

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Working Group of the Parties

Twenty-fourth meeting

Geneva, 1–3 July and 28-29 October 2020

Item 7 (a) of the provisional agenda

Preparations for the seventh session of the Meeting of the Parties:

Future work programme

Explanatory note regarding comments by EU and its Member States regarding the draft note on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention¹

Prepared by the secretariat in consultation with the Bureau

1. This paper is prepared pursuant to comments by EU and its Member States submitted after the twenty-fourth meeting² on the draft note of the Bureau on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention (ECE/MP.PP/WG.1/2020/13)³.

2. EU and its Member States asked to clarify the following:

(a) We would like to ask the Secretariat for some more clarification on the legal basis for establishing a rapid response mechanism with the proposed powers under the Aarhus Convention, especially in case of option 3, when such mechanism would envisage creating a post of a special rapporteur.

Clarification:

The question of which provisions in the Convention provide the most suitable legal basis for the proposed Rapporteur on environmental defenders is a matter for the Parties to the Convention. To assist the consideration by the Parties, the secretariat suggests to drawing their attention to Article 10 (2) (a), (d) and (g), and also Article 15 of the Convention. In this regard, Parties may wish to note that the wording of Article 10 (2) (g) appears to give the Meeting of the Parties broad powers.

Article 10, MEETING OF THE PARTIES

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

.....

¹ This document was not formally edited.

² See comments by EU and its Member States: <https://unece.org/environmental-policy/events/twenty-fourth-meeting-working-group-parties-aarhus-convention-site>

³ See https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/ODS/ECE_MP.PP_WG.1_2020_13_E.pdf

(d) Establish any subsidiary bodies as they deem necessary:

....

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

Article 15 REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

(b) We are aware that it is difficult to estimate the exact cost of the mechanism. Nevertheless, we would be grateful if the Secretariat could provide us with an approximate estimation of costs of the mechanism for one year, especially for option 3. We wonder if the rapporteur would be given a remuneration apart from the expenses listed in paragraph 23 of the note.

Clarification:

As described in paras 12 and 14 of the draft elements of the work programme for 2022-2025 (ECE/MP.PP/WG.1/2020/7)⁴, additional costs will be required for e.g.: (a) work associated with the new mechanism to deal with matters related to article 3 (8); (b) additional legal support to the Compliance Committee; (c) supporting capacity-building and advisory support to Parties, in particular for implementing decisions of the Meeting of the Parties on compliance; (d) strengthening synergies with other organizations and processes dealing with matters relevant for the protection of environmental defenders. It is estimated that one P3 staff at 55 % (\$ 99 000) and one P2 at 50 % (\$60 000) per year would be allocated to support the work of the Rapporteur (other staff time will be assigned for work on capacity building, synergy and other legal tasks). If less staff time will be required to support the work of the Rapporteur during specific weeks/months, the staff time will be channelled to support other work on compliance to bridge the increased demand for this work area. Consultancy and travel costs to support the work of the Rapporteur would amount \$29,000 per year. Thus, about \$ 215 000 per year, including programme support costs of 13%, is estimated for the work of the Rapporteur outlined in option 3. The following document prepared by the secretariat demonstrates a difference in costs allocation between the current work programme and the draft elements of the work programme for 2022-2025: https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/AEC/Inf_11_Accomp_doc_for_WP_2022-2025.pdf In case of option 2 (b), in addition to the costs listed in paragraph 23 of the draft note (ECE/MP.PP/WG.1/2020/13), there would still be travel and daily subsistence expenses for the tenth Committee member (apprx. USD 10 000 per year) to be present for at least part of some Committee meetings, for example, when the Committee discusses possible developments to its working methods and when it prepares its report to the Meeting of the Parties.

It is not envisaged that the Rapporteur will receive remuneration for his/her work. The Rapporteur will be only entitled to expenses listed in paragraph 23 of the draft note on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention (ECE/MP.PP/WG.1/2020/13).

This is in keeping with the approach taken by the UN Human Rights Council with respect to its Special Rapporteurs and Independent Experts:

⁴ See: https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/ODS/ECE_MP.PP_WG.1_2020_7_E.pdf

“The human rights experts mandated and appointed by the United Nations do not receive salaries or any other financial reward for carrying out their tasks. They take on their functions out of a commitment to human rights and a conviction that the United Nations work in this field could make a difference.”⁵

This is also consistent with the now long-established practice under the Convention that members of the Aarhus Convention Compliance Committee are not remunerated for their work for the Committee either.

(c) Also, we kindly ask the Secretariat to inform the Parties on how the Secretariat foresees to finance the mechanism.

Clarification:

The work programmes under the Convention are financed by Member States. As for other work areas, Parties are expected to allocate the required resources. Para 15 of the draft elements of the work programme for 2022-2025 suggests ways to allocate the required funds. Furthermore, Parties may wish explore ways to finance the mechanism through regular budget of the United Nations.

(d) Furthermore we would like to ask for further clarification on how the proposed powers of the rapid response mechanism will result in the protection of those subject to non-compliance under Article 3(8) and if there are any sanctions proposed for Parties that fail to follow the protection measures imposed by the mechanism.

Clarification:

Paragraph 7 of the “Draft note on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention” states:⁶

“In order to protect the complainant or any other person(s) named in the complaint from persecution, penalization or harassment, the Rapporteur might take one or more of the following measures:

- Issue an immediate protection measure to the Party concerned (see paras. 8 and 9 below)
- Issue an ongoing protection measure to the Party concerned (see paras. 8 and 10 below)
- Issue public statements and press releases
- Use diplomatic channels
- Request the Chair of the Bureau of the Meeting of the Parties to use diplomatic channels, including to bring the matter to the attention of the Head of State or Government and/or another senior official of the Party concerned
- Bring the complaint to the attention of other relevant human rights bodies (for example, special rapporteurs, national independent human rights commissions, etc.) and, to the extent feasible and appropriate, coordinate efforts with those other bodies.”

Paragraph 8 of the “Draft note” explains what a protection measure would be:⁷

“A protection measure would be a measure issued to the Party concerned by the Rapporteur directing the Party concerned either to refrain forthwith from any action that may amount to persecution, penalization or harassment of the complainant and any other person(s) named in the protection measure, or to act without delay in order to protect the complainant and any other person(s) named in the protection measure from persecution, penalization or harassment by third parties. The Rapporteur might issue the protection measure to:

⁵ Fact Sheet N.27: Seventeen Frequently Asked Questions about United Nations Special Rapporteurs, p. 10, see ohchr.org/Documents/Publications/FactSheet27en.pdf

⁶ https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/ODS/ECE_MP_PP_WG.1_2020_13_E.pdf

⁷ https://unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/ODS/ECE_MP_PP_WG.1_2020_13_E.pdf

- The Minister of Environment *or any other minister responsible for the implementation of the Aarhus Convention*
- The Minister for Foreign Affairs of the Party concerned
- Any other ministry or government entity that the Rapporteur might consider appropriate
- Relevant judicial bodies of the Party concerned.”

If a Party violated an immediate or ongoing protection measure imposed by the Rapporteur then, depending on the serious and/or systemic nature of the violation of the protection measure, the Rapporteur may forthwith take one or more of the following actions:

- Report the violation to the Bureau and request the Chair of the Bureau of the Meeting of the Parties to use diplomatic channels, including to bring the matter to the attention of the Head of State or Government and/or another senior official of the Party concerned⁸
- Issue public statements and press releases⁹
- Use diplomatic channels¹⁰
- Make a referral to the Compliance Committee.¹¹
- Bring the complaint to the attention of other relevant human rights bodies (for example, special rapporteurs, national independent human rights commissions, etc.) and, to the extent feasible and appropriate, coordinate efforts with those other bodies.¹²
- Report the violation to the Meeting of the Parties.¹³

A violation of an immediate or ongoing protection measure constitutes a breach of article 3(8) of the Aarhus Convention in its own right. The Compliance Committee has previously held that:

“If members of the public are penalized, harassed or persecuted for exercising their rights under the Convention, it puts in grave jeopardy the implementation of the Convention as a whole by the Party concerned.”¹⁴

Accordingly, to make clear the gravity with which the Meeting of the Parties regards the violation of an immediate or ongoing protection measure, the Meeting of the Parties may decide to issue a declaration of noncompliance by the Party concerned with article 3(8) of the Convention. The taking of such a measure would accord with the practice of the European Court of Human Rights and the UN human rights treaty bodies which have found the breach of a protection measure to constitute an additional breach of those treaties.¹⁵

In line with the above and taking into account the serious and/or systemic nature of the violation of the protection measure, the Meeting of the Parties may decide to take one or more of the following actions:¹⁶

- Make recommendations to the Party concerned
- Issue a declaration of noncompliance by the Party concerned with article 3(8) of the Convention (see above).
- Issue a caution to the Party concerned
- Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention
- Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

⁸ Ibid, paras. 7 and 10(a).

⁹ Ibid, para. 7.

¹⁰ Ibid, para. 7.

¹¹ Ibid., para. 10(b).

¹² Ibid, para. 7.

¹³ Ibid, para. 10(a).

¹⁴ ECE/MP.PP/C.1/2017/19, para. 110.

¹⁵ See Keller, Helen/Marti, Cedric, 2013, Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights, ZaöRV 73, p. 364.

¹⁶ See decisión I/7, para. 37 (d)-(h).

(e) We would also like to ask how exactly the mechanism will lead to a quicker response than the interim orders that exist under other international protection measures.

Clarification:

First, it is important to underline that at the present time, besides the Aarhus Convention., there is no other international instrument that imposes a binding obligation on the States party to the Aarhus Convention to ensure that persons seeking to protect the environment are not penalised, persecuted or harassed for doing so.

The only other international instrument in the world to impose such a requirement is the Escazu Agreement, but that agreement is limited to membership by countries of Latin America and the Caribbean.

As the “Overview of existing mechanisms under other treaties and organisations that cover or may potentially cover rights of environmental defenders”¹⁷ pointed out:

“the United Nations Environment Programme rapid response mechanism is the only initiative explicitly aiming to protect environmental defenders.¹⁸ It is not, however, built upon a binding legal framework that enables it to examine whether the State concerned has violated the rights of environmental defenders. Nor does it have a mandate to take any legal measures to protect the persons at risk.¹⁹”

Of the other mechanisms reviewed in the above “Overview”, the most relevant for protecting environmental defenders are the European Court of Human Rights and the individual complaints procedures under the Optional Protocol to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁰

However, as the “Overview” clarified, none of the three mechanisms cited in the preceding paragraph could truly be considered to be a “rapid response mechanism”. This is because:

- (a) While each mechanism can grant interim measures to protect persons who are at risk of harm, they can only do so if there is already an ongoing case before the relevant court²¹ or committee²².
- (b) All three mechanisms require available domestic remedies to be exhausted before the underlying case is submitted to them.²³

These two pre-conditions mean that those mechanisms cannot, in practice, be considered a rapid response mechanism to protect environmental defenders.

Obviously, being mechanisms established under other treaties or organizations they also do not have a mandate to respond to alleged violations of article 3 (8) of the Aarhus Convention.²⁴

¹⁷ AC/WGP-24/Inf.7, para. 23.

¹⁸ See

https://wedocs.unep.org/bitstream/handle/20.500.11822/22769/UN%20Environment%20Policy%20on%20Environmental%20Defenders_08.02.18Clean.pdf?sequence=1&isAllowed=y, pp. 3 and 4.

¹⁹ No information is available online as to the extent to which the United Nations Environment Programme rapid response mechanism has been used in practice. The United Nations Environment Programme is currently in the process of reviewing its policy on environmental defenders.

²⁰ AC/WGP-24/Inf.7, para. 24.

²¹ European Court of Human Rights, “Interim Measures”, factsheet, January 2019. Available at https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf.

²² Informal guidance note by the secretariat for the States parties on procedures for the submission and consideration by treaty bodies of individual communications, Office of the United Nations High Commissioner for Human Rights, January 2017. Available at <https://www.ohchr.org/Documents/HRBodies/TB/NoteStatesParties.pdf>

²³ AC/WGP-24/Inf.7, para. 25.

²⁴ AC/WGP-24/Inf.7, para. 26.