Comments and reflections by Association Justice and Environment, z.s. (J&E), the European Environmental Bureau (EEB) and ClientEarth on the Draft Note on a Rapid Response Mechanism to Deal with Cases Related to Article 3(8) of the Aarhus Convention, prepared by the Bureau of the Aarhus Convention

1 December 2020

Introduction

J&E, EEB and ClientEarth welcome the initiative of the Bureau of the Aarhus Convention (Bureau) to set up a mechanism regulated by public international law to deal with situations related to possible violations of Article 3(8) of the Aarhus Convention (the Convention). Such instances, commonly referred to as "harassment cases" cover a wide range of actions or omissions by state or non-state actors, aiming at suppressing the exercise of rights enshrined in the Convention. These incidents of harassment go against the very essence of the Convention, not targeting procedures or legal instruments but people who are the cornerstones of law enforcement and without whom the entire Aarhus infrastructure is meaningless and empty.

We have long called for the protection of the members of the public when exercising their access rights. A large part of the work done by our member organizations and partners is about assisting the members of the pulbic when they want to access information, participate in decision-making or seek remedies. We also have encountered cases when environmental defenders / activists were harassed for their opinion, campaign or legal action. This is reflected in the number of publications that J&E published lately on the matter of harassment, such as

> A study on the harassment of environmental activists with a summary, statistics and case studies from selected EU Member States (in cooperation with the European Environmental Bureau): http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2019/The_Harassment_of_Environmental_Defenders_in_the_European_Union_-_A_Case_Study_Report_final.pdf
>
> An analytical study on the harassment of environmental activists globally and in the EU: http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2018/Harassment_study_2018.pdf

Because instances of harassment and intimidation are documented more and more, how international bodies respond to the phenomenon of the ever-growing number of incidents committed against environmental defenders is crucial. This consideration motivated the preparation of our comments to the foregoing Draft Note.

Comments

Paragraph 7

We fully support the interpretation by the Bureau of the term "environmental defender". We believe that being a defender of the environment and exercising rights enshrined in the Convention do not need to be performed in a professional capacity or within a professional organization, e.g. an NGO. Ordinary citizens, lay persons, when going to court or claiming remedies for a breach of rights become environmental defenders immediately and solely by doing so. Therefore, the protection measures suggested by the Bureau should be available to them as well.

Paragraph 12

We fully agree with the analysis of the Bureau about the already high case load of the Compliance Committee which would require additional resources and the need for prompt action in situations where there may be possible violations of Article 3(8). There is no need to further detail why the conclusions in Section 12 are accurate, since it is commonly known for all dealing with access issues.

Paragraph 16

We fully agree that other available international judicial avenues are not adequate to respond to immediate and urgent instances of a possible violation of Article 3(8) of the Aarhus Convention. Even in those instances where courts may be able to impose interim measures before the filing of a complete application, a new response mechanism under the Aarhus Convention should not replace judicial means of redress, but be able to serve as a preventive measure to ensure compliance with Article 3(8).

Paragraph 23

In order for the option 3 of a Rapid Response Mechanism to work, we would like to add an expenditure category to the ones listed under (a), (b) and (c). We believe that the person appointed / elected as the one dealing with instances of harassment, intimidations and threats on behalf of the UNECE should receive appropriate remuneration for its work in the form of salary or fee. The costs currently listed under the foregoing points cover all external aspects of the work to be done by the person in charge of Article 3(8) cases, ranging from travel and daily subsistence via translation costs to the salaries of the support staff provided by the Secretariat. However, it is not appropriate to expect a high level expert (the profile that will be needed to fulfill the position) to work free of charge or only for the coverage of his or her material expenses. The seriousness of the position requires that the persons dealing with these cases be paid on at least an equal level as the members of the Convention Secretariat.

Paragraph 36

It might be a good idea to emulate or at least draw inspiration from the mandate of the UN Special Rapporteur on the Situation of HR defenders (for background information on the mandate and competences see here https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Mandate.aspx). The option 3 as drafted by the Bureau, which we support, would allow for the Rapporteur to refer a case to the Compliance Committee (as set out in section 11 of the Annex to the Draft Note).

Paragraph 40

In connection with our above comment re the costs of options, we believe that giving additional powers to the Chair of the Bureau would cost less than having a special Rapporteur for Article 3(8) cases. The difference for option 3 would be exactly the cost category (salary or fee) that we mentioned under Section 23 which we believe is justifiable.

In light of the above comments, we take the opportunity to provide some additional reflections on the text in the Annex, supporting the development of a Rapid Response Mechanism under option 3:

Section 6: As one of the means for collecting the necessary information to properly carry out his/her functions, the Draft Note suggest that the Rapporteur might "with the consent of the complainant, send questions to any other person or institution or entity (e.g. the public authority or private body or person alleged to be perpetrating the penalization, persecution or harassment, the independent national human rights institution in the Party concerned)". However, in the next bullet point it is stated that "with the consent of the Party concerned, undertake information gathering in the territory of the Party" which contradicts to the previous point because sending questions to any other person or institution or entity is information gathering in the territory of the Party and thus, its consent should be asked for, or the point referring to the State consent should be rephrased to take into account the previous point.

Section 7: We believe that solely issuing public statements and press releases does not guarantee that they will reach the appropriate audience. For this reason, we suggest using the following wording: "Issue public statements and press releases and distributing them actively via its own website, the media and social media."

Section 8: First of all, we think that a protection measure may be necessary to be issued not only to those organs that are listed in the current draft. It may happen that the state body committing a harassment of an environmental defender belongs to the subordination of none of the listed entities. For this reason we suggest using the following wording in addition to the current ones, as a fourth item "any public body of the executive branch of the government". Secondly, we find the listing of judicial bodies in the list (currently item number 4) maybe problematic to reach an agreement on and to implement. Although we do not oppose including the judiciary here, it is quite sure that this will raise serious concerns from the Parties to the Convention and not only those where rule of law may not have such strong roots. Countries are usually particularly sensitive to any intrusion to the independence of their judiciary, and they may consider such protection measures as examples of interference with that independence/sovereignty. To that end, it should be noted that neither the ECtHR nor the HRC can indicate interim measures to courts but only to Governments (which then have to take all the necessary measures to comply with the interim measures which are usually of administrative nature, e.g. not deport an asylum seeker or allow a lawyer to visit his / her client in jail). What could work would be if domestic courts, either following a request by the defendant and / or of their own motion, could address a preliminary reference request to the Rapporteur soliciting his / her view on e.g. issues of penalties / costs imposed in environmental defenders' cases (admittedly this would not be that easily applicable in relation to criminal cases against environmental defenders). Similarly, a provision could be made that should domestic courts be seized with a request by the defendant to file such a request with the Rapporteur and they (the courts) turn it down, then that decision should be reasoned. That said, such an approach would create some logistical issues (translating the request for a preliminary ruling, delays in the proceedings etc.)

Section 11: The solution under point (b) when the Compliance Committee can lift or uphold a protection measure issued by the Rapporteur seems problematic in our view. The Draft Note represents a certain standpoint the foundations of which are that a compliance case is quite distinct from an instance of harassment, both in terms of its content and process. Having said that, it is difficult to explain why one can exercise a decisive influence over the other. There may be cases when a country is in non-compliance with the Convention and still there is no need for a protection measure, and vice versa, when a protection measure may seem necessary, maybe to avoid the finding of a non-compliance and to prevent it from occurring. Therefore, we suggest deleting the last sentence of point

(b) of Section 11 of the Draft Note. What Section 11 does not answer, however, not even in point (c), is whether the two processes can be initiated separately and if yes, how they interrelate with each other. This part should be better elaborated in the draft in our understanding.

Furthermore, it would be helpful if there were clearer wording on "The Rapporteur on Environmental Defenders would be a specialized "rapid response" procedure...". The Rapporteur is a specialized body, institution to the Aarhus Convention not a procedure. We therefore suggest either "the work of the Rapporteur" or "the mandate of the Rapporteur", or "the procedure overseen by the Rapporteur". In the same vein, it would be helpful to rephrase "The Rapporteur is a complementary procedure to the Compliance Committee".

Section 13: We are confident that the awareness raising efforts listed in the Draft Note are weak and will not bring suitable results even if performed well. We think that in our times, without a robust communications campaign using multiple tools, no success can be achieved. For this reason we suggest adding the following exemplificative list with no particular suggestion for wording to the existing section: and other awareness raising means as appropriate, including recommendations, toolkits, studies, notes, etc. using the media and social media.

Conclusions

J&E, EEB and ClientEarth welcome the preparation of the Draft Note and asks the Bureau and the Working Group of the Parties to present the framework under option 3 to the 7th Meeting of the Parties of the Convention (MOP7) to be held in 2021.

We urge the Parties to the Convention to adopt a mechanism for the protection of environmental defenders, overseen by a designated Rapporteur, as soon as possible but no later than at the MOP7 in order to prevent the occurrence of serious harm to environmental defenders in the UNECE region.

We thank the work done by the Bureau and the Secretariat of the Convention in order to prepare the adoption of such a mechanism, and offer our assistance and resources to help the mechanism be widely known and applied, should there be a need for this.

A first draft of this Position Paper was adopted by the Aarhus Topic Team of J&E on 31 March 2020 and subsequently worked on and endorsed by EEB and ClientEarth.

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