

**Draft recommendations with regard to
request for advice ACCC/A/2022/3 by Ukraine**

Adopted by the Committee on ...

I. Introduction

1. On 27 June 2022, Ukraine submitted a request to the Compliance Committee seeking its advice on whether its adoption of certain measures in connection with the military aggression by the Russian Federation against Ukraine is compatible with its obligations as a Party to the Aarhus Convention.
2. On 4 July 2022, observer Environment-People-Law wrote in support of Ukraine's request to the Committee for advice and provided some additional information regarding the changes to the legal framework for access to information and public participation in procedures on environmental impact assessment (EIA) introduced since the beginning of the military invasion.
3. By letter of 21 July 2022, the Committee confirmed its readiness to provide the requested advice and explained its proposed procedure regarding the preparation of its advice on the request. The Committee also enclosed a number of questions for Ukraine's reply by 29 August 2022.
4. Also on 21 July 2022, and in accordance with the procedure described in its above letter, the Committee wrote to members of European ECO Forum's thematic group on compliance asking them to circulate to Ukrainian environmental non-governmental organizations (NGOs) and other interested members of the public the Committee's invitation for comments on Ukraine's request for advice, with a deadline for comments of 28 July 2022.
5. On 22 July 2022, observer Environment-People-Law submitted comments and additional information regarding Ukraine's request for advice.
6. On 27 July 2022, observer Right to Protection submitted comments on Ukraine's request for advice.
7. On 28 November 2022, Ukraine submitted its replies to the Committee's questions dated 21 July 2022.
8. After taking into account the information received, the Committee prepared its draft advice and agreed it through its electronic decision-making procedure on 9 March 2023. In accordance with paragraph 34 of the annex to decision I/7, the draft advice was then forwarded on that date to the Party concerned and observers for their comments by 23 March 2023.
9. *Comments on the draft advice were received on XX from XX.*
10. *The Committee thereafter finalized its advice, taking account of the comments received, and adopted it through its electronic decision-making procedure on XX. It requested the secretariat to send the advice to the Party concerned and the observers.*

II. Summary of advice and assistance sought by the Party concerned

11. In its request for advice dated 27 June 2022, the Party concerned requested the Committee's advice on:
 - (a) Whether its proposed forms of access to information and public participation in decision-making on the EIA procedure might be considered discriminatory;
 - (b) Whether the proposed ways to ensure access to information and public participation in the EIA procedure would be sufficient and adequate.

12. The Party concerned also asked the Committee to share its experience and to provide recommendations on the ways and means of respecting the rights provided to the public under the Convention during hostilities.

III. Consideration and evaluation by the Committee

13. The Committee warmly welcomes the proactive approach taken by the Party concerned with respect to its request for advice on whether the measures concerning access to information and public participation in decision-making in EIA procedures that it has put in place during the military aggression by the Russian Federation, which started on 24 February 2022, are compatible with its obligations as a Party to the Aarhus Convention.

14. The Committee also welcomes the request by the Party concerned for the Committee to provide advice more generally on ways and means of respecting the public rights provided in the Convention during the hostilities.

15. The Committee provides the present advice to the Party concerned in accordance with paragraphs 14, 36 (a) and 37 (a) of the annex to decision I/7.

16. The Committee emphasizes that the present advice is provided in the specific context of the current war. At the outset, the Committee notes that there are no specific provisions in the Convention providing for a different legal regime applicable during time of war. This means that even during time of war the Convention, and the requirements incumbent upon a Party thereunder, continue to apply.

17. That said, the particular circumstances generated by a situation of war may mean that, should the Party concerned, despite all best efforts, be unable to fully meet its obligations under the Convention due to the war, it may be able to avail of certain defences existing under general principles of international law, such as force majeure, self-defence or necessity. Whether the Party concerned could, in the face of a failure to meet its obligations under the Convention, in fact successfully rely on any of those defences is outside the scope of the present advice and will be a matter of fact in each particular case.

18. The Committee also reminds the Party concerned that any shortcomings in ensuring effective access to environmental information and public participation in decision-making under the Convention during the war may be subject to challenge by members of the public in accordance with the provisions of article 9 of the Convention.¹

19. Having reviewed the information provided by the Party concerned and the observers Environment-People-Law and Right to Protection, the Committee in the present advice will address the following issues:

- (a) Access to environmental information contained in the unified EIA register solely upon request;
- (b) The forms the public must complete to request access to documentation in the EIA register;
- (c) The time-frame for the public to submit comments in pending EIA procedures;
- (d) The redaction from EIA documentation of all information related to the location of the proposed activity;
- (e) Access to EIA conclusions issued prior to 24 February 2022;
- (f) Exclusion of “restoration works” from public participation;
- (g) Public participation in the preparation of the “Environmental Security” chapter of the draft Recovery Plan of Ukraine;
- (h) Public participation in the preparation of restoration plans and programmes under the Law “On Regulation of Urban Planning”.

¹ See also the Committee’s recommendations with regard to request for advice ACCC/A/2020/2 by Kazakhstan, ECE/MP.PP/C.1/2021/6, para. 21.

(a) Access to environmental information contained in the unified EIA register solely upon request

20. Prior to the war, any member of the public could access the information contained in the unified EIA register online without needing to register or provide any personal data or to make an information request.

21. By Resolution No. 263 of 12 March 2022, the Cabinet of Ministers of Ukraine authorized ministries and other central and local executive bodies to stop or limit the operation of information and communication systems, electronic communication systems and public electronic registers.²

22. By Order No. 225 of the Ministry of Environmental Protection and Natural Resources of Ukraine dated 15 June 2022, public access to the EIA register was partially resumed with the public thereafter granted access to certain, limited information regarding pending EIA procedures, but access to documentation concerning those pending EIA procedures remains suspended.³ In order to have access to the EIA report and other documentation concerning pending EIA procedures, members of the public must at the present time therefore submit a request for that information and give consent to the processing and use of their personal data, in the prescribed forms.⁴

23. It is clear that Resolution No. 263 of the Cabinet of Ministers and the related ministerial orders, including Order No. 225 of the Ministry of Environmental Protection, have reduced the ease with which the public can access EIA reports and other documentation concerning pending EIA procedures.

24. In its findings on communication ACCC/C/2004/4 (Hungary), the Committee considered that the Convention does not completely exclude the possibility of a Party reducing existing rights, so long as they do not fall below the minimum level granted by the Convention.⁵ While there is no explicit non-regression principle in the Convention, the Committee makes it clear that, in keeping with the objective set out in article 1 of the Convention, Parties should as a rule increase, rather than decrease, the implementation of the rights granted to the public under the Convention over time. This is in keeping with the general principle of human rights law that the establishment of a standard for protection of rights, once established, should not be derogated from without a compelling countervailing right.⁶ The Committee however considers that the public's right to safety and security during an ongoing war may indeed constitute such a compelling countervailing right.

25. As to whether the current practice established by Order No. 225 of the Ministry of Environmental Protection falls below the minimum level granted by the Convention, article 6 (6) of the Convention requires competent public authorities to give the public concerned access to all information relevant to the decision-making referred to in article 6 "upon request where so required under national law".

26. The Committee considers the requirement in Order No. 225 that members of the public submit a request for access to the EIA report and related documentation is in line with the possibility envisaged in article 6 (6) of the Convention for Parties to make access to the information relevant to the decision-making "upon request where so required under national law". Based on the foregoing, the Committee considers that it is not inconsistent with article 6 (6) of the Convention that access to information contained in the EIA register is presently only available upon request.

27. Moreover, since all persons, irrespective of their citizenship, nationality or domicile, are required to make a request to have access to information contained in the EIA register, the Committee does not consider such a requirement to be discriminatory within the meaning of article 3 (9) of the Convention either.

² Comments by observer Environment-People-Law, 22 July 2022, para. 4.

³ Party's replies to Committee's questions, 28 November 2022, p. 8.

⁴ Party's replies to Committee's questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

⁵ ECE/MP.PP/C.1/2005/2/Add.4, para. 18. See also The Aarhus Convention: An Implementation Guide, p. 68.

⁶ See The Aarhus Convention: An Implementation Guide, p. 68, referring, by way of example, to the judgment of Hungary's Constitutional Court in the *Protected Forests Case*.

28. Based on the foregoing, the Committee concludes that the temporary suspension of unlimited access to the EIA register during the ongoing war is not inconsistent with either articles 3 (9) or 6 (6) of the Convention.

(b) The forms the public must complete to request access to documentation in the EIA register

29. In order to have electronic access to the documentation concerning pending EIA procedures, members of the public at present must complete two forms available on the website of the Ministry of Environmental Protection.⁷

30. The first form is a request for access to the EIA documentation. Completion of the form requires requesters to provide their first and last name, signature, email address, contact phone number and Internet Protocol (IP) address.⁸ It also requires requesters to attach the second form to their request.⁹

31. The second form requires requesters to consent to the processing of their personal data. For this purpose, the second form requires requesters to provide their name, signature, place of birth, passport number and other passport details. The second form requires that, “in accordance with the Law of Ukraine ‘On the Protection of Personal Data’” and “taking into account the security situation in the regions of Ukraine and for the purpose of recording the list of persons who request environmental impact assessment documentation with specification of technical characteristics”, requesters consent to the processing and use of their personal data as specified in the request.¹⁰

32. Based on the information before it, the Committee understands that, should requesters fail to complete each of the required forms in full, they will not be sent the information requested.¹¹ The Party concerned states that members of the public concerned in the vicinity of the proposed activity may nevertheless view, and make copies of, the documentation in person at various locations.¹² The Committee notes, however, that due to the war, many members of the public have had to leave their homes and regions, and any such members of the public concerned will not be able to view the documentation in person at those locations. Rather, they will need to make an information request to receive the EIA documentation, by completing and submitting the two prescribed forms.

33. The Committee thus examines whether, in the context of the ongoing war, the requirement that, in order to have access to EIA documentation, members of the public concerned must complete and submit the two prescribed forms is consistent with the Convention.

34. As a preliminary point, and as already noted in paragraph 26 above, a requirement that members of the public concerned submit an information request to have access to information contained in the EIA register is not in itself inconsistent with article 6 (6) of the Convention. The Committee next examines whether the required content of the request form, and accompanying consent form, are in line with article 6 (6) of the Convention.

35. Regarding the requirement in the consent form that members of the public concerned making a request for EIA documentation consent to the processing of their personal data, the Committee notes that some processing of the personal data of members of the public making requests for environmental information is a standard feature in a number of Parties to the Convention. While stressing that such processing must be for a legitimate purpose in keeping with the objective set out in article 1 of the Convention, having reviewed the content of the consent form in the present

Commented [user1]: This is also relevant for the NGOs who can be located hundreds of km away from the location of the proposed activity but still may wish to participate in the procedure, and who has always (since the Registered became operational) relied on the on-line access to the EIA documentation.

⁷ Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

⁸ Comments by observer Environment-People-Law, 22 July 2022, p. 3.

⁹ Comments by observer Environment-People-Law, 22 July 2022, p. 3.

¹⁰ Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

¹¹ Comments by observer Environment-People-Law, 22 July 2022, para. 9.

¹² Party’s replies to Committee’s questions, 28 November 2022, p. 8.

case, the Committee does not consider that a requirement to give consent is itself inconsistent with the requirements of the Convention.

36. With respect to the information that the two forms require members of the public concerned to provide, the Committee makes clear that any information that members of the public concerned are required to provide for access to the EIA documentation must not act as a potential barrier to accessing that information. In this regard, the Committee expresses concern regarding three aspects of the forms that members of the public concerned seeking access to EIA documentation must presently complete.

37. First, a request for access to information relevant to the decision-making under article 6 (6) of the Convention can be made by any member of the “public concerned”. Article 2 (5) of the Convention defines the “public concerned” as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.” NGOs promoting environmental protection and meeting any requirements under national law are therefore entitled to request access to the information relevant to the decision-making in accordance with article 6 (6). The Committee points out, however, that the details presently required to be provided in the Ministry’s request and consent forms all concern the identity details of natural persons only. The Committee therefore recommends that suitable provision be made in the forms to enable requests for EIA documentation to be submitted by environmental NGOs and other legal persons also.

38. Second, with respect to the requirement in the consent form to provide one’s passport details, even in the case of members of the “public concerned” who are natural persons, not all natural persons hold passports. The Committee accordingly recommends that the consent form be amended to enable requesters to submit other possible forms of identification. For natural persons, this may be the details of the requester’s national identity card or driver’s licence instead.

39. Third, the form for requesting access to EIA documentation presently requires requesters to provide their IP address. However, requiring requesters to specify an IP address may operate as a barrier to members of the “public concerned” exercising their right to access the EIA documentation. First, many members of the “public concerned” may not be aware of what an IP address is nor how they find it. Second, requests for information can be submitted on paper, not only electronically, and the Committee cannot see how an IP address is of any relevance to requests for information submitted, and responded to, in paper form. In any event, even for information requests submitted electronically, since a Virtual Private Network (VPN) can be used to provide an artificial IP address, any utility of requiring members of the public concerned to provide their IP address would seem to be uncertain. Given that the Committee has not been provided with any specific justification, whether relating to “national defence” or “public security” under article 4 (4) (b) or under any other grounds, for requesting members of the public concerned to provide their IP address, the Committee recommends that the requirement to provide an IP address is removed from the request form.

40. To conclude, in the light of the foregoing and on the basis of the information before it, the Committee recommends that, if the two prescribed forms for requesting access to EIA documentation during the war are to continue to be used, those forms are revised to address the matters set out in paragraphs 37 to 39 above.

(c) The time-frame for the public to submit comments in pending EIA procedures

41. Under the Law “On Environmental Impact Assessment” as in force prior to the war, the public had a minimum of 25 and a maximum of 35 business days to submit comments on the EIA report starting from the date the relevant documents were uploaded to the EIA register.¹³

¹³ Comments by observer Environment-People-Law, 22 July 2022, para. 11.

Commented [user2]: In Ukraine, there are two types of passports - an internal passport and a passport for traveling abroad. The national identity card is a new form of the internal passport.

ID card is a passport of a citizen of Ukraine of the new model, which certifies identity and confirms Ukrainian citizenship. The passport is produced in the form of a card containing a contactless electronic medium. - <https://pasport.org.ua/en/faq/661>

Commented [user3]: other widely used document deemed to be an identification document under the national legislation would be a pension certificate

42. Pursuant to the Ministry of Environmental Protection's Order No. 225 of 15 June 2022:

- (a) For EIA procedures in which the period for the public to comment on the EIA report began prior to 22 March 2022 and was still ongoing at that date, the commenting period was extended by the number of working days in the commenting period during which the EIA register was closed.
- (b) For EIA reports uploaded to the EIA register since 22 March 2022, members of the public have 25 working days to submit comments and suggestions regarding the planned activity.¹⁴

43. The observer Environment-People-Law states that, due to the suspension of automatic access to the documentation contained in the EIA register, members of the public must at present make a request for access to the EIA documentation, and the provision of the requested documentation by email may take at least five working days. Environment-People-Law submits that this means that the time-frame for the public to submit comments on the proposed activity is effectively reduced by the number of days required for the EIA documentation to be provided.¹⁵

44. The Party concerned however states that, following the March 2022 restriction of access to documentation in the EIA register, EIA documentation on proposed activities has been made available to the public at the premises of the competent public authority, the local self-government body of the relevant administrative-territorial unit affected by the proposed activity and at the premises of the developer. In some cases, it can also be accessed at other publicly accessible places identified by the developer. The Party concerned submits that, at each of these locations, the public not only has had the opportunity to view the documents but also to make copies.¹⁶

45. Article 6 (3) requires that the public participation procedures shall include reasonable time-frames for the different phases, inter alia, "allowing sufficient time for the public to prepare and participate effectively during the environmental decision-making".

46. With respect to those EIA procedures for which the period for the public to comment on the EIA report began prior to 22 March 2022 and was still ongoing at that date, the Committee considers that the extension by the Party concerned of the time-frame for the public to comment by the number of working days during the commenting period for which the EIA register was suspended was a reasonable and appropriate way to proceed in the circumstances.

47. Concerning the EIA reports uploaded to the EIA register since 22 March 2022, the Committee notes that the time-frame for public comments is currently 25 working days from the date the documents are uploaded to the register.

48. The Committee recognizes that some, perhaps many, members of the public concerned may have the possibility to view the EIA documentation directly at the locations identified by the Party concerned in paragraph 44 above, without having to wait until they receive the EIA documentation from the competent public authority upon request. However, in the context of the ongoing war, it cannot be assumed that all members of the public concerned will be able to access the EIA documentation in person at these locations. Many members of the public have had to leave their homes, and regions, due to the war. Members of the public concerned who have had to do so will need to make an information request to receive the EIA documentation, by submitting the two prescribed forms. The effective time-frame for those members of the public concerned to review the EIA documentation will accordingly be reduced by the number of days it takes for them to receive that documentation.

49. Based on the information before the Committee, the time-frame for obtaining access to the EIA documentation upon request is at least five working days (see para. 43 above). This means that, for members of the public concerned unable to access the EIA documentation in person, the effective time-frame to prepare their comments in pending EIA procedures will be approximately 20 working days while those who can access the

Commented [user4]: same for ecoNGO, Ukraine is a big country and we often comment on something that is planned to happen hundreds of km away

¹⁴ Party's replies to Committee's questions, 28 November 2022, p. 11.

¹⁵ Comments by observer Environment-People-Law, 22 July 2022, para. 11.

¹⁶ Party's replies to Committee's questions, 28 November 2022, p. 8.

documentation in person will have 25 working days. Recalling the requirement in article 3 (9) of the Convention that the public shall have, among other things, “the possibility to participate in decision-making” without discrimination as to “domicile”, the Committee recommends that the Party concerned endeavour to respond to requests for the documentation related to pending EIA procedures as soon as possible, so that members of the public concerned who are not able to view the EIA documentation in person are not at a disadvantage regarding the time they have to review and comment on the documentation compared to members of the public concerned who can access that documentation in person.

50. The Committee also recognizes that members of the public concerned able to access the EIA documentation in person may themselves face challenges when reviewing and commenting upon the EIA documentation, including practical constraints such as power cuts and internet outages or due to having to deal with the competing priorities and uncertainties of daily life in the midst of an ongoing war. For this reason, the Committee considers that the time-frames for the public to prepare and to submit comments on proposed activities subject to the requirements of article 6 of the Convention in time of war should be at least as long as the time-frames provided for that purpose during peacetime.

51. Pursuant to article 7 (6) of the Law “On Environmental Impact Assessment”, as in force prior to the war, the public had a minimum of 25 and a maximum of 35 business days to submit comments on the EIA report starting from the date the relevant documents were uploaded to the EIA register.¹⁷ Bearing in mind the additional challenges and constraints the public concerned may face in seeking to participate in decision-making on proposed activities in the midst of an ongoing war, the Committee recommends that, rather than applying a fixed time-frame of 25 working days in all pending EIA procedures, the Party concerned apply the maximum and minimum time-frames set out in article 7 (6) of its Law “On Environmental Impact Assessment” during the war also.

52. Based on the foregoing, the Committee recommends that, for larger or more complex activities¹⁸ or in cases where the opportunities for the public to prepare and to participate effectively will be affected by the time it will take to receive the EIA documentation upon request or will otherwise be negatively impacted by the ongoing war, the public has up to 35 working days to review the relevant documentation and to prepare its comments.

(d) The redaction from EIA documentation of all information related to location of the proposed activity

53. Paragraph 2 (3) of the Ministry of Environmental Protection’s Order No. 225 of 15 June 2022 stipulates that “in order to prevent any unauthorized actions with the information contained in the register”, the practice of providing the approximate location on Google Maps of a proposed activity subject to an EIA procedure is suspended.¹⁹

54. In addition to the suspension of the practice of disclosing the location of proposed activities on Google Maps, observer Environment-People-Law states that, when providing EIA documentation to the public, competent public authorities in practice erase all information related to the location of the proposed activity (all coordinates, maps and all references to geographic location). Environment-People-Law submits that this makes it effectively impossible to comment on the scope, depth and quality of the EIA report.²⁰

55. According to article 6 (6) of the Convention, each Party shall require the competent public authorities to give the public concerned access for examination to all information relevant to the decision-making “without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4”.

¹⁷ Comments by observer Environment-People-Law, 22 July 2022, para. 11.

¹⁸ See the Committee’s findings on communication ACCC/C/2005/16 (Lithuania), para. 69.

¹⁹ Party’s replies to Committee’s questions, 28 November 2022, p. 8.

²⁰ Comments by observer Environment-People-Law, 22 July 2022, para. 5.2.

56. Pursuant to article 6 (6) (a), “the relevant information shall include at least, and without prejudice to the provisions of article 4...a description of the site”.

57. The Committee considers that the location of the site of the proposed activity is an essential part of “a description of the site” under article 6 (6) (a).

58. However, since article 6 (6) expressly permits the exemptions from disclosure in article 4 (4) (b) to be applied, in the exceptional situation of an ongoing war, the Party concerned may, for reasons of national defence or public security, decide to redact information that would enable the identification of the precise location of the proposed activity.

59. Bearing in mind the requirement in the final paragraph of article 4 (4) for any exemptions from disclosure in article 4 (4) to be interpreted in a restrictive way, to the extent that it may be possible and appropriate, the general location of the activity may be indicated, albeit not its precise location.

60. Based on the foregoing, the Committee concludes that, in the exceptional situation of an ongoing war, the Party concerned may, for reasons of national defence or public security under article 4 (4) (b) of the Convention, redact information that would enable the identification of the precise location of a proposed activity within the scope of article 6 of the Convention. However, given the Convention’s requirement that any exemptions from disclosure in article 4 (4) be interpreted in a restrictive way, the Committee recommends that, to the extent that it may be possible and appropriate, the general location of the activity, albeit not its precise location, be indicated.

(e) Access to EIA conclusions issued prior to 24 February 2022

61. Paragraph 2 (1) of the Ministry of Environmental Protection’s Order No. 225 of 15 June 2022 provides that “in order to prevent any unauthorized actions with the information contained in the register”, access to EIA conclusions issued prior to 24 February 2022, and related documentation, is suspended.²¹

62. The observer Environment-People-Law submits that EIA conclusions issued prior to 24 February 2022 are not available to the public upon request either.²²

63. The Committee considers that EIA conclusions are “administrative measures ...effecting or likely to affect the elements of the environment” within the meaning of article 2 (3) (b) of the Convention. Accordingly, the requirements for the public to be provided with access to information under article 4 and 5 of the Convention apply to EIA conclusions, unless one of the grounds in article 4 (3) or (4) of the Convention apply.

64. Pursuant to article 4 (4) (b) of the Convention, “A request for environmental information may be refused if the disclosure would adversely affect...national defence or public security”. Article 4 (4), final paragraph, requires that the aforementioned grounds for refusal “be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”.

65. While the Party concerned may be able to rely on the grounds for refusal in article 4 (4) (b) to withhold certain information contained in the EIA conclusions and related documentation, this does not mean that the EIA conclusions or the related EIA documentation may be withheld in their entirety.

66. Rather, in accordance with article 4 (6) of the Convention, if the information exempted from disclosure can be separated out without prejudice to the confidentiality of the information exempted, the remainder of the

Commented [user5]: We think that such a decision shall be made 1) on the basis of law (at the time there is no law, order or regulation allowing such reduction); 2) on a case by case basis rather than as a general rule. There are many planned activities (construction of brand new facilities, touristic facilities like ski resorts, logging etc.) that hardly justify redaction of information on its proposed location for reasons of national defence or public security.

Commented [user6]: Given that the current war lasts for over a year now and doesn't seem to be resolved in either way in the nearest future, we think it is worth mentioning in the advice that the possibility for such reduction should be included in the legal framework and made on a case-by-case basis (weighting the public interest in disclosing the information in its entirety and public security reasons) rather than as a general rule.

²¹ Party’s replies to Committee’s questions, 28 November 2022, p. 8.

²² Comments by observer Environment-People-Law, 22 July 2022, para. 5.1.

documentation should be disclosed. It is only if such separation is not possible that the full EIA conclusion or other EIA documentation may be withheld.

67. In this regard, the Committee recommends that a consistent approach be adopted for the disclosure of documentation concerning both pending and concluded EIA procedures.

(f) Exclusion of “restoration works” from public participation

68. Pursuant to Law No. 2132-IX of 15 March 2022 “On Amendments to Certain Legislative Acts of Ukraine Concerning Environmental Activities and Civil Protection for the Period of Martial Law”, “restoration works to eliminate the consequences of armed aggression and hostilities during martial law and in the reconstruction period after the end of hostilities” are not subject to environmental impact assessment under the Law “On Environmental Impact Assessment”, including its provisions on public participation. Law No. 2132-IX entered into effect on 22 March 2022.²³

69. As a consequence of the above amendment, article 3 (1), second paragraph, of the amended Law “On Environmental Impact Assessment” currently provides:²⁴

Activities not directly provided for in parts two and three of this article, as well as planned activities aimed exclusively at ensuring the defense of the state, eliminating the consequences of emergency situations, the consequences of an anti-terrorist operation on the territory of the anti-terrorist operation for the period of its implementation, in accordance with criteria approved by the Cabinet of Ministers of Ukraine, **restoration works to eliminate the consequences of armed aggression and hostilities during martial law and in the reconstruction period after the end of hostilities** – are not subject to environmental impact assessment.

70. According to article 6 (1) (c) of the Convention, each Party “may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article [i.e. article 6] to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes”.

71. To come within the scope of article 6 (1) (c), a proposed activity must not only serve national defence purposes – the Party concerned must also have deemed that the application of article 6 (2) – (10) would have an adverse effect on those purposes. Unless both of these conditions are fulfilled, the Convention does not permit proposed activities within the scope of article 6 (1) (a) or (b) of the Convention to be permitted until they have been subject to public participation fully meeting the requirements of article 6 (2) – (10) of the Convention.

72. With respect to the meaning of “serving national defence purposes”, the Committee recalls article 31 (1) of the 1969 Vienna Convention on the Law of Treaties, which provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.²⁵

73. The Committee considers that, in line with article 31 (1) of the Vienna Convention, the ordinary meaning of what constitutes “serving national defence purposes” is necessarily broader during a war than in peacetime. For example, proposed activities to support the war effort or urgently needed to ensure public health and well-being during the war, such as water and sanitation services, energy and telecommunications infrastructure, roading and bridges, may be considered to “serve national defence purposes” in the context of an ongoing war, whereas during peacetime they would not.

²³ See comments from observer Environment-People-Law, 4 July 2022, p. 1.

²⁴ See comments from observer Environment-People-Law, 4 July 2022, p. 1 (emphasis in original).

²⁵ Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

74. During peacetime, the ordinary meaning of “serving national defence purposes” has a very narrow, military-related scope and, in keeping with general principles of international law, any exclusion from the application of the Convention’s provisions on public participation must be interpreted restrictively.

75. As set out in paragraph 69 above, article 3 (1), second paragraph, of the amended Law “On Environmental Impact Assessment” addresses two time periods: first, the period where martial law applies and hostilities remain ongoing and, second, the period after the end of hostilities. The Committee examines the possible application of article 6 (1) (c) of the Convention during these two time periods below.

While hostilities remain ongoing

76. While the war remains ongoing, proposed activities within the scope of Annex I of the Convention that are urgently needed to support the war effort or to ensure public health and well-being during the war may be considered to “serve national defence purposes” within the meaning of article 6 (1) (c). If the Party concerned then deems that the carrying out of a public participation procedure meeting the requirements of article 6 would have an adverse effect on those national defence purposes then, in accordance with article 6 (1) (c), the proposed activity may be permitted without carrying out a public participation procedure meeting the requirements of article 6.

77. The Committee makes it clear, however, that “restoration works to eliminate the consequences of armed aggression and hostilities” that are proposed activities within the scope of Annex I of the Convention, do not automatically qualify as serving “national defence purposes” under article 6 (1) (c) of the Convention. Rather, it is only those proposed activities that are urgently needed to support the war effort or to ensure public health and well-being during the war that will qualify. All other restoration works within the scope of Annex I of the Convention must still undergo public participation meeting the requirements of article 6 prior to being permitted. The Committee accordingly recommends that, for the duration of the war, the Party concerned establish a mechanism in its legal framework through which to determine (a) which proposed activities within the scope of Annex I of the Convention are urgently needed to support the war effort or to ensure public health and well-being; and (b) whether the carrying out of a public participation procedure meeting the requirements of article 6 with respect to those activities would, in fact, have an adverse effect on achieving that purpose.

Once hostilities have ended

78. When the war is over, the ordinary, narrow meaning of “serving national defence purposes” as set out in paragraph 74 above will once again apply. It will then not be consistent with article 6 (1) (a) of the Convention for the Party concerned to permit any proposed activities that are listed in Annex I of the Convention, even those that may be “restoration works to eliminate the consequences of armed aggression and hostilities”, without those activities being first subjected to a public participation procedure meeting the requirements of article 6 (2) – (10) of the Convention unless both of the following conditions are met:

- (a) The proposed activity is for national defence purposes, restrictively interpreted (see para. 74 above); and
- (b) The Party concerned has deemed that the application of public participation meeting the requirements of article 6 (2) – (10) to the proposed activity will have an adverse effect on those national defence purposes.

Concluding remarks

79. Based on the foregoing, the Committee concludes that it would not be consistent with the Convention if proposed activities within the scope of Annex I of the Convention were, either during the ongoing war or once it is over, to be exempted from the requirement to undergo public participation meeting the requirements of article 6 simply by virtue of their being “restoration works to eliminate the consequences of armed aggression and hostilities”. The Committee recommends that, while the war remains ongoing, the Party concerned puts in place a mechanism to determine: (a) which proposed reconstruction (or other) activities within the scope of Annex I of the Convention are urgently needed to support the war effort or to ensure public health and well-being while the hostilities remain ongoing; and (b) whether the carrying out of a public participation procedure meeting the requirements of article 6 with respect to those activities would, in fact, have an adverse effect on achieving that purpose. Finally, the Committee

makes it clear that, when the war is over, the ordinary, narrow meaning of “serving national defence purposes” (see para. 74 above) will once again apply.

(g) Public participation in the preparation of the “Environmental Security” chapter of the draft Recovery Plan of Ukraine

80. The observer Right to Protection submits that, given the state of environmental security in the Party concerned prior to the war coupled with the environmental disasters resulting from the war itself, it is essential that the “Environmental Security” chapter of the draft Recovery Plan of Ukraine be subject to strategic environmental assessment (SEA).²⁶

81. The Aarhus Convention does not regulate the situations when an SEA is required. As explained in *The Aarhus Convention: An Implementation Guide*:

[T]he Aarhus Convention does not require an environmental assessment to be carried out. The Aarhus Convention does not stipulate that an environmental assessment must be a mandatory part of public participation procedures nor does it regulate the situations where environmental assessment is required. However, if an environmental assessment is carried out (either EIA or SEA) then the public participation provisions of the Convention will apply (see the commentary to articles 6 and 7). Thus, one can conclude that while public participation is in fact a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope.²⁷

82. In line with the foregoing, the role of the Committee is not to determine whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine should be subject to SEA, but rather to determine whether that chapter should be subject to public participation meeting the requirements of article 7 of the Convention during its preparation.

83. With respect to determining whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan, programme or policy within the scope of article 7 of the Convention, the Committee recalls its findings on communication ACCC/C/2014/105 (Hungary), in which it held that:

126. Article 7 of the Convention does not define a “plan”, “programme” or “policy” relating to the environment. When determining how to categorize a document under the Convention, the document’s substance, legal functions and effects must be evaluated, rather than its label in domestic law.

127. A typical plan or programme: (a) is often regulated by legislative, regulatory or administrative provisions; (b) has the legal nature of a general act (often adopted finally by a legislative branch); (c) is initiated by a public authority, which (d) provides an organized and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which (e) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.

128. The Committee points out that the scope of plans and programmes under article 7 of the Convention is not limited to those “which are likely to have a significant impact on the environment” but instead includes any plan or programme “relating to the environment”.²⁸

²⁶ See comments from observer Right to Protection, 28 July 2022, p. 4.

²⁷ The Aarhus Convention: An Implementation Guide (2014), para. 122.

²⁸ ECE/MP.PP/C.1/2021/16, paras. 126-128 (footnotes omitted).

84. Having reviewed the text of the “Environmental Security” (*Екологічна безпека*) chapter of the draft Recovery Plan of Ukraine²⁹ in the light of the criteria set out in paragraph 127 of its findings on communication ACCC/C/2014/105 (Hungary), the Committee considers that the content of the chapter appears to have the character of a plan or programme relating to the environment (see criterion (d) in para. 127 cited above). The Committee has not, however, been provided with any information that would enable it to ascertain the legal nature of either the draft Recovery Plan of Ukraine (criteria (a) and (b)) nor of the National Council for the Restoration of Ukraine (criterion (c)). In the absence of this information, the Committee is not in a position to determine whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan or programme relating to the environment within the scope of article 7 of the Convention.

85. In the light of the considerations in paragraph 84 above, the Committee is not in a position to conclude upon whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan or programme relating to the environment under article 7 and thus whether that chapter was required to undergo public participation meeting the requirements of article 7 during its preparation.

(h) Public participation in the preparation of restoration plans and programmes under the Law “On Regulation of Urban Planning”³⁰

86. The Committee understands that, based on the Law “On Regulation of Urban Planning”, as amended, regional restoration plans and programmes will not be subject to SEA.³¹

87. As noted in paragraph 81 above, the role of the Committee is not to determine whether regional restoration plans and programmes should be subject to SEA, but rather to determine whether regional restoration plans and programmes should be subject to public participation meeting the requirements of article 7 of the Convention during their preparation.

88. Applying the criteria set out in paragraph 80 – 83 above, the Committee considers that restoration plans and programmes under the Law “On Regulation of Urban Planning” are plans relating to the environment within the scope of article 7 of the Convention.

89. Accordingly, whether or not a strategic environmental assessment is carried out with respect to regional restoration plans and programmes, public participation fully meeting the requirements of article 7 must be provided for.

IV. Conclusion

90. The Committee warmly welcomes the request by the Party concerned for the Committee to provide it with advice regarding the application of the Convention during the military aggression by the Russian Federation which started on 24 February 2022. While the Convention remains applicable in full during the war, as the Committee has explained in paragraphs 16 to 89 above, the means used to implement its provisions may, in some cases, require adjustment in order for the public to be able to exercise their rights under the Convention in time of war.

²⁹ See link in comments from observer Right to Protection, 28 July 2022, p. 4.

³⁰ See comments from observer Right to Protection, 28 July 2022, p. 4.

³¹ See comments from observer Right to Protection, 28 July 2022, p. 4.