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## Public Participation and the Escazú Agreement: Implementation Challenges for Vulnerable Groups Amid a Global Pandemic

*Jakub Ciesielczuk\* Gabriel Lopez Porras\**

### 1. Introduction

There are a few reasons why the Escazú Agreement,<sup>1</sup> could be regarded as novel. Apart from being the solely treaty to have emerged from 2012 Earth Summit, it is also the first regional treaty on environment of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). More importantly, the Escazú Agreement represents the only treaty worldwide that contains specific provisions for the promotion and protection of defenders in environmental matters.<sup>2</sup> Innovatively, special attention is also given to persons and groups in vulnerable situations, that is, that face particular difficulties to fully exercise their right to public participation as a result of the deeply rooted inequality and discrimination in the Latin America and the Caribbean.<sup>3</sup> The Escazú Agreement also provides provisions for public participation, which although are not novel in the global context, are welcomed in the Latin America and the Caribbean given the democratic deficits and participatory challenges troubling this region.<sup>4</sup>

While the adoption of the Escazú Agreement is of importance, there are many obstacles in the Latin America and the Caribbean to the implementation of this treaty, especially in terms of public participation. Those obstacles are social and institutional challenges, such as culture of privilege, killing of environmental activists, and COVID-19. All those challenges have nuanced impacts on

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\* Doctoral Candidate, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK (jciesielczuk@lincoln.ac.uk).

\* Research Fellow in Earth System Law, Lincoln Centre for Ecological Justice, University of Lincoln, Brayford Way, Brayford Pool, Lincoln LN6 7TS, UK (glopezporras@lincoln.ac.uk).

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<sup>1</sup> United Nations, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean' (adopted on 4 March 2018, has not yet entered into force) C.N.195.2018.TREATIES-XXVII.18 of 9 April 2018 (Opening for signature) and C.N.196.2018.TREATIES-XXVII.18 of 9 April 2018 (Issuance of Certified True Copies).

<sup>2</sup> Ibid, Article 9.

<sup>3</sup> Ibid, Article 2(3).

<sup>4</sup> Ibid, Articles 5,6,7 and 8.

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persons and groups in vulnerable situation and often ensuring and protecting their right to public participation in environmental matters has not been possible. The question arises to what extent can the implementation of the Escazú Agreement overcome those challenges?

The aforementioned challenges need to be examined and addressed in order to ensure that the efforts of negotiating and adopting of the Escazú Agreement will not be in vein and the implementation of the this agreement is successful. Given that there is not much information guiding the Parties to the Escazú Agreement, or supporting the implementation of the Escazú Agreement, this article examines the implementation challenges that the Escazú Agreement will face in terms of ensuring public participation for persons and groups in vulnerable situations. In doing so, this article examines key obstacles to public participation in the Latin America and the Caribbean, the position of persons or groups in vulnerable situations, and the relevant provisions of the Escazú Agreement. Finally, this article discusses to what extent the Escazú Agreement can potentially overcome the existing challenges and ensuring public participation for persons or groups in vulnerable situations.

This article is divided in 5 sections. Section 1 begins with a brief introduction to the Escazú Agreement and sets up objective of this research. Section 2 discusses regional and global challenges to public participation for persons or groups in vulnerable situations. Consideration is given to various challenges to public participation; culture of privilege, killing of environmental activists and restrictions on civil freedoms related to the COVID-19. Section 3 provides a theoretical outlook of the Escazú Agreement. Section 4 gives a critical evaluation of the Escazú Agreement in the context of ensuring public participation for persons or groups in vulnerable situations, and foresees potential challenges that will be found during its implementation. The last section concludes the article and provides some recommendations for enhancing the implementation of the provisions on persons or groups in vulnerable situations of the Escazú Agreement.

## **2. Regional and global challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations**

The Escazú Agreement needs to be perceived and interpreted in the light of the Latin American and the Caribbean peculiarities, but also within the global context. The uniqueness of this region needs to be acknowledged, on the one hand the Latin America and the Caribbean has extremely rich biodiversity but on the other hand it has a complicated geopolitical position and turbulent social frameworks.

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## 2.1 Regional challenges: social and ecological context of Latin America and the Caribbean

Latin America and the Caribbean have an extremely rich and diverse natural capital; around 60% of Earth's terrestrial life is located in this region.<sup>5</sup> Latin America and the Caribbean hosts six of the seventy megadiverse countries, half of the global forests, and the second-largest reef system, however, unsustainable growth and development patterns are leading to worrisome environmental degradation in the region.<sup>6</sup> The region has lost around 30% of its original biodiversity, and another 23-24% of species located in the region are at risk of extinction.<sup>7</sup> Land degradation, climate and land-use change, pollution, resource overexploitation, and the introduction of invasive species are the main degradation drivers which are negatively impacting on region's biodiversity.<sup>8</sup> Furthermore, structural inequalities in the region's economic, social, and political systems are hindering all regulatory and institutional efforts to address environmental degradation.<sup>9</sup> As highlighted during the 'Forum of the Countries of Latin America and the Caribbean on Sustainable Development', environmental degradation has been inefficiently addressed, principally, as societal inequalities directly undermine "access rights"<sup>10</sup> that are key to protect the environment.<sup>11</sup> Weak protection of the right to public participation in environmental decision-making processes in Latin America and the Caribbean, undermine all social and political efforts for stopping environmental degradation.<sup>12</sup>

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<sup>5</sup> UNEP-WCMC, 'The State of Biodiversity in Latin America and the Caribbean: A Mid-Term Review of Progress towards the Aichi Biodiversity Targets' (2016).

<sup>6</sup> OECD, 'Biodiversity Conservation and Sustainable Use in Latin America Evidence from Environmental Performance Reviews' (2018) <[https://www.oecd-ilibrary.org/environment/biodiversity-conservation-and-sustainable-use-in-latin-america\\_9789264309630-en](https://www.oecd-ilibrary.org/environment/biodiversity-conservation-and-sustainable-use-in-latin-america_9789264309630-en)> accessed 11 August 2020.

<sup>7</sup> Stephen Leahy, 'Life on Earth Is Under Assault—But There's Still Hope' [2018] *National Geographic* <<https://www.nationalgeographic.com/news/2018/03/ipbes-biodiversity-report-conservation-climate-change-spd/>> accessed 11 August 2020.

<sup>8</sup> The State of Biodiversity in Latin America and the Caribbean, (n 5).

<sup>9</sup> Economic Commission for Latin America and the Caribbean (ECLAC), 'The Inefficiency of Inequality (LC/SES.37/3-P)' (2018); Global Witness, 'Defending Tomorrow, the Climate Crisis and Threats against Land and Environmental Defenders' (2020) <<https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>> accessed 11 August 2020.

<sup>10</sup> These consist of the rights to information, public participation and environmental justice. See Preamble 10 of the Escazú Agreement, page 8.

<sup>11</sup> The Economic Commission for Latin America and the Caribbean (ECLAC), 'Forum of the Countries of Latin America and the Caribbean on Sustainable Development. Third Meeting', *Foundational Thinkers on Sustainable Development* (2019) <<https://foroalc2030.cepal.org/2019/en/news/latin-american-intellectuals-warn-about-environmental-degradation-region-and-call-countries>> accessed 11 August 2020.

<sup>12</sup> Article 19, 'Un Verde Mortal Amenazas Contra Los Defensores Y Defensoras de Los Derechos' (2016) <[https://www.ciel.org/wp-content/uploads/2016/08/Deadly\\_shade\\_of\\_green\\_Spanish\\_Aug2016.pdf](https://www.ciel.org/wp-content/uploads/2016/08/Deadly_shade_of_green_Spanish_Aug2016.pdf)> accessed 31 August 2020.

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Another important element of the state of affairs in Latin America and the Caribbean is its culture of privilege that conditions and limits the enjoyment of some human rights (such as the right to public participation) according to the socioeconomic status, gender, the racial and ethnic identity, as well as geographical location.<sup>13</sup> This system emerged from the colonial era, establishing social asymmetries between the colonisers and the indigenous tribes, and reinforcing itself by granting (almost exclusive) participation to the elites on the economic and political matters, so they can preserve their privilege.<sup>14</sup> It is foolhardy to ignore the numerous ways of discrimination (e.g. religious, political, ethnic and racial) that hinder the right of participation of vulnerable people and that negatively impact the social and the ecological.<sup>15</sup> For instance, the Water Conflict Observatory created by the Mexican Institute of Water Technology, registered from 2004 to 2016, more than 100 water conflicts in Mexico because of the violation of the right to participation of indigenous peoples, threatening the existence of communities and their territories.<sup>16</sup>

Besides, those who, in the face of poor, unequal or null public participation, decide to raise their voices, express their disagreement, and carry out environmental activism, risk losing their lives. With 148 murders related to environmental activism in 2019 (more than two-thirds of murders of environmental activists worldwide), defending the environment has become a deadly activity in the Latin America and the Caribbean.<sup>17</sup> Environmental activism is mainly triggered by ecological damage and land disputes, taking place in the absence of suitable and open public spaces to participate in environmental decision-making processes.<sup>18</sup> Although figures on killings certainly underestimate the scale of the problem,<sup>19</sup> it has been found that mining and extractive sector, agroindustry, and logging are the main economic activities related to the killing of environmental

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<sup>13</sup> Forum of the Countries of Latin America, (n 11)

<sup>14</sup> Ibid.

<sup>15</sup> Roberto P Guimarães, 'Environment and Socioeconomic Inequalities in Latin America: Notes for a Research Agenda' (2012) 20.

<sup>16</sup> José Luis Martínez Ruiz, Daniel Murillo Licea and Luisa Paré, *Conflictos Por El Agua Y Alternativas En Los Territorios Indígenas de México* (Instituto Mexicano de Tecnología del Agua 2017) <[www.imta.gob.mx](http://www.imta.gob.mx)> accessed 1 February 2020.

<sup>17</sup> Global Witness, 'Defending Tomorrow, the Climate Crisis and Threats against Land and Environmental Defenders' (5 July 2020).

<sup>18</sup> Ibid.

<sup>19</sup> In the Latin America and the Caribbean, restrictions imposed on a "free press", underreported killing and threat cases, and difficulties related to information access, do not allow to accurately capture the severity of the problem.

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activists.<sup>20</sup> Likewise, either through the violent repression of protesters, labelling activists as gang members or terrorists, and issuing arrest warrants under false charges, governments in the Latin America and the Caribbean have been involved in harassment and aggression against environmental activists.<sup>21</sup> Moreover, there is a gender issue on this subject. The participation of women is a central element in the consolidation of contemporary democracy, however, women in general (and indigenous woman in particular) have less participation in decision-making processes in the Latin America and the Caribbean.<sup>22</sup> But the problem is not only limited to participation in environmental decision-making processes: if, as already stated, being an environmental activist in Latin America is dangerous enough, being a woman environmental activist is even worse. As an illustration, about 40% of the attacks, violence and murders of women environmental activists in Mexico have a gender component.<sup>23</sup> In addition, given the passive attitude and failure to act on this problem, governments of the Latin America and the Caribbean countries are partners in crime of the deaths of activists, since, in most cases, before being murdered environmental activists did report receiving life threats and the governments did not take any preventive actions.<sup>24</sup> In the Latin America and the Caribbean, ensuring the right to public participation, so environmental activists can effectively be included in formal decision-making processes, can have the potential to diminish life-threatening situations, by avoiding the exposure of environmental activists through “informal” ways of participation.

## **2.2 Global challenges posed to public participation**

In the global context, COVID-19 renders protecting the environment and the access rights, especially the right of public participation extremely difficult. As stated by the United Nations Secretary-General, given current global pandemic, environmental law enforcement is being relaxed while

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<sup>20</sup> Ibid.

<sup>21</sup> Global Witness, ‘Enemigos del Estado’ (30 July 2019) <<https://www.globalwitness.org/en/campaigns/environmental-activists/enemigos-del-estado/>> accessed 31 August 2020.

<sup>22</sup> Lizeth Pérez Cárdenas, ‘Participación Política de Mujeres Indígenas En Tiempos de La Revolución Ciudadana’ (2018) 28 *Alteridades* 61 <[www.doi.org/10.24275/uam/izt/dcsh/alteridades/2018v28n55/Perez](http://www.doi.org/10.24275/uam/izt/dcsh/alteridades/2018v28n55/Perez)> accessed 9 October 2020.

<sup>23</sup> Jose Luis Garcia Hernandez and Martin Lopez Gallo, ‘Mujeres Mártires Ambientales En América Latina. Una Visibilización de Los Ecofeminicidios Por La Defensa Del Territorio En México’ (2016) 3 *HistoriAgenda* 13 <<http://revistas.unam.mx/index.php/historiagenda/article/view/64607>> accessed 18 March 2020.

<sup>24</sup> Un Verde Mortal Amenazas Contra (n 12); Dawn Paley, ‘Drug War as Neoliberal Trojan Horse’ (2015) 42 *Latin American Perspectives* 109 <<http://journals.sagepub.com/doi/10.1177/0094582X15585117>> accessed 18 March 2020.

violence against environmental activists and defenders is increasing.<sup>25</sup> That can be illustrated by the report of CIVICUS,<sup>26</sup> from which it is clear that because of COVID-19 outbreak, the Latin America and the Caribbean has suffered many restrictions on civic freedoms (Table 1). These restrictions consist of 1) censorship and restrictions on access to information, 2) threats and arrests for criticising state response, 3) restrictions on the media, and 4) targeting of human rights defenders.

*Table 1 Restrictions on civic freedoms related to COVID-19 in Latin America<sup>27</sup>*

<b>Country</b>	<b>Example of the civic freedom restricted by the government</b>
<b>Brazil</b>	<b>The president decreed that government officials did not have to answer any requests regarding the freedom of information.</b>
<b>El Salvador</b>	<b>Journalists are not allowed to ask questions related to the COVID-19 crisis or the government's response.</b>
<b>Venezuela</b>	<b>A journalist was detained and accused of instigating hatred and public instigation for his reporting on the pandemic.</b>
<b>Honduras</b>	<b>A human rights' activist was arbitrarily arrested for being on the street while she was buying food for her family. She states that this attack was a reprisal.</b>

<sup>25</sup> ECLAC, 'United Nations Secretary-General Highlights the Escazú Agreement in His Policy Brief on the Impact of COVID-19 on Latin America and the Caribbean' (3 August 2020) <<https://www.cepal.org/en/notes/united-nations-secretary-general-highlights-escazu-agreement-his-policy-brief-impact-covid-19>> accessed 27 August 2020.

<sup>26</sup> CIVICUS, Civic Freedoms and the COVID19 Pandemic: A snapshot of restrictions (*Civicus Monitor*, April 2020) 8 <<https://monitor.civicus.org/COVID19/>> accessed 10 August 2020.

<sup>27</sup> Ibid.

<b>Colombia</b>	<b>Death squads are taking advantage of lockdowns to kill land and environmental activists.</b>
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The restrictions on open civic spaces<sup>28</sup> described in Table 1, are directly undermining public participation, by hindering peoples’ freedom to associate, express their views, and assemble peacefully.<sup>29</sup> Of course, measures to prevent contagion should be implemented, for instance, compulsory wearing face masks and keeping distance in public hearings, citizen assemblies, or voting processes. However, decrees and emergency laws issued for addressing COVID-19 related problems, should not restrict certain fundamental rights, such as the right of public participation.<sup>30</sup> In the preface to the Escazú Agreement, one can read that it is a visionary and unprecedented agreement that reflects the ambition, priorities and particularities of the region. Nonetheless, it is necessary to look closer into the provisions of the Escazú Agreement and its standing in the intentional law arena in to order to examine whether it can overcome the preexisting challenges, which have been troubling the Latin America and the Caribbean.<sup>31</sup>

### 3. Theoretical outlook of the Escazú Agreement

The Escazú Agreement is deeply rooted in Principle 10 of the Rio Declaration on Environment and Development (Rio Declaration) which laid down the “*pillars of environmental democracy*” consisting of three different elements; participation in decision-making processes on environmental issues, access to environmental information and access to administrative and judicial proceedings.<sup>32</sup>

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<sup>28</sup> These are the physical, digital, social, legal, and cultural environments, where civil society organisations claim and exercise their rights, and effectively engage in political processes; definition obtained from Catherine Hyde Townsend, ‘A CSO playbook to reclaim civic space: Version 1.0 (2018) <<https://www.jstor.org/stable/pdf/resrep22533.pdf>> accessed 2 September 2020.

<sup>29</sup> Civic Freedoms and the COVID19 Pandemic (n 26).

<sup>30</sup> Ibid.

<sup>31</sup> Preface to the Escazú Agreement, page 8.

<sup>32</sup> Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874; see also preface to the Escazú Agreement.

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In fact, the Escazú Agreement became the second regional agreement which applies Principle 10 of the Rio Declaration, after adoption of the Aarhus Convention in 1998.<sup>33</sup>

As the Escazú Agreement is built on the core elements of Principle 10, it represents a regional elaboration of the Rio Declaration.<sup>34</sup> The Escazú Agreement consists of four procedural pillars: accessibility of environmental information (Articles 5 and 6); public participation in the environmental decision-making process (Article 7); access to justice in environmental matters (Article 8); and strengthening of national environmental capacities and cooperation between the member States (Articles 10 and 11). The resemblance between pillars of the Rio Declaration and the Escazú Agreement is clearly visible. Further, the structure of the Escazú Agreement is also similar to the text of the Aarhus Convention. However, that has been already been discussed elsewhere.<sup>35</sup> While the resemblance to the provisions included in the Rio Declaration and the Aarhus Convention is evident, the Escazú Agreement includes innovative provisions. In the context of this article, the following novel elements should be highlighted; right to a healthy environment; protection of human rights defenders; and norms related to vulnerability. Those unprecedented provisions will be examined in this section and then in the next section it will be determined whether they can help to address the challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations.

### **3.1 Sustainable development and indigenous communities**

Article 4(1) of the Escazú Agreement states that “*Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement*”. The wording of this provision implies that the right to the healthy environment should be regarded as a human right, which is supported by the Inter-American Court of Human Rights. In its advisory opinion on the environment and human rights the Inter-American Court of Human Rights, confirmed that a right to a healthy environment exists under the American

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<sup>33</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in 25 June 1998, entered into force in 30 October 2001) 447 UNTS 2161.

<sup>34</sup> Stephen Stec and Jerzy Jendrośka, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) *Journal of Environmental Law*, Volume 31, Issue 3, 533–545, 534.

<sup>35</sup> *Ibid*, 535-536.

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Convention on Human Rights.<sup>36</sup> Further, while the Aarhus Convention also recognises the right of “of every person of present and future generations to live in an environment adequate to his or her health and well-being”,<sup>37</sup> the Escazú Agreement goes a step further and acknowledges the “right of every person of present and future generations to live in a healthy environment and to sustainable development[emphasise added].”<sup>38</sup> The reference to the right to sustainable development is novel and very welcomed given the global attempts to ensure the sustainability in various areas including environment.<sup>39</sup>

While the legal meaning of the term “sustainable development” is not provided by the Escazú Agreement and is yet to be determined in the context of this regional instrument, this provision can be highly relevant for persons in vulnerable situations such as indigenous people, who often live in their traditional lands, which are very rich in biodiversity and natural resources.<sup>40</sup> On many occasions, indigenous peoples’ cultural and physical survival depends on those traditional lands. Hence, because of that relationship and dependency on traditional lands, indigenous people are often significantly affected by environmentally unsustainable projects (e.g. constructions of dams, deforestation or mining). Various human rights instruments acknowledge the importance of traditional lands.<sup>41</sup> Those instruments also call for protection of indigenous people’s interests *via* participation. For example, Article 5 of the Declaration on the Rights of Indigenous Peoples states that “*indigenous peoples have the right to maintain and strengthen their own institutions, while*

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<sup>36</sup> Advisory Opinion OC-23/17, Inter-Am Ct HR (ser A) No 23 (15 November 2017) <[http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf)> accessed 7 November 2020 (in Spanish)

<sup>37</sup> Article 1 of the Aarhus Convention.

<sup>38</sup> Article 1 of the Escazú Agreement.

<sup>39</sup> See e.g. United Nations Conference on the Human Environment, Declaration on the Human Environment, U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972); U.N. World Commission on Environment and Development, Our Common Future: Report of the World Commission on Environment and Development, chap. 2, paragraph 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987); Decision No. 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development “Towards sustainability,” 1998 O.J. (L 275) (Oct. 10, 1998).

<sup>40</sup> See e.g. Maria A. Cruz-Saco, ‘Indigenous Communities and Social Inclusion in Latin America’ (2018) New York: United Nations Expert Group Meeting on Families and Inclusive Societies; Wilfredo Ardito, ‘Los indígenas y la tierra en las leyes de América’ (1996) Latina Survival International; Beatriz Huertas Castillo, ‘Los pueblos indígenas en aislamiento: su lucha por sobrevivencia y libertad’ (2002) IWGIA.

<sup>41</sup> See e.g. Article 25 of Declaration on the Rights of Indigenous Peoples, International Labor Organization’s Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries Articles 13-19; see also Principle 22 of the Rio Declaration.

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*retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State*". Likewise, Article 6 (1) (a) of the International Labor Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever it is considering legislative or administrative measures which may affect them directly.<sup>42</sup> In fact, the right to participation in decision-making processes that are likely to have an impact on indigenous peoples is protected by judicial human rights bodies.<sup>43</sup> The right to healthy environment and to sustainable development can provide extra protection to vulnerable persons and groups. As explained in the previous section, in the cases where governments ignore the interests of vulnerable communities, including indigenous people, some decide to express their disagreement and carry out environmental activism, which is often deadly. The Escazú Agreement attempts to address that issue with a novel provision on protection of human rights defenders.

### **3.2 Human rights of persons or groups in vulnerable situations**

Article 9 of the Escazú Agreement provides obligations for Parties to "*guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.*" Further, paragraph 3 of Article 9 requires Parties to "*prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.*" This provision aims at providing extra protection for individuals and groups that promote and defend human rights in environmental matters. It could be argued that the Parties to the Escazú Agreement are already bound to certain degree to protect the human rights of people within their jurisdiction, according to their national law (including constitutions) and obligation under the human rights treaties.<sup>44</sup> In

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<sup>42</sup> For other references to the concept of participation in the Convention No. 169 see also articles 2,5,7, 15,17, 20, 22, 23, 25, 27, 28, 33

<sup>43</sup> See e.g. *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, Afr. Comm. on Human and Peoples' Rights, para. 53 (Oct. 13-27, 2001); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 172, para. 129, 133-34 (Nov. 28, 2007). *Human Rights Committee, Lubicon Lake Band v. Canada*, Comm. No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40), at para. 33 (Mar. 26, 1990).

<sup>44</sup> See e.g. the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988)

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fact, the resemblance between the wording of Article 9 and texts of certain human rights instruments on protection of individuals and groups that promote and defend human rights can be observed.<sup>45</sup> However, regardless of the existing obligations of the Parties to the Escazú Agreement under their national law and international human rights law, Article 9 is of importance from a political perspective. It places additional pressure on the Parties to the Escazú Agreement to stop and prevent killings of the environmental activists in the Latin America and the Caribbean, as well as to address the restrictions on civic freedoms which can be observed in the region since the global spread of COVID (Table 1). Given that most of the Parties to the Escazú Agreement, are also members of the Inter-American System of Human Rights, the cooperation and dialogue between the institutional bodies set by the Escazú Agreement and bodies of the Inter-American Human Rights System would be welcomed. That could in effect reduce the number of killings and provide more protection of human rights defenders in the region. Apart from acknowledging the protection of the human rights defenders, the Escazú Agreement also notices the importance of protecting persons or groups in vulnerable situations.

Expressly, Article 2(e) of the Escazú Agreement provides a definition of “*persons or groups in vulnerable situations*” for the first time ever in the international legal instrument. The definition states that “*Persons or groups in vulnerable situations’ means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party’s national context and in accordance with its international obligations.*” This definition has a crucial role to play throughout the text of the Escazú Agreement, as it is linked to the exercise of the access rights in the Latin America and the Caribbean.<sup>46</sup> The relevant provision on access rights include e.g. Article 5(3) and Article 6(6) on facilitating access to environmental information for persons or groups in vulnerable situations, Article 7(14) on engaging persons or groups in vulnerable situations in decision-making processes and in Article 8(5) on providing persons or groups in vulnerable situations with access to justice. All those provisions seem to promote participation of

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reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L /II.82 Doc 6 Rev 1 at 67 (1992).

<sup>45</sup> See e.g. Article 9 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RES/53/144.

<sup>46</sup> See Article 4(5) of the Escazú Agreement, see also The Escazú Agreement and the Regional Approach (n 34), 541.

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persons or groups in vulnerable situations under equal conditions, by providing appropriate means and formats that are comprehensible to vulnerable groups. Those provisions are of importance in addressing the culture of privilege in the Latin America and the Caribbean, as they seem to acknowledge the diversity and special needs of persons or groups in vulnerable situations. Granting access right is not enough as those rights need to be tailored to the needs of individuals using them.<sup>47</sup> For example, the fact that some members of indigenous people's tribes might be illiterate, need to be taken into consideration by the facilitators of the participation processes.

### **3.3. Democracy and participation**

While not novel, the access rights provided in the first three pillars of the Escazú Agreement also require commentary as those rights are linked with theories of participation and literature on public participation. To put it simply, a person who is affected by an environmental matter should be informed about decision-making processes which aim to address that issue, and should also be able to get involved in those processes, or should be able to seek justice in the case of negligence in decision-making processes.<sup>48</sup> However, one could ask, is it not the job of our representatives in our governments to ensure that everyone's best interest and views are taken into consideration while making decisions on environmental matters?<sup>49</sup> In theory that should be the case, however in practice many governments worldwide have been suffering from the democratic deficit. That is clearly visible in the specific case of the Latin American and Caribbean governments which

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<sup>47</sup> See e.g. Norbert Weber and Tim Christopherson, 'The influence of nongovernmental organisations on the creation of Natura 2000 during the European policy process' (2002) *Forest Policy and Economics* 4, 1–12; Christina Prell and at el., 'f you have a hammer everything looks like a nail: 'traditional' versus participatory model building' (2007) *Interdisciplinary Science Reviews* 32, 1–20.

<sup>48</sup> See e.g. Judith Petts, 'Public participation and Environmental Impact Assessment'. In Judith Petts, *Handbook of Environmental Impact Assessment*, (London: Blackwell Science 2003) 146. Those rights are also reflected in various human rights treaties see e.g. Article 25 of the International Covenant on Civil and Political Rights, article 23 of the American Convention on Human Rights, and Article 13 of the African Charter on Human and Peoples' Rights.

<sup>49</sup> Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2011) *Colo. J. Int'l Env'tl. L. & Pol'y* [Vol. 23:2], 313.

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struggle with challenges such as culture of privilege and unsuitable spaces for public participation.<sup>50</sup>

Decreasing democratic challenges in environmental decision-making processes is one of the key justifications for public participation.<sup>51</sup> Borrowing primarily from the literature of deliberative democracy, many have argued that participation allows sharing power between different groups and helps to democratise environmental decision-making.<sup>52</sup> Supporters of deliberative democratic theory, which is mainly influenced by the scholarship of Habermas,<sup>53</sup> generally criticise traditional polyarchal mechanisms of liberal-democratic systems in which individuals' participation is limited to voting in elections and call for “*debate and discussion aimed at producing reasonable, well-informed opinion in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants*”.<sup>54</sup>

The overall objective of the participation from the standpoint of deliberative democracy is to provide broader democratic participation. In other words, it argues for improving the decision-making processes, which can be contrasted with another justification for participation, viz.,

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<sup>50</sup> See e.g. Mark Payne and et al., ‘Democracies in Development: Politics and Reform in Latin America, IDB and International Institute for Democracy and Electoral Assistance’ (2002); World Bank, ‘Inequality in Latin America & the Caribbean: Breaking with History Washington’ (2003); UNDP/PNUD, ‘La Democracia en America Latina (2004).

<sup>51</sup> For overview of various theoretical perspectives on participation see e.g. Benjamin J. Richardson and Jona Razzaque, ‘Public Participation in Environmental Decision Making (2006) Environmental Law for Sustainability, 165-194; Margherita Pieraccini, ‘Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England’ (2015) Journal of Environmental Law, Volume 27, Issue 1, 45–67, 48-50

<sup>52</sup> See, for example, Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach’ (2001) 21 OJLS 415; John Parkins and Ross Mitchell, ‘Public Participation as Public Debate: a Deliberative Turn in Natural Resource Management’ (2005) 18 Soc Natur Resour 529; Ortwin Renn, ‘Participatory Processes for Designing Environmental Policies’ (2006) 23 Land Use Policy 34; see also John Dryzek, *The Politics of the Earth* (Oxford: Oxford University Press 1997), Chapter 5 on ‘Democratic pragmatism’.

<sup>53</sup> Jürgen Habermas, ‘The public sphere: An encyclopedia article’ in Stephen Eric Bonner and Douglas Keller (eds) *Critical theory and society* (New York: Routledge 1989); Jürgen Habermas, ‘The structural transformation of the public sphere. An inquiry into a category of bourgeois society’, translated by Thomas Burger and Fredrick Lawrence (Cambridge, MA: MIT Press, 1989).

<sup>54</sup> Simone Chambers, ‘Deliberative democratic theory’ (2003) *Annu. Rev. Polit. Sci.* 6:307–326, 309. For the supports of the deliberative democratic theory see, for example John Dryzek, *Deliberative democracy and beyond. Liberals, critics, contestations* (New York: Oxford University Press, 2000); Jon Elster, *Deliberative democracy* (New York: Cambridge University Press 1998).

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improving the substantive “*results*” (*i.e.* outcomes – decisions) of decision-making processes.<sup>55</sup> Proponents of that argument claim that involving various actors in environmental decision-making processes can result in higher quality decisions, as those decisions involve a wide range of information and are more likely to be foreseen and ameliorated before they occur.<sup>56</sup> While the Escazú Agreement does not explicitly refer to justifications for providing public with participatory, it does call for providing “*the public with the necessary information in a clear, timely and comprehensive manner, to give effect to its right to participate in the decision-making process.*”<sup>57</sup>

Addressing the environmental matters very often include balancing out competing social values and political considerations.<sup>58</sup> For example, when decisions are made on the environmental protection it would include deciding on how much it would be “*reasonable*” to spend on measures designed to protect the environment. In order to make this decision, it has to be established how important is the protection of environment for the society and could that money be allocated somewhere else e.g. to build new schools or improve the health care system. Hence, it is not solely technical decision which can be made by experts alone. The local public often understands the issues at stake more intimately than the officials tasked with making the decision and thus can provide additional insight and work alongside experts.<sup>59</sup> The Escazú Agreement acknowledges the needs for balance between economic, social and environmental factors.<sup>60</sup> Growing number of scholars appears to argue that a combination of local and scientific knowledge is likely to lead to better decisions.<sup>61</sup> This is recognised in Article 5 subsections 3 and

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<sup>55</sup> See e.g. Bende Toth, ‘Public Participation and Democracy in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World’ (2010) 30 J. Land Resources & Envtl. L, 295, 298.

<sup>56</sup> See e.g. Thomas M. Koontz, and Craig W. Thomas, ‘What Do We Know and Need to Know about the Environmental Outcomes of Collaborative Management?’ (2006) Public Administration Review 66, 111–122; Frank Fischer, *Citizens, experts and the environment. The Politics of Local Knowledge* (London: Duke University Press 2000); Thomas C. Beierle, ‘The quality of stakeholder-based decisions.’ (2002) Risk Analysis 22, 739–749.

<sup>57</sup> Article 7(4) of the Escazú Agreement.

<sup>58</sup> James L. Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (San Francisco: Jossey-Bass 2005), 15.

<sup>59</sup> Vera Rodenhoff, ‘The Aarhus Convention and its Implications for the ‘Institutions’ of the European Community’ (2002) Review of European Community & International Environmental Law, 11: 343-357, 344.

<sup>60</sup> Preamble 10 of the Escazú Agreement, page 8.

<sup>61</sup> See e.g. L.C. Stringer and Mark Reed, ‘Land degradation assessment in southern Africa: integrating local and scientific knowledge bases’ (2007) Land Degradation and Development 18, 99–116; David S.G. Thomas, and Chasca Twyman,

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4 of the Escazú Agreement, by establishing that indigenous persons and ethnic groups should have access to information according to their specific needs, to participate in decision-making processes under equal conditions.<sup>62</sup> As the result, the integration of the broader spectrum of views across various groups might pave the way to perception of “*a community ownership*” of a particular environmental decision embedded in national legislation or international treaty.<sup>63</sup> By strengthening democratic processes, allowing and facilitating public participation in environmental matters across various groups in the society, participants might perceive the decision-making process as more transparent and inclusive, which in turn might help to address the culture of privilege.<sup>64</sup>

Discussing the theoretical outlook of the Escazú Agreement is a vital step of this article, which leads to the critical examination of some of the relevant provisions of this agreement in order to determine whether it can overcome implementing challenges explained in Section 2.

#### **4. Critical evaluation of the Escazú Agreement in the context of ensuring public participation for persons or groups in vulnerable situations**

The effective implementation of the Escazú Agreement is prerequisite for addressing the regional and global challenges to public participation in the Latin America and Caribbean for persons or groups in vulnerable situations. The question then is: can the Escazú Agreement overcome the pre-existing challenges and ensure more protection and participatory rights for vulnerable communities in the Latin America and the Caribbean? In order to answer that, it is necessary to

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‘Good or bad rangeland? Hybrid knowledge, science, and local understandings of vegetation dynamics in the Kalahari’ (2004) *Land Degradation and Development* 15, 215–231. However, the counter argument is that the local knowledge is of limited importance in modern conservation management see; e.g. Joseph J. Molnar and at el., ‘Agricultural science and agricultural counterculture: paradigms in search of a future’ (1992) *Rural Sociology* 57, 83–91; Kevin J. Morgan and Jonathan Murdoch, ‘Organic vs. conventional agriculture: knowledge power and innovation in the food chain’ (2000) *Geoforum* 31, 159–173.

<sup>62</sup> Ibid.

<sup>63</sup> Public Participation in Environmental Decision Making (n 51), 172; Thomas Webler at el., ‘What Is a Good Public Participation Process? Five Perspectives from the Public. *Environmental Management*’ (2001) Vol. 27, No. 3, 435–450, 444.

<sup>64</sup> See e.g. Caspian Richards and at el., ‘Practical Approaches to Participation SERG Policy’ (2004) Brief No. 1. Macauley Land Use Research Institute, Aberdeen.

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critically examine some of the elements of the the Escazú Agreement, as well as lessons which can be learned from implementation of the Aarhus Convention.

#### 4.1 Guiding principles of the Escazú Agreement

Article 3 of the Escazú Agreement provides eleven guiding principles that each Party should use in implementing the agreement. While the examination of all those principles is outside the scope of this article, some commentary is provided on the principles, which are of importance in implementation of the access rights for the persons and groups in vulnerable situations. However, before moving to their examination, it should be noted that the Escazú Agreement does not define the guiding principles neither elaborates on how Parties should adopt them. The elaboration on those principles should be included in future implementation guide for the Escazú Agreement.<sup>65</sup> Further, most of the guiding principles included in the Article 3 of the Escazú Agreement are well-established in international law *e.g.* precautionary principle, preventive principle or principle of good faith.<sup>66</sup> Two principles which seem to be of importance in the implementation of the access rights for the persons and groups in vulnerable situations are; principle of intergenerational equity and principle of *pro persona*.

The former should be interpreted in light of “*the right of every person of present and future generations to live in a healthy environment and to sustainable development*” stated in Article 1 of the Escazú Agreement. Ensuring equity of persons and groups in vulnerable situations would require mitigating where possible the culture of privilege, so future generations that belong to currently marginalised communities, such as indigenous peoples, can have equal participation within environmental decision-making processes. Moreover, this principle should shed some light on the legal meaning of the term of sustainable development in the context of the Escazú Agreement.

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<sup>65</sup> See *e.g.* Implementation guide for the Aarhus Convention; UNECE, The Aarhus Convention: An Implementation Guide (1st edn, UN 2000), Foreword by Kofi Annan.

<sup>66</sup> See *e.g.* Rio Declaration, Principle 15 and 27; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Articles 26 and 31; see also Ellen Hey, ‘The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution’ (1992) 4 *Georgetown International Environmental Law Review* 303.

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The latter, the principle of *pro persona*, should be regarded in the context of culture of privilege and killings of environmental activists. This principle seems to be inspired by the Article 29 of the American Convention on Human Rights.<sup>67</sup> It links the Escazú Agreement with the jurisprudence of the Inter-American Court of Human Rights, in a similar way to the European Court of Human Rights being linked with the Aarhus Convention.<sup>68</sup> This principle has a potential to add another layer of protection to persons and groups in vulnerable situations and boost the dialogue between the Escazú Agreement and the Inter-American Human Rights System.

In general, by including the guiding principles in the text of the Escazú Agreement Parties seem to acknowledge the difficulties in implementation of international treaties in the Latin America and the Caribbean. While those guiding principles are welcomed and have a potential to enhance the implementation of the access rights for the persons and groups in vulnerable situations, much is contingent upon the interpretation of the provisions of the Escazú Agreement by its Parties.

#### **4.2 Limitations of the key provisions on protection and participatory rights of persons and groups in vulnerable situations**

While interpreting the Escazú Agreement, the Parties will find occasional lack of precision and vagueness in the language of the agreement, which is detrimental to effective implementation of access rights. The text of the Escazú Agreement appears less scrupulous in comparison with the Aarhus Convention. For example, it is argued that the wording of the Article 9, which provides protection for environmental human rights defenders, could be clarified as to not leave discretion to the Parties to decide what qualifies as promoting and defending human rights in environmental matters.<sup>69</sup> Further, the Escazú Agreement does not consider any mechanism of cooperation, transparency, monitoring, or security to guide the Parties towards the achievement of objectives related to stopping the killing of environmental activists. The fact that Article 9 represents

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<sup>67</sup> Organization of American States, American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (1979) 1144 UNTS 143.

<sup>68</sup> See e.g. Ole Pedersen, ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008–2009) 21 *Georgetown Int’l Envtl L Rev* 74, 580.

<sup>69</sup> See the references to the environmental defenders in Office of the High Commissioner on Human Rights, Framework Principles on Human Rights and the Environment (2018) <<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>> (‘Knox Framework Principles’) accessed 1 December 2020.

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separate provision on the environmental human rights defenders, and is not linked with access rights (as it is done with persons and groups in vulnerable situations and provisions on access rights) is another limitation in addressing killings of environmental activists in the Latin America and the Caribbean. As it is illustrated by the recent restrictions on civil freedoms related to the COVID-19, individuals are at risk while exercising their various access rights. Regarding this, if the Escazú Agreement calls itself a ground-breaking legal instrument for environmental protection, since it is also a human rights treaty, it fell very short on protecting the life of environmental activists.

Similarly, another novel provision of the Escazú Agreement, which is the protection of persons or groups in vulnerable situations, also lacks precision. Identifying persons or groups in vulnerable situations is subjected to “*conditions identified within each Party’s national context and in accordance with its international obligations.*” It is evident that it leaves a wide discretion to the Parties of the Escazú Agreement to choose who needs special protection and which individuals and groups can be excluded. Given that the concept of vulnerability is perceived through the social and context-specific lenses, achieving the uniform standards of it across the jurisdictions of the Parties to the Escazú Agreement is virtually impossible.<sup>70</sup> That is detrimental to addressing the culture of privilege in the Latin America and the Caribbean and has a little chance to improve the social inequalities in the region. Therefore, it appears that while providing unprecedented provisions, which are of importance for the protection and participatory rights for vulnerable communities in the Latin America and the Caribbean, the Escazú Agreement will struggle to overcome the challenges to its implementation. For this reason it is worth looking into the implementation process of the Aarhus Convention to determine what can Parties to the Escazú Agreement learn from it.

### **4.3 Lessons to be learned from the Aarhus Convention**

The Aarhus Convention and the Escazú Agreement are often discussed together as both represent a regional application of Principle 10 of the Rio Declaration. Apart from the novel provisions of the Escazú Agreement, both treaties have a similar structure and provide provisions for access

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<sup>70</sup> The Escazú Agreement and the Regional Approach (n 34), 542.

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rights. Given that the Aarhus Convention was adopted over 20 years ago, its implementation can be used as a guidance for the Parties to the Escazú Agreement. While it is beyond the scope of this article to provide the thorough analysis of implementation process of the Aarhus Convention, there are three key aspects that need to be highlighted for the implementation of the Escazú Agreement.

Firstly, by looking at the implementation of the Aarhus Convention it is evident that the operation of its compliance committee (Aarhus Convention Compliance Committee (ACCC)) has been crucial in effective implementation of provisions enshrined in the text of this agreement.<sup>71</sup> Given that Article 18 of the Escazú Agreement establishes the Committee to Support Implementation and Compliance (CIC), it might be very useful to examine the practice of the ACCC. That should allow enhancing functioning of the CIC and learning from experiences of the Aarhus Convention. The rules of procedure of the CIC are yet to be determined by the Conference of the Parties at its first meeting, hence this article will not go into details of analysis of structure, effectiveness and limitations of the ACCC.<sup>72</sup>

Secondly, the implementation process of the Aarhus Convention illustrates that differences among jurisdictions (including constitutional and common law legal systems) have proved to have a significant impact on the implementation of the right to access to justice.<sup>73</sup> Differences in legal cultures in the Latin America and the Caribbean might also be challenging for the implementation of the access to justice and other key provisions of the Escazú Agreement. Learning from the Aarhus Convention and exploring how the Parties to this agreement dealt with that implementation challenge is crucial.

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<sup>71</sup> Ibid, at 545; Belen Olmos Giupponi, 'Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights (2019) *RECIEL*; 28: 136– 151, 148-150.

<sup>72</sup> It was not discussed at the First Meeting of the Countries Signatory to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. See the report from that meeting, LC/ESZ.1/3 13 January 2020.

<sup>73</sup> Jan Darpo, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (2013).

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Thirdly, broadly understood non-State actors (e.g. non-governmental organisations, inter-governmental organisations etc.) had a substantial impact on the implementation of the Aarhus Convention. Various non-State actors got involved in negotiations and implementation of the Aarhus Convention by organising a strong on-European network.<sup>74</sup> The Aarhus Convention is also supported by the European Union (EU), which adopted directives to comply with the provisions of the Aarhus Convention.<sup>75</sup> The EU also supports the Aarhus Convention financially, which allows to allocate funds to various implementation mechanisms.<sup>76</sup>

While the Parties to the Escazú Agreement should cooperate with various non-State actors in implementation of this regional instrument, the situation in the Latin America and the Caribbean is very different from the realities in Europe.<sup>77</sup> There is no equivalence of the EU in the region and there is also a question to what extent various non-governmental organisations (NGOs) can effectively represent the interests of individuals.<sup>78</sup> Whilst it has to be acknowledged that many NGOs played an important role in the democratic transition in many Latin American and Caribbean states, their ability nowadays to represent the interests of marginalised and poor in the region is questionable.<sup>79</sup> Transparency, accountability and ability to effectively protect and represent people's interests of NGOs have been a topic of a scholarly debate.<sup>80</sup> Those concerns are especially applicable to the Latin America and the Caribbean given its level of corruption and democratic deficit. Some authors are sceptical about the credibility of NGOs in participatory processes as a tool for representativeness, for example Toth argues that NGOs might “*privilege a*

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<sup>74</sup> The Escazú Agreement and the Regional Approach (n 34), 545; see also Mariolina Eliantonio ‘The role of NGOs in environmental implementation conflicts: ‘stuck in the middle’ between infringement proceedings and preliminary rulings?’ (2018) *Journal of European Integration*, 40:6, 753-767.

<sup>75</sup> Fostering environmental democracy in Latin America (n 72), 149.

<sup>76</sup> The Escazú Agreement and the Regional Approach (n 34), 545.

<sup>77</sup> Although it should be noticed that some Parties to the Aarhus Convention are from Central Asia.

<sup>78</sup> Ten Years of the Aarhus Convention (n49), 316. For a general discussion on who can be a legitimate representative of people's interest see e.g. Samantha Besson and José Luis Martí, ‘Legitimate actors of international law-making: towards a theory of international democratic representation’ (2018) *Jurisprudence* 9:3, 504-540.

<sup>79</sup> Jenny Pearce, ‘Collective Action or Public Participation? Complementary or Contradictory Democratisation Strategies in Latin America?’ (2004) *Bulletin of Latin American Research*, vol. 23, no. 4, 483–504, 487

<sup>80</sup> See e.g. Cecilia Tortajada, *Nongovernmental Organizations and Influence on Global Public Policy*.

(2106) *Asia & the Pacific Policy Studies*, 3: 266– 274; Mary Kaldor, ‘The Idea of Global Civil Society’ (2003) *International Affairs* (Royal Institute of International Affairs) vol. 79, 583–593, 589. See also *Public Participation and Democracy in Practice* (n 55).

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*narrow elitist pro-environmental orientation over the will of the larger public*".<sup>81</sup> That might be more applicable in the Latin America and the Caribbean, than in Europe, given the widespread culture of privilege.

Hence, while some lessons can be learned from the Aarhus Convention in the implementation process of the Escazú Agreement, the peculiarities of the Latin America and the Caribbean need to be taken into consideration. Relying on the experiences from the implementation of the Aarhus Convention should not be regarded as a panacea but rather as a guide on what can work in practice. However, given the preexisting problems in the Latin America and the Caribbean, the implementation of the Escazú Agreement will be extremely difficult. While it is yet to be determined, how effective the implementation of the Escazú Agreement will be, it appears that this regional instrument fails to address the identified problems such as the culture of privilege, killings of environmental activists and the restrictions on the civic freedoms related to COVID-19.

## **5. Conclusion**

The Escazú Agreement is a critical international treaty for strengthening international efforts to stop the alarming environmental degradation in the Latin America and the Caribbean. Among the relevance and novelty of this agreement, there are the provisions for the promotion and protection of access rights (such as the right of public participation in the environmental decision-making process) for environmental activists, as well as persons and groups in vulnerable situations. Nevertheless, for ensuring that the Escazú Agreement will succeed as a legal instrument for environmental and human rights protection, the Latin American and the Caribbean governments need to foresee the social and institutional challenges that can undermine the agreement's effectiveness.

This article has highlighted some regional (culture of privilege and killing of environmental activists), and global (COVID-19) challenges that require special attention when protecting the right

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<sup>81</sup> Public Participation and Democracy in Practice (n 55), 320. See also the discussion on how NGOs have been used to serve industry's interests in Francesca Spagnuolo, 'Diversity and Pluralism in Earth System Governance: Contemplating the Role for Global Administrative Law' (2011) 70 Ecological Economics 1875.

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of public participation in the environmental decision-making process of persons and groups in vulnerable situations. Likewise, it analyses whether the provisions established by the Escazú Agreement are suitable for overcoming those regional and global challenges that hinder the right of public participation of persons and groups in vulnerable situations. Moreover, this article highlights some lessons which can be learned from the implementation of the Aarhus Convention, so the Latin America and Caribbean can anticipate and overcome potential challenges posed to the implementation of the Escazú Agreement.

It is concluded that some of the key provisions on the protection and participatory rights of persons or groups in vulnerable position in the Escazú Agreement are vague and lack precision. There is a room for improvement of the legal language of this agreement which can be done by adopting subsequent agreements and/or amendments, as well as subsequent case law of the Inter-American Court of Human Rights. The potential way forward for the better protection of vulnerable persons and groups and ensuring their participatory rights is drafting guiding principles tailored to peculiarities of the Latin America and the Caribbean, considering the special status and needs of persons or groups in vulnerable situations.

While the Escazú Agreement should be considered as an important milestone in ensuring more environmentally oriented rules across the Latin America and Caribbean, and protection of rights of people in vulnerable situations, it is yet to be determined to what extent the Parties to the Escazú Agreement will adhere to its provisions.