The legal standing in environmental litigation before regional international courts in Africa and Latin America

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Abstract: This article compares the rules governing the legal standing before selected regional international judicial and quasi-judicial bodies in Africa and Latin America from the perspective of environmental litigation. The focus is on active legal standing of private entities in contentious proceedings against states. The article sytematizes the rules governing the legal standing into two broad categories: *subjective (rights based) litigation* and *objective interest litigation*. Subsequently, the approach of each court will be analyzed on the basis of its procedural rules and jurisprudence. Several trends can be identified, including a tendency of human rights courts to move towards objective interest litigation, a trend to grant non-governmental organizations a privileged position to initiate environmental litigation, and the development of community rights based approach by courts for regional economic integration that could become relevant in the future.

Keywords: environmental litigation, comparative law, legal standing, Africa, Latin America.

Streszczenie: Artykuł porównuje regulacje sytuacji prawnej w sprawach przed wybranymi regionalnymi międzynarodowymi organami sądowymi lub quasi-sądowymi działającymi w Afryce i Ameryce Łacińskiej, z perspektywy sporów środowiskowych. Autorka skupia się na aktywnej sytuacji prawnej prywatnych jednostek w spornych sprawach wnoszonych przeciwko państwu. Artykuł systematyzuje reguły rządzące stanem prawnym w dwóch szerokich kategoriach: sporu subiektywnego (opartego na prawach) oraz obiektywnego konfliktu interesów. Następnie, podejście każdego z sądów zostaje przeanalizowane na podstawie jego reguł proceduralnych i orzecznictwa. Można wyróżnić kilka trendów, włącznie ze skłanianiem się sądów praw człowieka w stronę traktowania takich spraw jako obiektywnego konfliktu interesów, trendem udzielania organizacjom pozarządowym uprzywilejowanej pozycji wszczynania sporów środowiskowych, oraz wzmacnianiem podejścia opartego na prawach społeczności przez sądy w celu regionalnej integracji ekonomicznej, które mogą stać się istotne w przyszłości.

Słowa kluczowe: spór środowiskowy, komparatystyka prawnicza, stan prawny, Afryka, Ameryka Łacińska.

1. Introduction

All over the world, citizens have become increasingly frustrated with the perceived failure of governments to tackle environmental protection, therefore seeking redress from the judiciary. Hence, strategic environmental litigation has been on the rise before both international and domestic courts (Hirschl 2006; Lukic 2022). It has been applied as a mechanism to enforce environmental law in a local context, but also a strategic tool to address concerns of public interest and a direct structural change. Resorting to courts as a form of political activism has also gained popularity with many developing countries in Africa and Latin America (Peel and Lin 2019).

Traditionally, international environmental litigation was limited to inter-state disputes, the reason being that international law was understood to be regulating the relations between states (Grotius 1625: 162; Vattel 1758: 67). Some of the most important international bodies are still accessible only to states, such as the International Court of Justice and the World Trade Organization Dispute Settlement Mechanism. However, by now, it is widely accepted that individuals and legal persons derive certain rights from international law (Parlett 2011: 338-339). Accordingly, most of the newly established international courts in Africa, Europe, and Latin America grant access to justice to private actors (Parlett 2011: 343-44; Alter 2014: 3-5). Therefore, they either have or could yet become popular venues for environmental litigation on an international level.

Nonetheless, rules on legal standing before these courts are often complex and subject to certain conditions. In many cases, they have been developed by the courts' jurisprudence and cannot be inferred simply by reading the rules of procedure. Despite the fact that the rules governing legal standing are of crucial importance to environmental litigation, they have not always received the academic attention that they deserve. Although there is literature comparing regional courts in Africa and Latin America (see Romano et al. 2014; Alter and Hooghe 2016; Alter et al. 2018), very few studies compare and systematize their rules on legal standing (see Kruger 2008; Onoria 2010; Yk 2011; Eliantonio and Roer-Eide 2014), and even fewer of them do so from the point of view of environmental litigation (see Schall 2008).

This article will explore the rules on active legal standing of private entities from the environmental perspective of the most important regional international courts in Africa and Latin America, including Central America and the Caribbean. These courts include the Inter-American Commission and Court of Human Rights (IACm/CtHR), the African Commission and Court of Human and Peoples' Rights (ACm/CtHPR), the Court of Justice of the Economic Community of West African States (ECOWAS CJ), the East African Court of Justice (EACJ), the Tribunal of Justice of the Andean Community (TJAC), the Central American Court of Justice (CACJ), and the Caribbean Court of Justice (CCJ). This article focuses on contentious proceedings brought against states.

2. Systematization and terminology

Rules governing legal standing constitute the first major hurdle in achieving access to environmental justice, and any case stands or falls with them. They determine whether access to court is granted only to states, as it was the case traditionally, or corporate entities, individual citizens, local communities, administrative entities, and non-governmental organizations (NGOs), and whether and to what degree the complaints filed must be affected by the challenged measure.

It is worth systemizing briefly approaches to legal standing in order to enable a comparative analysis. The following classification will provide the conceptual basis for this study; other scholars may as well offer different taxonomies. I will differentiate two types of legal standing: subjective (rights based) litigation and objective interest litigation.

In subjective (rights based) litigation, only those who have been affected in their rights have legal standing. The most important source of rights on the international level are human rights treaties (human rights based litigation), but rights may also be distilled from other sources, such as the law of regional organizations for economic and political cooperation (community rights based litigation) or from domestic law, such as a national constitution (domestic rights based litigation). Rights based litigation also recognizes a variety of possible rights-holders. Rights can be granted to either an individual human being, a collective of humans, or a legal entity such as a corporation or NGO. A growing number of legal systems recognize even animals or ecosystems, such as rivers, mountains, or forests, as rights-holders (ecocentrism).

In addition, there may be differences in the procedural design of rights based litigation. For instance, the rules governing legal standing may either require the victims to submit a case themselves or authorize action to be initiated by a representative on their behalf. In class action lawsuits, a multitude of affected individuals are allowed to seek judicial redress in one proceeding, often led by an individual (the face of the case) whose case is typical of the entire class (Aceves 2003: 358, 398-399).

Actio popularis constitutes a special form of rights based litigation, where a case is brought in the name of a broad group of victims, as opposed to individually identifiable victims. Actio popularis still requires the existence of at least one aggrieved human, and any achievement of structural changes that benefit the objective public interest is merely incidental. My understanding of actio popularis is shared by the Inter-American human rights institutions, as will be shown below (see Metropolitan Nature Reserve v Peru, IACmHR 2003: 1, 34).

Objective interest litigation, by contrast, does not require affectation of any victim or a group of victims. It authorizes litigants to proceed on behalf of the general public interest and file a case without identifying an aggrieved party, instead merely relying on an objective infringement of the law. Depending on the rules governing legal standing, litigants representing the public interest may be private parties, registered or non-registered NGOs, states, or an independent organ.

Generally, it is worth recalling that the use of these terms is highly inconsistent in literature and jurisprudence, hence none of these definitions is undisputed. As it will be shown below, some African institutions define actio popularis as "the right of individuals and corporate bodies who are not victims to bring an action" (Reverend Mfa and others v Nigeria and others (Fulani Herdsmen), ECOWAS CJ 2019: 59; see also Gabre-Selassie and IHRDA v Ethiopia, ACmHPR 2013: 61-66; Spilg and others v Botswana, ACmHPR 2013: 76). Nonetheless, pursuant to my definition, this does not refer to actio popularis, but rather to a rule authorizing the representation of the victims before the court.

Moreover, the differentiation between subjective rights-based and objective interest litigation is not always easy to draw. As this study will show, a wide understanding of group rights in the sense of an actio popularis comes very close to objective interest litigation. However, from the dogmatic point of view, it is important to understand that rights-based and objective interest litigation place different requirements on complainants.

Finally, further definitions that may exist include public interest litigation and strategic litigation. In my view, they refer more broadly to lawsuits aimed at generating a social change, regardless of whether the identification of the aggrieved party is required. Due to their lack of specificity, I shall not be using these terms.

3. Legal standing before regional human rights institutions

Latin America and Africa both host a pan-regional mechanism to supervise compliance with regional human rights law – the Inter-American Commission and Court of Human Rights and the African Commission and Court of Human and Peoples' Rights.

3.1. Inter-American Commission and Court of Human Rights

The Inter-American Commission and Court, established in 1959 and 1979 respectively, supervise compliance with the American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969), among other legal instruments, and constitute the human rights protection system of the Organization of American States (OAS). Private entities are granted access only to the Inter-American Commission, which assesses their petitions and issues a report with recommendations for the member state concerned. If the state fails to implement the recommendations, the Commission is empowered to forward the case to the Court for a binding final judgment.

Pursuant to Article 44 of the American Convention, a petition can be filed by "any person or group of persons, or non-governmental entity legally recognized in a member state." This means that petitioners who are not victims of a human rights violation can lodge petitions before the Commission. This includes domestic as well as foreign NGOs (Constitutional Court v Peru, IACmHR 1999: 3). The victim's authorization is not necessary until the proceedings advance to the Court (Pasqualucci 2013: 133).

The reference to "any nongovernmental entity legally recognized in one or more member states" has no real legal meaning, as a group not organized or formally recognized as an NGO may always appear as a "group of persons" (Faúndez Ledesma 2008: 234; Pasqualucci 2013: 132). Indeed, according to the Commission's jurisprudence, cases can also be filed by groups and collectives of people, as long as the groups are clearly defined and the individuals constituting them identifiable (Diaz and others v Colombia, IACmHR 1997; Chang Bravo v Guatemala, IACmHR 2008: 38). The provision of a list with the affected community members is recommendable (Yakye Axa v Paraguay, IACmHR 2002: 31; Barão de Mauá Residential Complex v Brazil, IACmHR 2012: 17; Navarro Pizarro and others v Colombia, IACmHR 2021: Annex 1). However, the Commission and the Court have shown a certain degree of flexibility in cases in which individuals were targeted due to their belonging to a group. It is thus not necessary for each member to be identified in cases brought by indigenous groups (Maya Indigenous Communities v Belize, IACmHR 2004: 1; Saramaka People v Suriname, IACtHR 2007: 188; Lhaka Honhat Association v Argentina, IACtHR 2020: Annex 1) or communities affected by severe environmental degradation (Community of San Mateo de Huanchor v Peru, IACmHR 2004; Community of La Oroya v Peru, IACmHR 2009). To date, indigenous peoples have played a pivotal role in the filing of environment-related group claims in the Inter-American System.

Nonetheless, the Inter-American system is strict in its requirement of an identifiable victim or a group of victims. In Metropolitan Nature Reserve v Panama, the Commission rejected a petition filed "on behalf of the citizens of the Republic of Panama", explaining that a case cannot concern "abstract victims represented in an actio popularis" (IACmHR 2003: 1, 34). The Commission has thereby expressly excluded both actio popularis and objective interest litigation. This significantly limits environmental litigation in cases where large groups of people or, as it is the case with climate change, the whole world is affected (Grant 2015: 157). Or, with the words of Shelton (2015: 150): "Unfortunately, the Commission's analysis suggests that the more widespread the violations – which can occur in many contexts where environmental harm is the origin of the complaint – the less likely it is that the complaint will be admissible."

Moreover, pursuant to Article 1(1), (2) of the American Convention, only human beings can be victims of a human rights violation. This means that legal entities such as NGOs or corporations cannot assert a human rights violation (only their members may appear as victims) (Mevopal SA v Argentina, IACmHR 1999; Martin 2006: 498-99). Similarly, ecocentric approaches based on the rights of elements of nature are unlikely before the Inter-American System. Although the Court took a progressive approach in its Advisory Opinion 23, where it held that the Convention contains the right to a healthy environment, which autonomously protects elements of nature, such as rivers, forests and mountains (IACtHR, 2017: 62), it is not clear how this approach can be operationalized.

3.2. African Commission and Court of Human and Peoples' Rights

Many features of the Inter-American system are shared by its African counterpart. The African Commission and Court of Human and Peoples'

Rights became operative in 1986 and 2013, respectively, and are tasked with interpreting and applying the African Charter on Human and Peoples' Rights (1981), among other instruments, under the umbrella of the African Union (AU). Individual petitions must go through the African Commission which acts as a gatekeeper and may forward cases to the Court (Article 55(1) of the African Charter). However, unlike in the Inter-American system, cases can also be submitted directly to the Court if the respondent state has accepted the competence of the Court to receive individual cases (Article 34(6) of the Protocol on the Establishment of an ACtHPR 1998).

The Commission has accepted cases by both individuals and NGOs, the latter not being required to be formally registered in an AU member state (Gabre-Selassie and IHRDA v Ethiopia, ACmHPR 2013: 64). Its practice as to whether NGOs as such can claim a victim status has not been entirely consistent (Lindblom 2009: 185-87). Like in the Inter-American system, cases must not necessarily be filed by the victims themselves (Union interafricaine des droits de l'Homme and others v Angola, ACmHPR 1997: 1).

Unlike the IACmHR, the ACmHPR has expressly accepted communications under the actio popularis doctrine. In SERAC v Nigeria (Ogoniland), it thanked the two NGOs for bringing the matter to it, highlighting that "[s]uch is a demonstration of the usefulness to the Commission and individuals of actio popularis, which is wisely allowed under the African Charter" (ACmHR 2001: 49). It should be noted that the African Commission's use of the term actio popularis may be somewhat misleading, as it effectively refers to rules of legal representation in rights based litigation, and is also used in cases concerning individual victims (see Gabre-Selassie and IHRDA v Ethiopia, ACmHPR 2013: 61-66; Spilg and others v Botswana, ACmHPR 2013: 76).

On the other hand, the African Commission has been very flexible in its acceptance of communications relating to groups or collectives of victims, and it does not require that members be identifiable. The reason for this is the existence of express group rights in the African Charter, granting rights to "peoples" (Articles 19-24 of the African Charter). The Commission has defined a people as a group "bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds" (Gunme v Cameroon, ACmHPR 2009: 171).

It has thus accepted cases where the victims were as vague as "black Mauritanians" or "certain sectors of the Mauritanian population" (Malawi African Association and others v Mauritania, ACmHPR 2000: 141), the "Ogoni people" (SERAC and CESR v Nigeria (Ogoniland), ACmHPR 2001: 62), "the peoples of the Democratic Republic of Congo" (DRC v Burundi, Rwanda, Uganda, ACmHPR 2003: 68, 77, 95), or "the people of Southern Cameroon" (Gunme v Cameroon, ACmHPR 2009: 178-79). The Commission dispenses with the necessity to provide a list of victims, especially in the context of grave and massive violations (Malawi African Association and others v Mauritania, ACmHPR 2000: 78–79; Gabre-Selassie and IHRDA v Ethiopia, ACmHPR 2013: 62; Spilg and others v Botswana, ACmHPR 2013: 75). Some authors express concern about such a broad concept of legal standing and warn of a "lack of control over the communications" (Pedersen 2006: 410-12).

The African system illustrates the difficulties to draw an exact line between rights-based and objective interest litigation. By allowing claims brought by very broad groups of victims, the system lends to objective interest litigation (see Schall 2008: 425). Nonetheless, the system still requires the existence of a human victim. Communications cannot be filed asserting the protection of a general public interest, such as environmental protection. Not only does the Charter itself grant rights explicitly to "individuals" and "peoples", but also the Commission's Rules of Procedure require that the communication contain the "name of the victim" (Rule 115(2)(e) of the Rules of Procedure of the ACmHPR 2020; see also Centre for Independence of Judges and Lawyers v Algeria, ACmHPR 2017).

Contentious cases before the African Court can be filed by individuals and NGOs if the respondent state has issued a declaration accepting the legal standing of these entities before the Court (Articles 5, 34(6) of the Protocol on the Establishment of an ACtHPR). Pursuant to Article 5(3) of the Protocol, the Court does not require the plaintiff to be the alleged victim, although the representative NGO must hold the observer status before the African Commission. Most likely, commercial organizations and businesses do not have legal standing (Hoeffner 2016: 850-51). Similar to the Commission, the Court does not require an applicant to identify a specific victim or a group of victims, considering it sufficient if a case "is of particular interest to all citizens as it has a direct or indirect bearing on their individual rights and the security and well-being of their society and country" (XYZ v Benin, ACtHPR 2020: 49).

3.3. Conclusion

The African and Inter-American human rights systems have much in common. Neither of them requires that the petitioner be the victim him- or herself; it is sufficient to report a specific human rights violation (Schall 2008: 424-25). In addition, by accepting cases filed on behalf of entire groups of victims, both have shifted the regime away from an individualistic paradigm and moved towards objective interest litigation (Grant 2015: 165-67). This broad legal standing is "extremely advantageous to NGOs and others, individuals and groups, raising issues of environmental degradation" (Meijknecht 2015: 193).

The ACmHPR itself has recognized that its practice is "somewhat similar to the actio popularis position under the Inter-American system" (Spilg and others v Botswana, ACmHPR 2013: 81). Nonetheless, the Inter-American system expressly rejects actio popularis and requires groups of victims to be defined and identifiable by a common feature of indigenousness or affectation by a localized event of pollution. By contrast, the African system admits claims brought by very broad and undefined groups. Most likely, this can be traced back to the existence of the notion of "peoples" in the African Charter. However, although the African actio popularis approach de facto gets very close to objective interest litigation, the requirement of an affectation of human victims remains indispensable.

4. Legal standing before courts for regional economic integration

Between the 1980s and early 2000s, the world witnessed an increase in the number of international judicial and quasi-judicial bodies, referred to as "proliferation of international courts" (Alter and Hooghe 2016: 541-42). Most of these courts are embedded in regional arrangements for economic and political integration as well as trade liberalization, and are modelled after the Court of Justice of the European Union (CJEU) (Alter 2014: 65–73).

This means that, besides being able to receive requests for preliminary references from national courts seeking guidance on the interpretation of Community law (preliminary reference procedure), these courts can examine violations of Community law by either the member states (infringement procedure) or organs and institutions of the Community (annulment procedure). It should be noted that these courts do not always apply this European terminology, but I will make use of it to facilitate the comparison. In the context of environmental litigation, the power to hear infringement cases against the member states is crucial. Whereas the CJEU can only hear infringement actions brought by the European Commission or another member state (Articles 258-260 of the Treaty on the Functioning of the European Union 1957), its African and Latin American counterparts have provided private entities with legal standing to submit cases against member states.

4.1. ECOWAS Court of Justice

The ECOWAS CJ was created in 2001 and is the chief judicial organ of the Economic Community of West African States (ECOWAS). It was initially designed to settle economic disputes between member states, and legal standing in infringement procedures against member states was only granted to other member states and the Executive Secretary of the Community (Article 9 of the Original Protocol on the ECOWAS Court 1991).

However, the powers of the Court were expanded in 2005, when the member states vested the Court with the power to hear human rights disputes (Articles 9(4), 10(d) of the Amended Protocol on the ECOWAS Court). Somewhat paradoxically, this means that the ECOWAS CJ is officially a court for regional integration but it de facto operates as a human rights court, as private entities cannot challenge violations of Community law, but only violations of human rights.

The Court accepts petitions brought by private actors if these can assert that human rights have been violated. However, unlike the Inter-American and African human rights systems, the ECOWAS CJ has granted legal standing only to victims of human rights violations, meaning the natural or legal person "who suffers directly or indirectly any harm or pain [...], emotional suffering [...], economic loss [...] or any impairment that can be categorized as human rights violation" (Reverend Mfa and others v Nigeria and others (Fulani Herdsmen), ECOWAS CJ 2019: 33, 35). Applications can be filed on behalf of the victim by an authorized NGO or relatives of the victim, unless the victim is not capable of providing authorization (Osaghae and others v Nigeria, ECOWAS CJ 2017: 18;

Reverend Mfa and others v Nigeria and others (Fulani Herdsmen), ECOWAS CJ 2019: 36-38).

Corporations can also assert a position as victims if they are deprived of "rights [that] are fundamental and necessary for the existence of a corporate body," such as the freedom of speech when advertising a product, the right to property, and the right to a fair hearing (Dexter Oil Ltd v Liberia, ECOWAS CJ 2019: 56-60, 68-72, 77).

However, when the rights of a "large group of individuals or even entire communities" are violated, the Court expressly allows cases to be submitted by NGOs in the public interest, without proof of authorization (SERAP v Nigeria (Ogoniland), ECOWAS CJ 2010: 61). Hence, an NGO "need not show that [it] has suffered any personal injury or has a special interest [...], [but] must merely establish that there is a public right which is worthy of protection which has allegedly been breached and that the matter is justiciable" (SERAP v Nigeria and UBEC, ECOWAS CJ 2009: 33; Reverend Mfa and others v Nigeria and others (Fulani Herdsmen), ECOWAS CJ 2019: 59-64). The Court relied on the Aarhus Convention (1998), considering that there was "persuasive evidence of an international communis opinion juris in allowing NGOs to access the Courts for protection of Human Rights related to the environment" (SERAP v Nigeria (Ogoniland), ECOWAS CJ 2010: 58). More recently, the Court has clarified that actio popularis is possible on behalf of an identifiable group, but also to protect "a public interest unrelated to any ascertained group" (SERAP v Nigeria, ECOWAS CJ 2021: 44-46).

It is necessary that the NGO be "duly constituted according to the national law of any ECOWAS Member State and enjoying observer status before ECOWAS institutions" (SERAP v Nigeria (Ogoniland), ECOWAS CJ 2010: 61). The Court is strict in this requirement. Osaghae and others v Nigeria, a case filed by a group of individuals, was dismissed by the Court due to a lack of legal standing. The Court held that a group of individuals not organized as an NGO has access only if they can either prove a personal affectation and thus assert a special victim position or if they have been authorized by the victims (ECOWAS CJ, 2017: 14-18).

4.2. East African Court of Justice

The EACJ is expressly empowered to examine violations of Community law alleged by private legal and natural persons, such as individuals, NGOs and corporate entities. In fact, Article 30(1) of the Treaty Establishing the EAC (1999) provides that any person who is resident in a member state may request the Court to determine the legality of an act of a member state, on the grounds that such an act infringes the provisions of EAC Treaty. Most importantly, the EACJ itself has explained that "none of the provisions [...] requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference" (Anyang' Nyong'o and others v Kenya, EACJ First Instance Division 2007: 16-17).

In other words, the EAC Treaty expressly allows for objective public interest litigation (see Milej 2018: 113; Onoria 2010: 159). The advantages

for environmental litigation become clear in ANAW v Tanzania (Serengeti Highway) (EACJ First Instance Division 2014; confirmed in Tanzania v ANAW, EACJ Division of Appeal 2014), where an NGO contended that the construction of the Serengeti Highway by Tanzania constituted a violation of several environmental provisions of the EAC Treaty. In its judgment, the EACJ made no mention of affected humans and found Tanzania in breach of Community law solely due to the effects of the construction project on local flora and fauna.

In addition, the EACJ has accepted human rights cases if a clear connection to democracy and the rule of law, which are provided for in the EAC Treaty, could be established (Katabazi and others v Secretary General of the EAC and Uganda, EACJ First Instance Division 2007).

4.3. Caribbean Court of Justice

The Caribbean Court of Justice was founded in 2005 and has two tasks: (1) under its original jurisdiction, it interprets the regional law of CARICOM, and (2) under its appellate jurisdiction, it serves as a final court of appeal for those CARICOM member states that have acceded to its appellate jurisdiction.

In the exercise of its original jurisdiction, the CCJ shares many similarities with its East African sibling, mostly because many member states have inherited the common law legal system from their former colonial occupiers. Nonetheless, the CCJ does not provide for objective interest litigation. Instead, private entities such as individuals and companies (the Court has not yet heard a case brought by an NGO) asserting a violation of Community law by a member state or the Community itself must apply for "special leave" to be granted by the CCJ. This requires that a right is conferred to the applicant by or under the Revised Treaty of Chaguaramas (2001) to the direct benefit of the applicant, and the applicant has been prejudiced in respect of the enjoyment of this right (Article 222 of the Revised Treaty of Chaguaramas). In this regard, the Court has explained: "For the most part, the Treaty does not explicitly confer rights. [...] [M]any of the rights are to be derived or inferred from correlative obligations imposed upon the Contracting Parties" (Trinidad Cement Ltd v Guyana, CCJ 2009: 32).

The CCJ has not been called to date to decide on a violation of environmental Community law. Although it is not unthinkable that private entities could rely on environmental obligations contained in CARICOM law, several important hurdles persist. Firstly, it is difficult to assert a violation of environmental obligations by a member state, as the Revised Treaty imposes such obligations almost exclusively on the Community (see for instance Articles 55-60 of the Revised Treaty of Chaguaramas). Secondly, legally binding environmental acts issued by CARICOM organs are virtually non-existent.

4.4. Central American Court of Justice

The Central American Court of Justice, created in 1991, is the main judicial body of the Central American Integration System (Sistema de Integración Centroamericano, SICA). Despite the strong intergovernmental nature of

the SICA, Community law has important supranational features, such as supremacy over national law, immediate applicability without the need for an act of domestication, and direct effect for Central American citizens (Advisory Opinion 1-1-3-97, CACJ 1997: Considerando III; Salazar Grande and Ulate Chacón 2013: 225-236). Pursuant to Article 25 of the Statute of the CACJ (1992), the Court is expressly prohibited from hearing human rights cases.

However, not unlike the CCJ's doctrine of "correlative rights", the CACJ has created a concept of "Community rights", which can be collective or individual, and consist of rights derived from the Protocol of Tegucigalpa (1991), the founding act of SICA. According to the Court, "the Tegucigalpa Protocol establishes [...] general rights that, once incorporated into Community Law, are opposable by the social conglomerate or individuals, in their capacity as Collective or Individual Community Rights, against the acts and decisions of the Bodies of the Central American Integration System and of the States that comprise it" (Advisory Opinion 1-18-2-2010, CACJ 2010: Considerando IX, X, own translation).

Nonetheless, in its practice, the Court's application of these Community rights has been inconsistent. This becomes visible in FONARE and FUNDENIC v Costa Rica (San Juan River) (CACJ 2012), where two Nicaraguan NGOs challenged the construction of a highway along the San Juan river by Costa Rica, without appropriate environmental impact assessment, public participation or cooperation with the neighbouring Nicaragua. Like in ANAW v Tanzania (Serengeti Highway) (EACJ 2014), the claimants did not contend any affectation of human beings or the NGO itself by the construction works, and instead merely relied on the objective violation of SICA environmental law.

Interestingly, the Court declared the case admissible and issued a decision on the merits, without examining the legal standing of the NGOs or whether they had been aggrieved by the challenged act. Hence, the Court effectively opened the door for objective interest litigation in the Central American system. Interviews conducted by the author with officials of the CACJ confirm that there is no entirely coherent explanation for the Court's decision. However, as explained by one Magistrate, the Court may reserve itself some flexibility when it comes to accepting cases brought in the general public interest, especially if the claimants are organized as an NGO that bears a relationship with the public interest at hand. The privileged legal standing of NGOs was explained with the fact that NGOs are expected to be more consistent and predictable in their actions and strategy of litigation than a lose group of affected individuals (Interview with Anonymous CACJ Magistrate 2022).

4.5. Andean Tribunal of Justice

Adhering closely to the European template, the law of the Andean Community (Comunidad Andina, CAN) constitutes a fully supranational legal order. The Andean Tribunal of Justice, created in 1984 as the main interpreter of the law of the CAN, has issued several decisions on environmental matters in the areas of trade, intellectual property, agriculture, and illegal mining. Almost all infringement cases before the TJAC are filed by corporate entities. For

example, the Tribunal's Pesticides cases, relating to the failure of Peru to correctly implement Andean law requiring the establishment of a register for agrochemical pesticides, were advanced by corporations that contended an economic disadvantage from the incorrect implementation of the normative (Farmagro SA and others v Peru, TJAC 2009; Bayer SA and others v Peru, TJAC 2011; Farmex SA and others v Peru, TJAC 2012; Farmex SA and others v Peru, TJAC 2013).

According to Article 19 of the Treaty Creating the Court of Justice of the Cartagena Agreement (1999), private actors may initiate an annulment proceeding if the challenged act affects their subjective rights or legitimate interests. By contrast, claimants initiating litigation against a member state are required to assert a violation of a "subjective right" pursuant to Article 25 of the Treaty Creating the Court. Initially, the TJAC interpreted these rules in a manner that permitted objective interest litigation in cases brought against organs of the Community (Moyano Bonilla v Andean Commission, TJAC 2002: 6-7; Eliantonio and Roer-Eide 2014: 37-39), but subjected cases against member states to a much higher threshold (Moyano Bonilla v Colombia, TJAC 2002).

However, in 2017, the Tribunal unified the criteria for both types of proceedings and held that both cases filed against a member state and the Community required that claimants demonstrate the affectation of either a legitimate interest or a subjective right (Vélez Escalón v Colombia, TJAC 2017: 1.8). Both concepts are now interpreted narrowly. A "legitimate interest" implies an affectation of the claimant's "real, potential, patrimonial or moral" interest, a "general" or "abstract" interest of all citizens or even a group of citizens no longer being sufficient (Vélez Escalón v Colombia, TJAC 2017: 1.7; Flores Maravilla SA v Colombia, TJAC 2017: 3.1.16; see also Asograsas v Andean Commission, TJAC 2016). Moreover, the affectation of a subjective right or legitimate interest must be "actual, immediate, real, specific, and direct" (Flores Maravilla SA v Colombia, TJAC 2017: 3.1.12; Flores Maravilla v Colombia (Recurso de consideración), TJAC 2017: 3.2.6).

The TJAC does not examine the violation of international human rights law. Hence, the "subjective rights" must emanate from Andean Community law. However, there is currently no conceptualized notion of correlative rights or Community rights as developed by the CCJ and CACJ. Since the Tribunal has not specified exactly which instruments of Andean law can confer rights upon private entities, at least not outside the economic context, it remains unclear whether environmental rights can be separated from Andean law. In its 2010 brochure "Rights for Andean Citizens", the General Secretariat of the Andean Community listed a series of environmental rights that can be derived from Andean law, but it is not certain whether the Tribunal will follow this approach.

4.6. Conclusion

As this chapter shows, there is a considerable degree of variation in the rules governing legal standing before courts for regional integration. The ECOWAS CJ has effectively become a human rights courts and its rules are not very different from the above-mentioned human rights courts, with the exception that the

ECOWAS CJ places an even greater emphasis on the role of NGOs. As the EACJ also hears human rights related claims under its implied mandate, both the ECOWAS CJ and EACJ operate in parallel with the African human rights system. This provides litigants with a choice between alternative fora. One reason why many have preferred the EACJ and ECOWAS CJ to the panregional system is their lack of a requirement to exhaust domestic remedies. The EACJ, moreover, openly allows for objective interest litigation.

The CCJ, TJAC and CACJ accept claims brought by private entities whose Community rights have been affected, but whereas the CACJ has allowed objective interest litigation, the TJAC has taken a narrow approach. Generally, Latin American courts have been much more willing to adhere to the traditional separation between human rights and economic integration than their African counterparts.

5. Legal standing in the Aarhus Convention and Escazú Agreement

Finally, as a point of reference, it is worth comparing these rules to the access rules of the Compliance Committees of the Aarhus Convention and the Escazú Agreement. For the sake of clarification, it is worth mentioning that these Compliance Committees are quasi-judicial bodies that, unlike courts, cannot issue legally binding decisions.

5.1. Aarhus Convention

The Aarhus Convention was adopted in 1998 under the auspices of the United Nations Economic Commission for Europe (UNECE). It includes 47 members, including all EU members and the EU itself. It grants private individuals procedural and participatory rights in environmental matters, such as the right to information, participation in decision-making, and access to justice. The correct implementation of the Convention is monitored by a Compliance Committee, which can receive submissions by member states, the Convention's Secretariat, or a member of the public (Article 15 of the Aarhus Convention 1998; Decision I/7 on Compliance Review, Aarhus MoP 2004). The Committee can issue recommendations to the member states on compliance with the Convention.

The Aarhus Convention makes a distinction between "the public" and "the public concerned", the latter implying the public affected or likely to be affected by, or having an interest in, the environmental decision-making (Article 2 Nos 4 and 5 of the Aarhus Convention). However, this distinction amounts to little practical relevance as the "public concerned" implies a broad "category of the public that has an unspecified interest in the decision-making procedure" (UNECE 2014: 57). This includes both citizens and non-citizens (Article 3(9) of the Aarhus Convention). In addition, special importance is awarded to environmental NGOs, whose role in enabling a more participatory democracy is emphasized (Jans 2003: 55; see also Preamble of the Aarhus Convention). Indeed, NGOs are regarded as representing the "public concerned" vis-à-vis environmental authorities, regardless of whether

they or their members have been affected (see for instance Hungary ACCC/C/2004/04, Aarhus Compliance Committee 2005).

Hence, the Committee examines the violation of the Aarhus Convention, which is a human rights treaty. However, it does not require the identification of specific victims (the victim being "the public" or "the public concerned"), and it is satisfied with an assertion of an objective violation of these rules. In essence, this amounts to objective interest litigation on the basis of a human rights instrument. Naturally, human rights based litigation asserting the violation of the Convention by a specifically affected person or a group is also possible.

5.2. Escazú Agreement

The Escazú Agreement (Acuerdo de Escazú) was signed in 2018 by 25 Latin American and Caribbean states. It contains an ample set of rights of access to environmental information, public participation in environmental decisionmaking, access to environmental justice, and a healthy environment. In 2022, the member states adopted a decision to establish the Compliance Committee (Article 18 of the Escazú Agreement 2018; Decision I/3 on Compliance Review, Escazú MoP 2022). The Committee will be able to receive communications from member states or members of the public (Decision I/3 on Compliance Review, Escazú MoP 2022: V.1). Because the mechanism was established only recently, it cannot yet be said how the Committee will interpret these access rules relating to members of the public.

However, scholars have already pointed out some factors. As Jendrośka observes, unlike the Aarhus Convention, the Escazú Agreement does not make a difference between "the public" and "the public concerned" (Jendrośka 2021: 347). Also, the members of the "public" are limited to nationals of a member state or subject to the national jurisdiction of a member state (Article 2(d) of the Escazú Agreement). As a consequence, the reach of the Agreement in transboundary situations remains limited (Stec and Jendrośka 2019: 12). Also, the Escazú Agreement does not provide for a privileged position of environmental NGOs (Stec and Jendrośka 2019: 5; Jendrośka 2021: 349). Instead, it awards importance to the participation of "persons or groups in vulnerable situations", especially indigenous peoples. It remains to be seen how the Compliance Committee will interpret its standing rules in the light of these provisions.

6. Conclusions

This article shows how different judicial and quasi-judicial bodies have interpreted their procedural rules on active legal standing by private parties in environmental litigation. Accordingly, three interesting trends and tendencies can be identified from this study.

Firstly, it can be observed that human rights bodies in Africa and Latin America have moved towards objective interest litigation. Objective interest litigation is not traditionally foreseen in human rights litigation, but it has the advantage that the claimant is not required to assert that a human is

affected by a state's violation of its obligations under human rights law. The IACm/CtHR have taken the first step by introducing the concept of collective victims. Nonetheless, litigation in the name of an abstract collective or general public interest is expressly excluded and the Commission requires that victims constitute an identifiable group. The ACmHPR has taken up this paradigm shift. Relying on the concept of "peoples" in the African Charter, it has developed the notion of "peoples" as victims, and waived the necessity to identify individual victims. Despite this considerable expansion of group litigation, however, the existence of affected human beings remains an indispensable condition.

The ECOWAS CJ has gone a step further. Whereas it has rejected collective human rights litigation unless each litigant could demonstrate that it has been individually affected, it has accepted cases brought by NGOs contending that a "public right" was breached. By implying that "the public" itself could constitute a victim of human rights violations, the ECOWAS Court has opened the door to objective interest litigation before human rights courts. This approach has clearly been inspired by the approach applied by the Aarhus Compliance Committee, which permits both objective interest and human rights based litigation on the basis of the Aarhus Convention. The fact that an international court adopts an approach developed by a quasi-judicial compliance committee demonstrates the persuasive power that may be exercised by the latter. The ACtHPR has recently taken a similar approach.

This development is closely related to a second trend, which consists in awarding NGOs a privileged position in environmental litigation. Especially the ACmHPR, the ECOWAS CJ and the Aarhus Compliance Committee have expressly recognized the special position of NGOs as litigants. Similarly, the EACJ, which is expressly empowered to hear cases filed in the objective public interest, has acknowledged the crucial role of NGOs (EALS and others v Kenya, EACJ First Instance Division 2008: 16-17). The CACJ has allowed litigants to engage in environmental objective interest litigation, and it appears that one of the decisive reasons was the fact that the claimants were organized as NGOs.

As a third trend, courts for regional integration have developed community rights based approaches that could become relevant in environmental litigation. The CCJ and CACJ have, respectively, required that litigants assert a violation of their "correlative rights" or "Community rights" under Community law, with the CCJ having been more consistent in its application of this concept. Community rights have not been conceptualized in the Andean Community, but varying notions of "Andean rights" have been emerging, disappearing, and re-emerging in the Community for years.

We observe that rules governing legal standing are in constant development. They can oscillate considerably depending on the composition of the bench, the court's docket, and the political climate in the member states. As the environment becomes more and more important in courts of law, creative approaches can be expected in the future.

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