, a positive obligation was placed on public authorities to disseminate information relating to the environment.[73] Pursuant to Article 5(2) of the Information-Directive, a request for information could be refused if it affected sensitive areas of public

[58] Ibid. Article 3–8.
[59] Ibid. Article 6(1).
[60] Ibid. Article 6(2).
[61] Ibid. Article 9.
[62] Directive 2003/35/EC (n 55) Article 2.
[63] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (adopted 21 May 2003, entry into force 11 July 2010) 2685 UNTS 140, sometimes referred to as the Kiev-Protocol.
[64] Council Decision 2008/871/EC of 20 October 2008 on the approval, on behalf of the European Community, of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context, OJ [2008] L308/33.
[65] Council Directive 96/61/EC of 24 September 1986 concerning integrated pollution prevention and control, OJ [1996] L257/26. The IPPC-Directive has been replaced by the IED-Directive, Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast), OJ [2010] L334/17.
[66] Directive 96/61/EC (n 65) Article 15(1), and recital 13.
[67] Directive 2003/35/EC, Article 4 and recital 12.
[68] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ [2005] L124/1. See also Directive 2003/35/EC (n 55).
[69] The alignment to and the scope of the measures that have been taken by the EU have not escaped criticism, in particular how the EU has approached the access rights in relation to its own institutions. See Regulation 1367/2006/EC of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ [2006] L264/13. See further on the issue Kingston, Heyvaert and Čavoški (n 43) 179–180, 237–256.
[70] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, OJ [1990] L158/56. Replaced by Directive 2003/4/EC of the European Parliament and of the council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ [2003] L41/26.
[71] Directive 90/313/EEC (n 70) Article 3.
[72] Ibid. Article 1, and Article 3.
[73] Ibid. Article 1, and Article 7.

affairs or particular private interests.[74] In line with Article 4 of the Directive, persons who considered that a request for information had been unreasonably refused or ignored, was to have access to justice and the possibility of seeking judicial or administrative review of the decision in accordance with the relevant national legal system.[75] In the context of hazardous activities, public safety, and environmental information, the first Seveso Directive from 1982 is of interest.[76] In addition to the duty of the MS to ensure that the relevant manufacturers had in place the appropriate safety measures,[77] and that they provided the authorities with the necessary information,[78] the MS were under a positive duty to ensure that persons liable to be affected by a major accident were informed in an appropriate manner of the safety measures and of the correct behaviour to be adopted in the event of an accident.[79] In 1996 the first Seveso Directive was replaced by the second Seveso Directive,[80] which contained, *inter alia*, more detailed provisions relating to the access to information on the environment. Concerning emergency plans, they were to communicate the necessary information to the public,[81] the public was to be consulted on external emergency plans,[82] and information on safety measures was to be permanently available to the public.[83]

2.3 Some Concluding Remarks

As discussed above, the progressive expansion of the relevant EU's environmental law was probably the most influential factor in shaping the European broader environment within which the Aarhus Convention was developed. Even though some European states had early on furnished their constitutions with environmental guarantees meant to benefit the public, that factor did not seemingly have a decisive influence on the Aarhus Convention. As the development of European human rights had just begun when the Convention was being negotiated, it is doubtful that it had any influence on the content of the Convention.

2.4 Some Latin America and Caribbean Perspectives

2.4.1 Favourable legal environment

According to Peña and Hunter, the Latin American and Caribbean region is thought to be a particularly favourable field for the adoption of a regional instrument on the procedural rights of participation.[84] While the States of the region have not formed a Union like the EU, which has for decades been active in developing and harmonising European environmental law, the development of environmental law has nonethe-

[74] Further articulated in Article 3(2) of Directive 90/313/EEC (n 70).
[75] Ibid. Article 4.
[76] Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities, OJ [1982] L 230/1.
[77] Ibid. Article 4.
[78] Ibid. Article 5.
[79] Ibid. Article 8. See also the Convention on the Transboundary Effects of Industrial Accidents (adopted 17 March 1992, entry into force 19 April 2000), 2105 UNTS 457. The EU acceded to the Convention 24 April 1998, see Council Decision 98/685/EC of 23 March 1998 concerning the conclusion of the Convention on the Transboundary Effects Industrial Accidents, OJ [1998] L326.
[80] Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances, OJ [1997] L10/13. The second Seveso-Directive has been replaced by the third Seveso-Directive, Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ [2012] L197/1.
[81] Directive 96/82/EC (n 80) Article 11(2).
[82] Ibid. Article 11(3).
[83] Ibid. Article 13.
[84] Natalia Peña and David B. Hunter, 'The Hard Choices in Promoting Environmental Access Rights' in David Bradlow and David Hunter (eds), *Advocating Social Change through International Law: Exploring the Choice between Hard and Soft International Law* (Brill 2020) 122.

less been active in the region. In addition, most Latin American constitutions have provisions regarding environmental rights and responsibilities,[85] as well as governmental authorities charged with environmental management,[86] and a large number of countries in the region have passed general or framework environmental laws.[87] Moreover, several years before the Escazú Agreement negotiation began, national courts had progressively adjudicated on claims for the protection of environmental rights.[88] In cases where domestic legislation establishes more favourable rights than those of the Agreement, the former must prevail.[89]

To complement the above progression, an interesting development has taken place within the Inter-American system of human rights (IASHR). The Protocol of San Salvador to the ACHR is one of the few international human rights instruments to include a provision, Article 11, guaranteeing a right to a healthy environment.[90] However, while the Inter-American Commission (IACHR) can receive and process complaints from individuals,[91] with few exceptions only a State Party can submit a case to the Court.[92] As pointed out by Grant, in practice, the right guaranteed by Article 11 of the Protocol is therefore only indirectly protected by the IASHR.[93] On the issue, the Inter-American Commission has consistently and repeatedly, by citing Article 19(6) of the Protocol, brought out the limited competence of the organs of the IASHR to rule on alleged violations of the rights guaranteed by the protocol, including its Article 11.[94] Although the right enshrined in Article 11 of the Protocol of San Salvador is not directly enforceable through individual petitions submitted to the Inter-American institutions, the State Parties to the ACHR and the Protocol are nonetheless under an obligation to guarantee the right.[95]

In a recent advisory opinion OC-23/17,[96] the IACtHR concluded that the right to a healthy environment was autonomous and not only a by-product of other rights with an environmental connection such as the right to life and the

[85] See May and Daly (n 25) and their analysis (appendixes A–I of the book) of constitutions of the world containing environmental provisions.

[86] ECLAC, 'Access to information, participation and justice in environmental matters in Latin America and the Caribbean: towards achievement of the 2030 Agenda for Sustainable Development' (2018) LC/TS.2017/83, 33–34.

[87] Ibid.

[88] See further on this development, Adriana Fabra Aguilar, 'Enforcing the Right to a Healthy Environment in Latin America' (1994) 3 RECIEL 215. Discussion on these issues was prevalent in the region years before her article was published in 1994.

[89] Article 4(7), Escazú Agreement.

[90] See also Knox (n 8) 82.

[91] Article 44, ACHR.

[92] Article 61, ACHR.

[93] Evadné Grant, 'The American Convention on Human Rights and Environmental Rights Standards' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 61.

[94] See, e.g., Community Maya Kaqchikel de los Hornos and El Pericon and its members v. Guatemala, Admissibility, Report No. 87/12, Petition 140/08 (IACHR, 8 November 2012) [32]. See also National Association of Discharged and Retired Employees of SUNAT, Admissibility, Report No 21/09, Petitions 965/98, 638/09, and 1044/04, joined (IACHR, 19 March 2009) [56]; and Pensioners of the National Agricultural Development Bank (BANDESA), Admissibility, Report No 102/09, Petition 1380/06 (IACHR, 19 October 2009) [24].

[95] See IACtHR, Cuscul Pivaral and others v. Guatemala, Judgment of 23 August 2018. Serie C No. 359 [93]. On the relationship between the San Salvador Protocol and the ACHR, see Oswaldo R. Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties; Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31 Netherlands Quarterly of Human Rights 159, 156–183.

[96] IACtHR, *State Obligations In Relation To The Environment In The Context Of The Protection And Guarantee Of The Rights To Life And To Personal Integrity: Interpretation And Scope Of Articles 4(1) And 5(1) In Relation To Articles 1(1) And 2 Of The American Convention On Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017, Series A, No. 23.

right to personal integrity.[97] According to the understanding of the Court,[98] the right to a healthy environment is, furthermore, encompassed by the provision of Article 26 of the ACHR on progressive development. In the opinion, the IACtHR furthermore pointed out that a right to a healthy environment had been recognized at a constitutional level in several states of the region.[99] In fact, many constitutions in the region encompass provisions relating to various aspects of environmental concerns and have done so for a considerable time.[100]

Even so, as has become the usual exercise by international human rights bodies,[101] the Inter-American institutions have used progressive interpretation to extend the ambit of other rights as to also cover environmental matters.[102] Through interpreting other human rights, including the right to life,[103] the right to property,[104] the right to freedom of thought and expression,[105] and the right to due process of law,[106] and by means of providing some form of access rights, Inter-American institutions have afforded an indirect protection to the right to a healthy environment.

2.4.2 Enhancing access rights through other rights – examples from case-law

Relating to participation in environmental decision-making, in *Kichwa de Sarayaku v Ecuador* (2012),[107] the IACtHR concluded that Article 21 of ACHR, guaranteeing the right to property, gave rise to an obligation for the State to inform and consult with indigenous communities regarding projects on the collectively owned land.[108] Additionally, the right to be consulted was to be guaranteed by the State in accordance with the community's values, practices, customs, and forms of organization and through their institutions and mechanisms.[109] Similarly, in *Pueblos Kaliña y Lokono v Surinam* (2015),[110] the right to participate in government, enshrined in Article 23 of the ACHR, has been construed by the Court as to include the right of indigenous peoples to participate in the decision-making processes concerning their land.[111]

Access to environmental information has also been addressed. In *Claude-Reyes and Others v Chile* (2016),[112] the IACtHR acknowledged that the right of freedom of thought and expression as guaranteed by Article 13 of the ACHR, included the right to seek and receive public information from public authorities.[113] One of the instruments to which the Court referred as a basis for its justification was the Aarhus Convention.[114] Although the information access right may be limited, the request for information does not need to be based on a direct interest of the ap-

[97] Ibid. [63].
[98] Ibid. [57].
[99] Ibid. [58].
[100] See Maria Antonia Tigre, 'Implementing Constitutional Environmental Rights in the Amazon Rainforest' in Erin Daly and James R May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press 2018), 61. See also May and Daly (n 25) and their analysis of constitutions of the world containing environmental provisions, appendixes A–I; and Knox (n 8) 92.
[101] See Knox (n 8) 84.
[102] Grant (n 93) 61.
[103] Article 4, ACHR.
[104] Article 21, ACHR.
[105] Article 13, ACHR.
[106] Article 8, ACHR.
[107] IACtHR, Kichwa Indigenous People of Sarayaku v Ecuador, Judgment of 27 June 2012, Series C, No. 245.
[108] Ibid. [145], [232].
[109] Ibid. [232].
[110] IACtHR, Pueblos Kaliña y Lokono v Surinam, Judgement of 25 November 2015, Serie C No. 309.
[111] Ibid. [196].
[112] IACtHR, Claude Reyes v Chile, Judgement of 19 September 2006, Serie C No. 151.
[113] Ibid. [76], [77], [81].
[114] Ibid. [81].

plicant for information.[115] Scholars usually categorized the case as being instrumental in the development of access rights in Latin America, particularly the right to access to environmental information.[116]

Access to justice has as well been adjudicated upon. In *Saramaka People v Suriname* (2007),[117] the indigenous community of the Saramaka alleged that its ineligibility under domestic law to receive a communal title to land as a tribal community violated Article 3 of the ACHR, on the right to juridical personality.[118] According to the national legislation of Suriname, juridical personality would only be afforded to individual members of the community, not to the community as an entity.[119] As the IACtHR pointed out, this placed the Saramaka People in a vulnerable situation in protecting their property rights. By not recognising the juridical capacity of the Saramaka People to fully exercise their rights in a collective manner, the State had violated their rights under Article 3 ACHR.[120]

In *Kaliña and Lokono peoples v Suriname* (2015), the persistent non-recognition of a juridical personality was held to violate not only the community's rights to communal property but also its access to justice under Article 25 of the ACHR.[121] Recalling its jurisprudence on the matter, the Court asserted that national legislation should be interpreted and applied to take into account the rights of the indigenous community through the recognition of their collective juridical personality as a community as well as individuals; through recognition of their collective and individual legal standing in administrative and judicial procedures; and through the guarantee of access to justice without discrimination and in keeping with the rules of due process.[122] Stemming from Article 25 of the ACHR, the Court identified two specific obligations of the State. The first is to legislate and ensure the due application by the competent authorities of effective remedies that protect all persons subject to their jurisdiction against acts that violate their fundamental rights or that lead to the determination of their rights and obligations. The second obligation identified by the Court is to guarantee the means to execute the respective decisions and final judgments issued by those competent authorities so that the rights that have been declared or recognized are truly protected.[123]

2.5 Some Concluding Remarks

In addition to the general development of environmental law in Latin America and the Caribbean, the emphasis on environmental human rights within the IASHR along with the progressive case-law of the IACtHR have been decisive in shaping the broader legal environment of the Escazú Agreement. In contrast with the broader legal environment where the Aarhus Convention was developed, by the time the Escazú Agreement was being negotiated the importance of environmental human rights had already been acknowledged and such rights had been inserted into most constitutions in the region. It is therefore fair to conclude that the en-

[115] Ibid. [77]. Following the case, several domestic courts proclaimed the right to access public information a fundamental right. See IACHR, 'National jurisprudence on freedom of expression and access to information' (5 March 2013) OEA/Ser.L/V/II CIDH/RELE/INF.10/13, 60–63.

[116] Jonas Ebbesson, 'Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 71.

[117] IACtHR, Saramaka People v Suriname, Judgment of 28 November 2007, Series C, No. 172.

[118] Ibid. [159] *et passim*.

[119] Ibid. [173].

[120] Ibid. [174], [175].

[121] Kaliña and Lokono Peoples (n 110) [101] *et passim*.

[122] Ibid. [251].

[123] Ibid. [238], [239].

vironmental human rights factor had a decisive influence on the content of the Agreement.

3. The Three-pillar Approach – A Comparison

3.1 Definitions

For the operation of the three-pillar approach, the Aarhus Convention and the Escazú Agreement, in Article 2 of each, provide definitions of a few terms. In its Article 2, the Aarhus Convention provides five definitions for the purpose of the Convention. These are (1) "party", (2) "public authority", (3) "environmental information", and (4) "the public", and "the public concerned". In comparison, the Escazú Agreement defines five terms: (1) "access rights", (2) "competent authority", (3) "environmental information, (4) "public" and (5) "persons or groups in vulnerable situations".

Where the two instruments define comparable terms their definitions, though not identical, are to a large extent substantively similar.[124] However, the Escazú Agreement's article 2(d) restricts the definition of the "public" to persons who are nationals of the State Party or are subject to its national jurisdiction of the State Party. Not present in the Aarhus Convention's definition this limitation runs counter to the fundamental principles of equality and of non-discrimination, which are particularly mentioned in Article 3 of the Agreement. Moreover, the definition is irreconcilable with Article 7(1) of the Agreement, which places on each Party the obligation to implement open and inclusive public participation based on domestic and international normative frameworks. Furthermore, discrimination based on nationality contravenes international law, including several provisions of the ACHR, and the established practice of transboundary environmental impact assessment.[125]

While the Escazú Agreement employs the term "competent authority", the Aarhus Convention refers to "public authority". As has been pointed out by Zuluaga-Madrid,[126] although the terms have similar meanings and are used for the same purpose, "competent authority" is used in the Escazú Agreement to encompass a more comprehensive definition, drifting away from the restriction of the word "public".[127] In the Escazú Agreement, the definition is also broader from another perspective, as it includes private entities that receive public funds or benefits, whether directly or indirectly, as well as entities that perform public functions, without the condition that they are defined by national law, as is the case in the Aarhus Convention.[128]

One of the most interesting novelties of the Escazú Agreement is the Agreement's definition of "persons or groups in vulnerable situations". As further articulated in Article 2 of the Agreement, these are those persons or groups that face particular difficulties in fully exercising the access rights of the Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with

[124] For a comparison and textual analysis of the terms "competent authority" and "public authority", and "environmental information", see Juliana Zuluaga-Madrid, 'Definitions of the Aarhus Convention v the Proposal for a New Latin America and The Caribbean Instrument: Mapping the Differences in the Material Scope of Procedural Environmental Rights in International Law' in Jerzy Jendrośka and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice, vol 4* (Intersentia 2018) 44–53. See also Stephen Stec and Jerzy Jendorśka, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31 Journal of Environmental Law 533, 536–537.

[125] See also Stec and Jendrośka (n 124) 543–544. See furthermore *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment, I.C.J. Reports 2010, p. 14 [203] – [206] *et passim*.

[126] Zuluaga-Madrid (n 124) 44–47.

[127] Ibid.

[128] Ibid. 45.

its international obligations. Peña and Hunter have pointed out that as a result of compromises made in the pursuit of reaching a binding instrument among the varying opinions, the definition of persons and groups in vulnerable situations was intentionally left open.[129]

3.2 Principles and general provisions

Article 3 of the Aarhus Convention provides for several general provisions, including one relating to the minimum obligation character of the three-pillar provisions, which is also part of Article 4 of the Escazú Agreement. References to important international principles which are to guide the Parties when implementing the Aarhus Convention's provisions are also present in Article 3, including the non-discrimination principle.

Principles and general provisions are covered by Article 3 and Article 4 respectively of the Escazú Agreement. According to Article 3 of the Escazú Agreement, in implementing the Agreement each Party is to be guided by the principle of equality and non-discrimination; the principle of transparency and accountability; the principle of non-regression and progressive realization; the principle of good faith; the preventive principle; the precautionary principle; the principle of intergenerational equity; the principle of maximum disclosure; the principle of permanent sovereignty of States over their natural resources; principle of sovereign equality of States; and the principle *pro persona*.[130]

Of particular interest are references to three fundamental environmental law principles, i.e., those of prevention, precaution, and intergenerational equity,[131] which are not part of the Aarhus Convention. The references support the view that while the Aarhus Convention is generally thought to represent an instrument of procedural nature, the Escazú Agreement is not only a procedural instrument, but also contributes to a substantive right of every person to live in a healthy environment.

In addition, Article 4 of the Agreement contains several general provisions, some of them which are not present in the Aarhus Convention, such as provision requiring the Parties to ensure that the rights recognized in the Agreement can be freely exercised, and the emphasis on supporting persons or groups in vulnerable situations. In relation to the exercise of access rights, under Article 4(5) of the Escazú Agreement the States Parties are to ensure that guidance and assistance is provided to the public, particularly those persons or groups in vulnerable situations.

However, the most progressive provision of Article 4, and one which has no matching provision in the Aarhus Convention, is undoubtedly the duty of each Party to guarantee the right of every person to live in a healthy environment and any other universally recognized human right related to the Agreement (Article 4(1)). As Stec and Jendrośka have established, the provision provides for a human rights guarantee, independent of any relationship to access rights.[132]

3.3 The three pillars

3.3.1 Access to information

Although both instruments implement the first pillar, the access to information pillar compara-

[129] Peña and Hunter (n 84) 129–130.

[130] For further coverage on Article 3, see Stec and Jendrośka (n 124) 538–539. Regarding the principle of *pro persona*, which is extracted from Article 29 of the ACHR that prohibits restrictive interpretation., see, e.g., Alejandro Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 162.

[131] For environmental law principles, see, e.g., Sands, Peel, Fabra and MacKenzie (n 23) 197–251.

[132] Stec and Jendrośka (n 124) 537–538.

bly, there are some differences. The obligation of Article 4 of the Aarhus Convention, its access to environmental information provision, entails that States Parties need to establish a system through which members of the public, may request environmental information from public authorities without having to state an interest.[133] If a disclosure of information adversely affects defined public or private interests, which are further articulated in Article 4(4) of the Convention, a request for information can be refused. However, Article 5, on the collection and dissemination of environmental information, which has a strategic character, places a positive obligation on the State Parties to establish a system through which public authorities collect and disseminate environmental information to the public. Although not completely identical, the blueprint for the information pillar was provided for by the EU Environmental-Information-Directive of 1990.

In a similar way, Articles 5 and 6 of the Escazú Agreement provide that instrument's first pillar. Thus, Article 5 holds the principles relating to access to environmental information and Article 6 those on the generation and dissemination of environmental information. Although the principles enshrined in Article 5 and 6 of the Escazú Agreement resemble Article 4 and 5 of the Aarhus Convention, there are differences. One issue of particular interests is that while the Aarhus Convention, in its Article 4(4), outlines the public or private interests, which can justify non-disclosure of environmental information, justification of refusal of access to information pursuant to Article 5(5–6) of the Escazú Agreement may be based on the domestic legal regime of exceptions. If such a regime is not available, the Party may apply the four exceptions provided for by the Article 5(6) of Agreement, all of which are public interest oriented.

Its reliance on domestic legal regimes in the case of refusals is generally thought to weaken the access right to environmental information under the Escazú Agreement. As the Aarhus Convention establishes a clearer system of exceptions, the regime of exceptions of the Escazú does not achieve the level of protection of the Aarhus Convention.[134]

In line with Article 6(12) of the Escazú Agreement, the Parties are to promote access to environmental information held by private entities. While a similar provision had been suggested for the Aarhus Convention through a proposal by Norway during the negotiations, the EU ultimately blocked the proposal.[135] As a result, the Aarhus Convention does not have a provision that guarantees the public access to information held by private actors.

3.3.2 Public participation

Articles 6–8 of the Aarhus Convention cover the second pillar and the principles for the participation of the public in three environmental decision-making processes. Three kinds of decision-making processes are covered by the pillar. The first process, in line with Article 6, concerns public participation during the preparation of decisions on specific activities (Annex I projects, in principle stationary projects requiring operating permits). In line with Article 6(2), the public concerned shall be given notice of an en-

[133] The access to environmental information should be wide. See further the conclusion of the Aarhus Convention Compliance Committee (ACCC), in ACCC, *United Kingdom* (2013), ACCC/C/2010/53, [74], [75]. See also ACCC *Austria* (2014), ACCC/C/2011/63, [54], according to which the "environment" should be interpreted broadly.

[134] See Peña and Hunter (n 84) 130.

[135] According to Emily Barritt, 'Global Values Transnational Values: From Aarhus to Escazú' in Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds) *Research Handbook on Transnational Environmental Law* (Elgar 2020) 209.

vironmental decision-making procedure in an adequate, timely and effective manner. Moreover, in accordance with Article 6(3), public participation procedures shall include reasonable timeframes for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making. Furthermore, the Parties are to take "due account" of the outcome of the public participation in the decision, cf. Article 6(8). While it is not necessary that the public authority accept all comments and opinions received from the public, it is necessary that all comments and opinions are seriously considered.[136] Finally, in line with Article 6(9), when the decision has been taken the Parties are to inform the public of the decision along with the reasons and considerations on which the decision is based.[137]

There is a strong similarity between the Article 6 structure and principles and the approaches present in the 1985 EIA-Directive and the 1997 EIA-Directive amendments.

The second process, regulated by Article 7 of the Aarhus Convention, concerns public participation during the preparation phase of plans, programmes, and policies relating to the environment. Although subject to interpretation, the participation principles under Article 7 are broadly identical to the ones included in Article 6.[138] While the basic idea and the principles of Article 7 resemble the ones of the SEA-Directive of 2001, compared with the Directive, the scope of Article 7 is broader from several points of view. First, in addition to plans and programmes, it covers policies; second, the scope is not confined to significant effects; and third, in relation to object of the effect, the scope is not confined to effects on the environment.

The third process, covered by Article 8 of the Aarhus Convention, relates to public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.[139] This process ostensibly has not been imported into the Convention from EU environmental legislation.

While the Escazú Agreement addresses public participation in environmental decision-making processes in a single provision, i.e., in Article 7, its approach to the scope and types of decision-making processes and the participation principles is comparable to the Aarhus Convention's Articles 6–8. In line with Article 7(4–8), the Parties must ensure that the public can participate in the decision-making process, from an early stage, and that information is provided in a clear, timely and comprehensive way. Additionally, the public participation procedure shall allow for reasonable timeframes for the public participation procedure. Observations and comments from the public must be given due consideration by the relevant public authority before the decision on the matter is taken. Finally, once the decision has been made, the public must be informed thereof, and of the grounds and reasons underlying the decision.

However, there are some differences, which relate to special situation of indigenous peoples. As Peña and Hunter have pointed out, the construction of Article 7 of the Escazú Agreement was influenced by jurisprudence of the IACtHR, mainly in the context of the right of indigenous peoples to be consulted in relation to projects

[136] See ACCC *Spain* (2010), ACCC/C/2008/24, [99].
[137] Ibid. [100].
[138] The ACCC has sometimes evaluated compliance with the public participation requirements of Article 7 and Article 6 together. See, e.g., ACCC *Albania* (2007), ACCC/C/2005/12, [70].
[139] According to Stephen Stec and others, *The Aarhus Convention: An Implementation Guide* (UNECE 2014) 81, the wording of the provision establishes a relatively soft obligation, and the compliance is based on efforts rather than results.

situated within their territory.[140] Article 7(6), for instance, reflects this emphasis by including the right of the public to be informed of the decision-making procedure in accordance with customary methods, as appropriate. This emphasis is reflected the case law of the IACtHR.[141] Moreover, and in line with Article 7(14) of the Agreement, hindrances to the participation of persons or groups in vulnerable situations must be removed by the relevant authorities in order to ensure equal participation.

3.3.3 Access to justice

Article 9 of the Aarhus Conventions contains the third pillar, the access to justice pillar. Article 9(1) orders the Parties to have in place a review procedure to deal with decisions and other issues connected to Article 4 of the Convention. This approach resembles the measures provided for by the Environmental-Information-Directive of 1990. Under Article 9(2) of the Convention, which connects to its Article 6, the Parties are to ensure that members of the public concerned, fulfilling a defined interest test, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to Article 6. The interest test, having sufficient interest or the impairment of a right, is to accommodate the two basic schools of standing rules in Europe,[142] and is the blueprint for interest test approach of Article 9(2). As Article 2(5) awards non-governmental organizations (NGOs) interest, pursuant to Article 9(2) NGOs are deemed to have sufficient interest and have access to review procedures. The review avenue provided by Article 9(3), or the possibility to challenge acts and omissions by private persons and public authorities contravening provisions of Party's national law relating to the environment, is general and when matched against the material scope of Article 6–8, Article 9(3) it functions as a catch-all provision.[143] The provision is novel in the European environmental law setting and resembles a measure available under the laws of the United States of America.[144] In addition, Article 9(4) contains a few important principles relating to the review procedures, and in line with Article 9(5), to further the effectiveness of Article 9 the Parties should consider the appropriate mechanism to remove or reduce financial and other barriers to access to justice and disseminate information on the access to administrative and judicial review procedures.

While the access to justice pillar of the Aarhus Convention provides the general principles and defines the avenues for review, as Jendrośka has pointed out, questions relating to standing requirements and the scope of each review possibility have made the implementation of Article 9(1–3) problematic.[145]

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[140] Peña and Hunter (n 84) 129. See also Saramaka People (n 117) [133].

[141] See Saramaka People (n 117) [133].

[142] See further Vasiliki (Vicky) Karageorgou, 'The Scope of the Review in Environment-related Disputes in the Light of the Aarhus Convention and EU Law – Tensions between Effective Judicial Protection and National Procedural Autonomy' Jerzy Jendrośka and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice, vol 4* (Intersentia 2018) 238–245.

[143] The reference to national law relating to the environment has been construed broadly. See, e.g., ACCC, *United Kingdom* (2015), ACCC/C/2013/85 and ACCC/C/2013/86, [70]. Additionally, the scope of Article 9(3) encompasses any law that relates to the environment and is not limited to laws that explicitly include the term "environment" in their title or provisions. See *Austria* ACCC/C/2011/63 (n 133) [52].

[144] Usually referred to as direct or indirect citizens enforcement of law. See, e.g., Aðalheiður Jóhannsdóttir and Eiríkur Tómasson, *Endurskoðun ákvarðana sem áhrif hafa á umhverfið* (Viðar Már Matthíasson ed, Ritröð Lagastofnunar vol 7: The Law Institute of the University of Iceland 2008), 74–75.

[145] Jerzy Jendrośka, 'Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of

The access to justice pillar is covered by Article 8 of the Escazú Agreement. Under Article 8(1) of the Escazú Agreement, the Parties are to guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process. In line with Article 8(2), access to judicial and administrative mechanisms to challenge and appeal, with respect to substance and procedure, is to be ensured to three categories of decisions: (a) any decision, action or omission related to the access to environmental information; (b) any decision action or omission related to public participation in the decision-making process regarding environmental matters; and (c) any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment. A set of minimum requirements regarding the structure for the implementation of the right to access to justice in environmental matters is established by Article 8(3), including broad active legal standing. Pursuant to Article 8(4), the Parties are to eliminate barriers and disseminate information of the right of access to justice. In line with emphasis of the Escazú Agreement on the situation of persons or groups in vulnerable situations, Article 8(5) directs the Parties to meet their needs by establishing support mechanisms, including, as appropriate, free technical and legal assistance.

Although the idea and many of the principles of Article 8 are similar to those present in the Aarhus Convention, the Escazú Agreement's approach is less technical and minimal, and the scope of application seems to be wider to which decisions can be subject to a judicial review.

3.4 Some Concluding Remarks

As the above comparison indicates, although both instruments reflect access rights through their respective three-pillar approach, there are similarities and differences between the two. While the first and second pillars of the Aarhus Convention bear a strong resemblance to the relevant EU environmental law available when the Convention was negotiated, the Escazú Agreement echoes to a considerable degree the development of the environmental human rights which had already taken place through the progressive development of the IACtHR's case-law.

4. What Kind of a Right?

4.1 A right-based approach against provisions of obligations

Even though the Aarhus Convention and the Escazú Agreement each reflects the three-pillar approach of Principle 10 of the Rio Declaration, there are also other differences between the two instruments. Particularly revealing is the structure and the wording of the three-pillar approach provisions. While the Escazú Agreement frames the access rights as "rights" of the public, which shall be guaranteed by the Parties, the Aarhus Convention, is more concerned with the positive obligation of its Parties and only once, in its Article 1, stipulates that the Parties are to guarantee the access rights of the public. However, does this mean that the Aarhus Convention does not unequivocally assure those rights? Is it necessary to mention the word "rights" in every relevant substantive provision of the three pillars? If this were answered in the affirmative, the three-pillar approach of the Escazú Agreement would have been an unprecedented step forward in guaranteeing the public access rights. However, such a conclusion would be erroneous and reflects an over-simplification of how law operates. If the Aarhus Convention's three-pillar

the Main Interpretation Dilemmas" (2020) 17 Journal for Environmental & Planning Law 372.

approach did not encompass rights, what would then be the purpose of the access to justice pillar? Although the Aarhus Convention places an emphasis on the positive obligations of its Parties to ensure that their legal system has in place the necessary measures and mechanisms favouring the public this does not mean that the possibilities provided for the public by the Convention are not to be conceived as rights. Rights and obligations must be placed in context as they usually come as a pair representing two different sides of the same coin. The most likely reason for this "style" in the wording of the Aarhus Convention could be the legislative technique found in the EU directives that were instrumental for the Convention's development.

4.2 Procedural rights or a substantive right to a healthy environment?

In broad terms, the difference between procedural and substantive rights in environmental law is that the former are concerned with particular principles to be observed during the preparatory phase of decision-making, while the latter are usually rules of conduct setting out the environmental protective standards to be followed by individuals and legal entities.[146] Reliance on such standards, which are typically structured to prevent environmental degradation might be expected to enhance environmental quality in general.

Although its potential to enhance the quality of environmental decisions[147] was inherent in the Aarhus Convention from the outset, the Convention is stereotypically labelled as being guaranteeing the public a set of defined procedural rights.[148] The procedural rights (the access rights), which the States Parties are to guarantee are usually seen as a vehicle to protect an undefined substantive right of every person of present and future generations to live in an environment adequate to his or her health and well-being.[149]

In contrast, the Escazú Agreement, ties together in its preamble access rights and human rights by reaffirming the importance of the Universal Declaration of Human Rights[150] and other international human rights instruments underscoring that all States have the responsibility to respect, protect and promote human rights and fundamental freedoms for all.[151] Moreover, the Escazú Agreement, in addition to its Article 1—on the full and effective implementation of the access rights contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development—orders the Parties, in its Article 4(1) to guarantee the right of every person to live in a healthy environment, in addition to any other universally-recognized human right related to the Agreement. No identical obligation is found in the Aarhus Convention.

While the Aarhus Convention recognises the connection between fundamental rights and the protection of the environment, and every person's right to live in an environment adequate to his or her health and well-being,[152] the Convention is otherwise silent on the relation of access rights to established human rights. The reason for this could be the length of time it took the ECtHR to embrace the environmental side of

[146] See also, *inter alia*, Jutta Brunnée, 'Procedure and Substance in International Environmental Law: Confused at a Higher Level?' (2016) 5 ESIL Reflection 1.

[147] See, e.g., the arguments of Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pilar' of Empowerment' (2008) 10 Environmental Law Review 28.

[148] See, *inter alia*, Peters (n 20) 11–25. See also, Boyle (n 8) 621–626.

[149] Aarhus Convention, Article 1.

[150] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

[151] Escazú Agreement, preamble.

[152] Aarhus Convention, Article 1. See also the Stockholm Declaration.

the ECHR guarantees, coupled with reluctance in Europe to commit to substantive environmental rights.

4.3 Human rights instruments in their own right?

Is it possible, then to argue that the Aarhus Convention, as far as it stretches, represents a human rights convention? What is a human rights convention? While it is difficult to provide a short answer to this question, there is usually little doubt as to which conventions guarantee traditional human rights. As mentioned above, environmental rights are categorized into a two-fold system as substantive or procedural rights.[153] The relevance of access rights as a cornerstone of the realization of substantive human rights has also been acknowledged in the Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment prepared by the Office of the United Nations High Commissioner for Human Rights.[154] Whereas the debate around the codification of substantive environmental human rights remains controversial, procedural environmental rights have made headway into several international instruments.[155] Therefore, the bulk of other international environmental conventions also include references to such rights, usually in connection to access to or dissemination of environmental information or tied to the participation of the public in environmental decision-making.[156] While these conventions are not categorised as being human rights conventions—their main emphasis is on the duty of their State Parties to take the diverse positive measures to protect the environment—they may nonetheless be containing provisions which are currently being accepted as procedural environmental human rights.

Although regional in their scope, the Aarhus Convention and the Escazú Agreement are currently the two main instruments structured around the three pillar procedural rights. In addressing the development of procedural rights in an environmental context, Boyle has introduced some appealing arguments which underpin the view that the Aarhus Convention is a human rights treaty.[157] The arguments relate to the human rights foundation of the Convention,[158] the fact that it awards rights to individuals and provides an avenue for complaints, and that the access rights have become part of European human rights through the ECtHR.[159] Based on Boyle's arguments, the Escazú Agreement would equally be considered a human rights treaty, if not more so. Moreover, the Agreement additionally guarantees a substantive right to a healthy environment.

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[153] Sumudu Atapattu, 'Environmental Rights and International Human Rights Covenants: What Standards are Relevant?' in Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre, and James R. May (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 19–20.

[154] OHCHR '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 [Knox, Framework Principles].

[155] See Peters (n 20) 3–4.

[156] Including the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entry into force 26 December 1996) 1954 UNTS 3 [UNCCD], see Articles 3(a) and 19; the United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107, Article 6; the Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 1760 UNTS 79 [CBD] Article 14; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 2 March 1973, entry into force 1 July 1975) 993-I-14537 in Article VIII.

[157] Boyle (n 8) 622–623.

[158] See on the human rights foundation Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 Yearbook of International Environmental Law 51.

[159] Boyle (n 8) 622–623.

5. Conclusions

The central objective of this article has been to provide a general overview and a comparison of the main elements of the Aarhus Convention and the Escazú Agreement and to draw attention to the relationship between their content and their broader legal environment. The Aarhus Convention and the Escazú Agreement build on and elaborate further the three-pillar approach of Principle 10 of the Rio Declaration. Through some cross-fertilisation of ideas and principles, the Aarhus Convention and the Escazú Agreement are in many respects comparable. However, there are interesting differences, which, as has been argued in the article, can best be explained by considering the broader legal environment into which each of the instruments was carved.

When the Aarhus Convention was being negotiated, the creation of a new body of environmental human rights in Europe had just begun through the ECtHR's progressive interpretation of a few of the ECHR human rights guarantees. Seemingly, this progression did not particularly contribute to the content of the Convention or strengthen its ties to substantive environmental human rights. However, through cross-fertilisation of ideas and principles, the three-pillar approach of the Aarhus Convention has gradually contributed to the construction of a new body of procedural human rights guarantees based on the ECHR.

In relation to EU environmental law and its influence on the Aarhus Convention, there is little doubt that some of the pieces of procedural-oriented EU environmental law already available or in preparation when the Aarhus Convention was being negotiated were instrumental in shaping the Convention's approach, particularly of the first two pillars.

Furthermore, by the time the Escazú Agreement was negotiated several aspects of procedural environmental human rights had already been acknowledged through the IACtHR's progressive interpretation of a number of human rights guarantees provided by the ACHR. These were instrumental in the Agreement's approach to the three-pillar model.

In addition to an emphasis on guaranteeing particular rights and assistance to persons or groups in vulnerable situations and providing unprecedented protection to human rights defenders, the Escazú Agreement goes further than the Aarhus Convention, as it guarantees a substantive human right to a healthy environment. All the same, the access rights guaranteed to the public are not necessarily of less legal value under the obligation-oriented Aarhus Convention than with the Escazú Agreement's rights-based approach.