Report by Mr. Jan Darpo
Chair of the Task Force on Access to Justice

Meetings of the Parties to the Aarhus Convention

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Interprefy

Introduction

This is my report on the outcomes of the work of the Task Force in the current inter-sessional period. In addition, I will also make some reflections on the progress made by the Task Force – as well as challenges in the work – over the 13 years of my chairmanship.

Report from the intersessional period 2018-2021

The current mandate was set out by decision VI/3 on promoting effective access to justice. The mandate allowed us to prioritize and further work on key issues in this area at each meeting. During this intersessional period, the Task Force held 3 meetings, namely the eleventh and twelfth meetings in Geneva on 27-28 February 2018[1] and on 28 February – 1 March 2019[2] respectively, and the thirteenth meeting of the Task Force held online on 15-16 February 2021[3]. Each meeting brought together more than 100 experts from the Parties to the Convention and other countries. Despite the COVID-19 pandemic in the last two years, the Task Force was able to fulfil its mandate. Overall, we have a record of experiences from a substantial number of experts, including representatives of the governments, members of the judiciary, NGOs, public litigation lawyers and partner forums dealing with access to justice issues.

In terms of other meetings, the Task Force also supported two meetings of the network of judiciary, judicial training institutions and other review bodies in the pan-European region, alongside several sub-regional and national events, and supported the preparations of the relevant thematic session of the Working Group of the Parties to the Convention related to access to justice on 28 October 2020[4].

As for substantive issues, the Task Force addressed the following subjects in line with decision VI/3[5]:

(a) **Access to justice in information cases** (para. 14 (a) (i));

(b) Acts or omissions that contravene permit requirements or laws relating to the environment with a focus on **cases relating to air quality** and **public interest litigation** (para. 14 (a) (ii));

With regard to access to justice in information cases, we finalized a report on the basis of a questionnaire and responses received with regard to 12 Parties from different sub-regions through open-ended consultations among Governments and different stakeholders. including: (a) the European Union together with six of its Member States, namely Germany, Ireland, Portugal, Slovakia, and Sweden; (b) Switzerland; (c) Serbia and Montenegro from South Eastern Europe; (d) the Republic of Moldova from Eastern Europe; (e) Georgia from the Caucasus and (f) Kazakhstan from Central Asia. The report underscored good practice and existing challenges in various jurisdictions to meet the requirements of article 9 (1) of the Convention and provided an informed basis for the discussion by the Task Force of measures required to improve work in this area. In brief, the existing challenges in different Parties primarily relate to the length of the procedure, weak enforcement and – to a certain extent – costs.

[1] See meeting webpage: https://unece.org/environmental-policy/events/eleventh-meeting-task-force-access-justice-under-aarhus-convention
[2] See meeting webpage: https://unece.org/environmental-policy/events/twelfth-meeting-task-force-access-justice-under-aarhus-convention
[3] See meeting webpage: https://unece.org/environmental-policy/events/thirteenth-meeting-task-force-access-justice-under-aarhus-convention
[4] See meeting webpage: https://unece.org/environmental-policy/events/twenty-fourth-meeting-working-group-parties-aarhus-convention-hybrid (tab AJ session)
[5] See:
http://www.unece.org/fileadmin/DAM/env/pp/mop6/Decison_Excerpts_EN/AarhusConv_MoP6_Decision_VI_3_AJ_e.pdf

Another area for the Task Force to focus on in this inter-sessional period was **access to justice in cases relating to air quality**. This subject was highlighted in separate agenda items on the 12th and 13th meetings of the Task Force, as well as on the thematic session on the 24th meeting of the Working Group of the Parties. On these meetings, a number of country reports and presentations were made, followed by a general discussion. The Task Force noted the increased number of cases across the Parties to the Convention aimed at challenging the content and scientific basis of air quality plans, zonal planning, location of measurement points, diesel car bans, and individual development projects that might cause exceedance of ambient air quality standards. In several situations, such public interest cases face serious barriers related to the proceedings and available remedies. These and other legal actions to challenge environmental decision-making show that that **public interest litigation in environmental matters has been instrumental** in progressing environmental rights of access to information, participation and access to courts. Other subject areas for such litigation concern issues such as biodiversity loss, water quality and climate change.

During the meetings of the Task Force, we have also taken stock of the experiences of Parties and stakeholders in implementing supporting tools as multi-stakeholder dialogues, e-justice and capacity-building initiatives to promote access to justice in environmental matters.

Finally, the Task Force has continued strengthening cooperation with relevant international forums dealing with access to justice, including UNEP, OHCHR, UNODC, UNDP, OSCE, IUCN and the Council of Europe. In particular, in order to contribute to an in-depth review of Sustainable Development Goal 16, the UNECE in cooperation with UNEP and other organisations – including the European Union Forum of Judges for the Environment (EUFJE) and the Association of European Administrative Judges (AEAJ) – convened a judicial colloquium back-to-back with the thirteenth meeting of the Task Force in 2019.[6] The objective of the colloquium was to strengthen the capacity of the judiciary to effectively handle cases related to environmental matters.

General experiences 2008-2021…

I have been chairing the Task Force on access to Justice between 2008 and 2021. My general experience of the work and activities of this body under the Aarhus Convention is overall very positive.

The aim of the Task Force is to provide a unique multi-stakeholder forum for experts from governments, civil society, members of the judiciary, legal professionals, international and regional organizations and other stakeholders. As the legal frameworks for judicial and administrative review in environmental matters vary among Parties, I truly believe that this sharing of experiences, learning from good practice and discussing different issues has been helpful in the understanding of the crucial importance of access to justice in environmental decision-making. The strength of our meetings has been the open atmosphere in which the delegates have been able to air all kinds of questions related to the third pillar of the Convention. This may also be the main reason for the positive outcome of our work in the evaluation that was performed in 2013. We have also seen a gradual increase of the participation in the eleven Task Force meetings I have chaired over the years, which of course is very satisfactory.

In addition to setting up these meeting, the Task Force has focused on the performance of analytical and support material on important issues under the Convention. To date, there are 15 studies from different sub-regions available on the Task Force studies webpage.[7] We have also organised a jurisprudence database in which cases from regional and national courts on access to justice in different environmental matters have been posted. Since its establishment in 2010, the database has continuously developed and is today populated with about 110 cases.[8] In addition, the Task Force and I as the chair have organised or participated in a couple of training activities, among others in Almaty in 2012 and Tblisi in 2015. These events have been very interesting as they have given lots of insight about the access to justice challenges at regional level.

Overall, the cooperation with the secretariat has run smoothly, albeit from time to time with some delay as their workload is very heavy and the resources meagre.

[6] See meeting webpage: https://unece.org/environmental-policy/events/2019-judicial-colloquium .
[7] See https://unece.org/env/pp/analytical-studies-on-access-to-justice .
[8] See https://unece.org/env/pp/tfaj-case-law-related-convention

…and some concerns

Having said this, I would also like to highlight some tendencies within the Aarhus community which are worth paying attention to for the future. In all kinds of administrative bodies, there is a risk of a culture of its own, due to bureaucratic traditions and amplified by a heavy workload and time pressure. The obvious remedy against such tendencies are transparency and open discussion, which is one of the guiding principles of Aarhus. There have, over the years, been occasions when my view on matters has differed from those of the secretariat. Most of those differences have been solved in a positive atmosphere of mutual understanding. However, there is one exception to this concerning the information study the Task Force on Access to Justice performed in 2018-2019.

As mentioned above, one of the most important tasks of our body is to perform analytic studies about the implementation of the Aarhus Convention. Thus, since 2011 we have launched six reports on our own accord covering subjects such as standing for the public concerned in national courts, remedies, costs, the loser pays principle and legal aid, as well as the possibility for ENGOs to claim damages on behalf of the environment. As our mandate includes both to perform "analytical studies" and to "promote the understanding of relevant findings of the Compliance Committee of a systemic nature",[9] the discussion in all of these reports is rather wide, including references to national law, EU law and case-law of the CJEU and the European Court of Human Rights, as well as the findings of the Compliance Committee. Commonly, they also include suggestions on how to improve the legislation in the Parties and recommendations of a more general nature. There has never been any discussion about the precise delimitations of the studies, as the core idea of our work is not to provide authoritative interpretations of the Convention, but **only to facilitate the discussion on how to understand the obligations therein and how they are implemented in different Parties.**

In the beginning of the current intersessional period, it was decided that we should undertake a study dealing with procedural matters concerning requests for, and review of, environmental information relating to both Article 4 and Article 9.1 of the Convention. This process started in 2017 and the study was discussed on the eleventh, twelfth and thirteenth meetings of the Task Force, after which the study was concluded in the spring of 2021.[10] At the twelfth meeting of the Task Force in the beginning of 2018, two ENGOs voiced concerns that the report was too negative in respect of the role of the Ombudsman institution in Communication C/2013/93. The ENGOs also claimed the report exceeded the mandate of the Task Force, as it addressed the interpretation of the Convention and the findings of the Compliance Committee. These views were not echoed by any of the other delegates at the meeting. For my own part, I expressed regret that the text regarding the findings in C/93 had been perceived as being too evaluative and undertook to address that issue in the next draft of the study. Furthermore, I confirmed that the ambition of the text was to remain faithful to the Convention and the findings of the Compliance Committee, while leaving room for analysis and the drawing of conclusions from those sources of law, all in accordance with the mandate. Lastly, I noted that this had been a common approach for all of the analytic studies undertaken under the auspices of the Task Force since 2008, and that this wide room for discussion was essential for the functioning of our body.

After having discussed the text with the secretariat after the meeting, we agreed that I would rephrase some of the observations in the report. In version 2, I explain the law as it stands today, using ordinary sources of law such as the text of the Convention, decisions made by the Compliance Committee, and taking into account state practise and "soft law sources" such as the Implementation Guide 2014. I checked this version with a group of friends of the Task Force – including the late Veit Koester, former chair of the Compliance Committee – and we agreed that the text was loyal to the Convention and the Compliance Committee's finding and did not draw any controversial conclusions. It was therefore quite surprising when the secretariat – having accepted the first version of the report and not expressing any concern until the two ENGOs intervened – reacted strongly against the text, claiming that no body under the Convention, except the Compliance Committee, is mandated to express a view about the understanding of the Aarhus text and the

[9] The mandate as set out in decision VII/3 on promoting effective access to justice; https://unece.org/env/pp/tfaj-mandate

[10] See paragraph 33 in the report; https://unece.org/fileadmin/DAM/env/pp/wgp/WGP-23/ODS/ECE_MP.PP_WG.1_2019_4_E.pdf

practice created thereunder. The secretariat therefore suggested major revisions, erasing two thirds of the text in the analytic part and inserting observations of various proportions. Amongst others the secretariat did not allow (bullet points with my remarks in italics):

- The statement that Article 9.1 contains both a procedural and a substantive aspect, as this is not expressly mentioned in the provision.
  - *This is only a matter of describing that the provision contains both requirements for the process of handling requests for information (procedural aspect) and criteria for refusal (substantive aspect).*
- Any conclusions on the Compliance Committee's findings, except for mere citations.
  - *To compare different decisions by the Compliance Committee and draw conclusions from should not be controversial if that analysis is performed with loyalty to the findings.*
- The view that the Implementation Guide 2014 goes beyond the text of Article 9.1, as this "is clearly interpreting the requirements of the Convention, which is outside the scope of the mandate". Instead, the controversial passage of the Guide should be cited.
  - *Guidance documents of different status are frequent in the field of environmental law. The Implementation Guide is one such document and is often referred to by the national and regional courts of the Parties. Its content is however not binding and must obviously be open for discussion, especially at points where it is ambiguous.*
- Conclusions about the position of EU law, as "that is for the EU's own institutions to decide".
  - *The study described how the autonomous expression "court or tribunal" has been interpreted in case-law under EU law and the European Convention of Human Rights, which obviously also is interesting from an Aarhus perspective.*
- The labelling of case-law of the CJEU as "state practice" according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).
  - *It is common ground in international law that the VCLT is generally applicable to all international agreements, including the Aarhus Convention.*

It is hard to see any explanation for the secretariat views. This attitude was new and had never before been applied to our studies. According to my contacts active in the international arena, this approach appears to differ from those associated with other international environmental agreements, where the debate can be quite lively.

After a couple of further exchanges between myself and the secretariat on the draft, we agreed that we would "agree to differ" about the text and the mandate of the Task Force. As this issue engages the basic principles of transparency and openness under the Convention, I asked for a meeting with the Bureau in June 2019.[11] At this meeting, I tried to clarify my position with the help of a Swedish delegate to the Convention. However, the Bureau convened on the matter in a second (virtual) meeting in September that year and thereafter again delegated the matter to the secretariat. The secretariat once again pressed for major revisions to the text, which I continued to oppose. This controversy continued during the fall of 2019, but at the end of the day the secretariat gave up their objections. The study could therefore be concluded in January 2020 without any major revisions or changes in substance. This version was presented at the thirteenth meeting of the Task Force in February 2021 and thereafter published.

I leave it to the reader to evaluate the study on access to justice in information cases. In my view, the text and the analysis clearly is in line with the mandate of the Task Force. Moreover, I believe the ability of the Task Force to undertake analytic studies is vital in order to encourage debate within the Aarhus community – and that such debate is healthy. And after all, the Aarhus Convention is about transparency and environmental democracy, something which requires room for debate also within the Convention.

[11] For a more comprehensive overview of the process of the study on access to justice in information cases and a description of the previous studies that have been performed by the Task Force, see my letter to the Bureau on 18 June 2019 which is posted on; http://jandarpo.se/articles-reports/

Into the future

The Task Force has always been given a broad mandate covering key elements of Article 9 of the Aarhus Convention on access to justice. In my view, this body has found its form as a platform for open discussion and analysis. For the future work, I think it is important that the Task Force combines the chosen theme with a horizontal focus on the key elements on access to justice in environmental matters: standing, scope of review, costs, remedies and timeliness. In this context, it can study the results of successful litigation in different Parties to the Convention and what actors and conditions that were conducive for this. Obviously, the Task Force should continue to promote tools supporting effective access to justice, including multi-stakeholder dialogues, e-justice initiatives, collective redress, as well as support of networking within the judiciary, judicial training institutions and other review bodies in the pan-European region. To this background, I kindly request the Meeting of the Parties to support the future mandate of the Task Force as set out in draft decision VII/3 on promoting effective access to justice.

Also, I would like to express my deep appreciation to the experts from the Parties, partner organizations and stakeholders who have supported the work of the Task Force throughout these years in delivering the results and implementing the mandate of the Task Force. The secretariat has been instrumental in this task, for which I am sincerely grateful.

And finally, I would like to express my warmest gratitude to Ms Maryna Yanush, my supporting and helping hand at the secretariat throughout all these years. Maryna is a wonder of expedience, bright and positive, inventive as the very best research assistants a rock to hold on when it is blowing. I do wish you good luck in any future venture that you may come across!

In addition to these closing words, I would like to welcome my successor. If the Meeting of the Parties so decides, the chair will be awarded to Luc Lavrysen, an eminent scholar and judge who without any doubt will take on this task with excellence.