

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

**Adopted by the Committee on 9 June 2023<sup>1</sup>**

**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 was 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. On 21 and 23 March 2023, respectively, the observer Environmental-People-Law and the Party concerned submitted comments on the Committee's draft advice.
10. The Committee thereafter finalized its advice, taking account of the comments received, and adopted it through its electronic decision-making procedure on 9 June 2023. It requested the secretariat to send the advice to the Party concerned and the observers and thereafter to publish the advice as an official document in the Convention's three languages.

**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:

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the Committee's recommendations and conclusions) may take place.

- (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 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 obligations 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, notwithstanding 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.<sup>2</sup>

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;

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<sup>2</sup> 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.

- (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”.

**(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.<sup>3</sup>

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 through the EIA register to documentation concerning those pending EIA procedures remained suspended.<sup>4</sup> In order to have access to documentation concerning pending EIA procedures and EIA conclusions issued since the war began on 24 February 2022, members of the public must therefore submit a request for that information and give consent to the processing and use of their personal data, in the prescribed forms.<sup>5</sup>

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.<sup>6</sup> 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 a standard for protection of rights, once established, should not be derogated from without a compelling countervailing right.<sup>7</sup> 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 current requirement 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

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<sup>3</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 4.

<sup>4</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 8.

<sup>5</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

<sup>6</sup> ECE/MP.PP/C.1/2005/2/Add.4, para. 18. See also *The Aarhus Convention: An Implementation Guide*, (2<sup>nd</sup> edition, 2014) p. 68.

<sup>7</sup> See *The Aarhus Convention: An Implementation Guide*, (2<sup>nd</sup> edition, 2014) p. 68, referring, by way of example, to the judgment of Hungary’s Constitutional Court in the *Protected Forests Case*.

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.

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.<sup>8</sup>

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.<sup>9</sup> It also requires requesters to attach the second form to their request.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> The Committee points out that non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements under national law are among the “public concerned” for the purposes of article 2 (5) of the Convention, even if they are not located in the vicinity of the proposed activity.<sup>14</sup> Moreover, due to the war, many members of the public concerned will have had to leave their homes and regions, and would therefore not be able to view the documentation in person at those locations. Rather, environmental NGOs and other members of the public concerned not in the vicinity of the activity will need to complete and submit the two prescribed forms in order to receive the EIA documentation.

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, including environmental NGOs, must complete and submit the two prescribed forms is consistent with the Convention.

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<sup>8</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

<sup>9</sup> Comments by observer Environment-People-Law, 22 July 2022, p. 3.

<sup>10</sup> Comments by observer Environment-People-Law, 22 July 2022, p. 3.

<sup>11</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

<sup>12</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 9.

<sup>13</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 8.

<sup>14</sup> Comments by observer Environment-People-Law on the Committee’s draft advice, 21 March 2023, p. 4.

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 the 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 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 notes that the definition of the “public” in article 1 of the Law “On Environmental Impact Assessment” includes NGOs.<sup>15</sup> 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, as a practical matter, 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 or other document deemed to be an identification document under national law.<sup>16</sup>

39. Third, the form for requesting access to EIA documentation presently requires requesters to provide their IP address. The Party concerned states that work is currently underway to improve the functionality of the EIA Register, so that users with a permanent IP address will be able to create a user account and thereafter have access to EIA documentation on an ongoing basis.<sup>17</sup> The Committee welcomes these developments and recognizes that, once that system has been set up, the provision of a permanent IP address by those seeking to create a user account may be useful for the functioning of that system. However, that system is not yet in place. Rather, at present, requesters must indicate the particular EIA procedure, and the particular documents in that procedure, that they request access to. In that context, the Committee considers that requiring requesters to specify an IP address may operate as a barrier to

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<sup>15</sup> Comments by the Party concerned on the Committee’s draft advice, 23 March 2023, p. 1.

<sup>16</sup> Comments by observer Environment-People-Law on the Committee’s draft advice, 21 March 2023, p. 5.

<sup>17</sup> Comments by the Party concerned on the Committee’s draft advice, 23 March 2023, p. 1.

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. Third, 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 for reasons of “national defence” or “public security” under article 4 (4) (b) of the Convention or otherwise, for requiring members of the public concerned to provide their IP address to request access to particular documents for a particular EIA procedure, the Committee recommends that the requirement to provide an IP address is removed from the current 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 particular 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.<sup>18</sup>

42. Following the adoption by the Ministry of Environmental Protection of Order No. 225 on 15 June 2022, the following time-frames have applied:

- (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.<sup>19</sup>

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 concerned 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 a proposed activity is effectively reduced by the number of days required to receive the EIA documentation after submitting a request.<sup>20</sup>

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 concerned 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 concerned not only has had the opportunity to view the documents but also to make copies.<sup>21</sup>

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<sup>18</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 11.

<sup>19</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 11.

<sup>20</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 11.

<sup>21</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 8.

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. 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. Environmental NGOs among the public concerned may not necessarily be located in the vicinity of the proposed activity either. The effective time-frame for these 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 following their submission of the prescribed forms.

48. 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 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.

49. 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 by the Party concerned for that purpose during peacetime.

50. 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 beginning on the date the relevant documents were uploaded to the EIA register.<sup>22</sup> 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 considers it appropriate that, rather than applying a fixed time-frame of 25 working days in all pending EIA procedures, the Party concerned apply the minimum and maximum time-frames set out in article 7 (6) of its Law “On Environmental Impact Assessment” during the war also.

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<sup>22</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 11.

51. In conclusion, based on the foregoing, the Committee recommends that, given the additional challenges and constraints the public concerned may face to participate in decision-making on proposed activities in the context of the ongoing war, the Party concerned apply the minimum and maximum time-frames set out in article 7 (6) of its Law “On Environmental Impact Assessment” during the war also.

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

52. 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.<sup>23</sup>

53. The observer Environment-People-Law states that, in addition to having suspended the practice of disclosing the location of proposed activities on Google Maps, competent public authorities at present erase all information related to the location of the proposed activity from EIA documentation provided to the public, including any coordinates, maps or other references to geographic location. Environment-People-Law submits that the deletion of this information renders it effectively impossible for the public concerned to comment on the scope, depth and quality of the EIA report.<sup>24</sup>

54. According to article 6 (6) of the Convention, each Party shall require 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”.

55. 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”.

56. 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).

57. However, since article 6 (6) expressly permits the exemptions from disclosure in article 4 (4) (b) of the Convention 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.

58. 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.

59. 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.

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<sup>23</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 8.

<sup>24</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 5.2.



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

60. Paragraph 2 (1) of the Ministry of Environmental Protection’s Order No. 225 of 15 June 2022 states 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.<sup>25</sup>

61. The Party concerned submits that the public can still request access to this documentation under the Law “On Access to Public Information”.<sup>26</sup>

62. The observer Environment-People-Law, however, claims that EIA conclusions issued prior to 24 February 2022 are not available to the public upon request either.<sup>27</sup> It points to a letter from the Ministry of Environmental Protection dated 20 July 2022 in which the Ministry refused access to an EIA conclusion issued on 12 April 2021.<sup>28</sup> The Ministry’s letter explained that its refusal was in accordance with paragraph 2 of Order No. 225 of 15 June 2022 (see para. 60 above).

63. The Committee considers that EIA conclusions are “administrative measures ...affecting 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. Paragraph 2 (1) of Order No. 225 of 15 June 2022 restricts the public’s access to EIA conclusions issued prior to 24 February 2022 and related documentation. In contrast, members of the public may request access to EIA conclusions issued since 24 February 2022, and any related documentation, by submitting the two prescribed forms (see para. 22 above).<sup>29</sup>

66. The Committee has not been provided with any specific justification as to why EIA conclusions issued before 24 February 2022 should be withheld from disclosure when documentation related to EIA conclusions issued after that date, as well as documentation concerning pending EIA procedures, may be obtained upon submission of the two prescribed forms.

67. 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, the requirement in article 4 (4), final paragraph, that any ground for refusal be interpreted in a restrictive way means that the EIA conclusions and the related EIA documentation should, as a rule, not be withheld in their entirety. 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 documentation should be disclosed.

68. In conclusion, and underlining that, in the context of the ongoing war, article 4 (4) (b) of the Convention permits the Party concerned to refuse a request for environmental information in any case in which disclosure would

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<sup>25</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 8.

<sup>26</sup> Comments by the Party concerned on the Committee’s draft advice, 23 March 2023, p. 4.

<sup>27</sup> Comments by observer Environment-People-Law, 22 July 2022, para. 5.1.

<sup>28</sup> See comments from observer Environment-People-Law, 22 July 2022, annex 1.

<sup>29</sup> Party’s replies to Committee’s questions, 28 November 2022, p. 10, and comments by observer Environment-People-Law, 22 July 2022, p. 3.

adversely affect national defence or public security, the Committee recommends that the Party concerned adopt a similar approach to the disclosure of EIA conclusions issued before 24 February 2022 and related documentation to that which it applies to documentation concerning EIA conclusions issued after 24 February 2022 and pending EIA procedures.

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

69. 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 EIA under the Law “On Environmental Impact Assessment”, or its provisions on public participation. Law No. 2132-IX entered into effect on 22 March 2022.<sup>30</sup>

70. As a consequence of Law No. 2132-IX, article 3 (1), second paragraph, of the Law “On Environmental Impact Assessment” now exempts the following activities from environmental impact assessment:<sup>31</sup>

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.**

71. 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”.

72. 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 allow proposed activities within the scope of article 6 (1) (a) or (b) of the Convention to be permitted unless they have been subject to public participation fully meeting the requirements of article 6 (2) – (10) of the Convention.

73. 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”.<sup>32</sup>

74. 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, and construction or repair work to roads and bridges, may be considered to “serve national defence purposes” in the context of an ongoing war, whereas during peacetime they would not.

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<sup>30</sup> See comments from observer Environment-People-Law, 4 July 2022, p. 1.

<sup>31</sup> See comments from observer Environment-People-Law, 4 July 2022, p. 1 (emphasis added).

<sup>32</sup> Available at [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

75. 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.

76. As set out in paragraph 70 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*

77. 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) of the Convention. This includes any “restoration works to eliminate the consequences of armed aggression and hostilities” that are urgently needed to support the war effort or to ensure public health and well-being during the war. In such cases, if the Party concerned 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 being first subject to public participation.

78. The Committee makes it clear, however, that not all “restoration works to eliminate the consequences of armed aggression and hostilities” will qualify as serving “national defence purposes” under article 6 (1) (c) of the Convention. Rather, only those proposed activities that are genuinely urgently needed to support the war effort or to ensure public health and well-being during the war will qualify. All other restoration works within the scope of Annex I of the Convention will still need to undergo public participation meeting the requirements of article 6 prior to being permitted.

79. In the light of the above, the Committee considers it important that, for the duration of the war, the Party concerned maintains a mechanism in its legal framework through which to determine 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 thus may be considered to “serve national defence purposes” within the meaning of article 6 (1) (c) of the Convention.

80. In this regard, the Party concerned states that Resolution No. 1010 of the Cabinet of Ministers dated 13 December 2017 “On approval of criteria for determining planned activities that are not subject to environmental impact assessment, and criteria for determining expansions and changes in activities and environment objects that are not subject to environmental impact assessment” (Resolution No. 1010/2017) establishes the following criteria under which the restoration of damaged and destroyed objects will not be subject to an EIA procedure during a period of martial law:

- (a) Construction of overhead power lines with a voltage of 220 kV or more and substations with a voltage of 330 kV or more during the period of martial law;
- (b) Restoration with the aim of achieving operational condition of objects damaged or destroyed as a result of the military aggression of the Russian Federation against Ukraine and hostilities (from the beginning and during the period of the legal regime of martial law) intended for the life of the population (objects that provide: gas supply; supply of electric energy; transportation and supply of thermal energy; centralized water supply; centralized drainage), by means of their current or major repair, reconstruction (without increasing the class of the consequences of the responsibility of the object and within the boundaries of previously allocated land plots, without changing the geometric dimensions of the object);

- (c) Restoration of objects provided for in paragraphs three to seven of clause 7 of part two of article 3 of the Law of Ukraine “On environmental impact assessment” and other railway tracks and structures damaged or destroyed as a result of the military aggression of the Russian Federation against Ukraine from the beginning and during the legal regime of martial law, by carrying out work on the new construction of destroyed and reconstruction, capital repair of damaged objects and structures without increasing the class of consequences (liability) of construction objects.<sup>33</sup>

81. The Committee welcomes Resolution No. 1010/2017 which, in line with paragraph 79 above, could provide a mechanism in the Party concerned’s legal framework to assist competent public authorities, during the current war, to determine 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 thereby “serve national defence purposes” within the meaning of article 6 (1) (c) of the Convention.

82. The Committee notes, however, that it is not clear from the wording of article 3 (1), second paragraph, of the amended Law “On Environmental Impact Assessment” that the scope of “restoration works to eliminate the consequences of armed aggression and hostilities during martial law” to be exempted from EIA, and thus public participation, is in fact limited to the activities listed in Resolution No. 1010/2017 of the Cabinet of Ministers. While article 3 (1), second paragraph, includes the phrase “in accordance with criteria approved by the Cabinet of Ministers of Ukraine”, the wording of the paragraph makes it unclear whether that qualification in fact applies to “restoration works” or only to certain other activities referred to in that paragraph.

83. Article 3 (1) of the Convention requires each Party to “take the necessary legislative, regulatory and other measures...to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”. In the light of the foregoing, the Committee recommends that the Party concerned amend article 3 (1), second paragraph, of the Law “On Environmental Impact Assessment” to make it clear that the scope of “restoration works to eliminate the consequences of armed aggression and hostilities during martial law” is to be determined “in accordance with criteria approved by the Cabinet of Ministers”.

*Once hostilities have ended*

84. Upon cessation of hostilities, the ordinary, very narrow, military-related meaning of “serving national defence purposes” under article 6 (1) (c) of the Convention (see para. 75 above) will once again apply.

85. Once the war is over, the period of martial law should also be at an end. This means that any potential exemption from EIA for “restoration works to eliminate the consequences of armed aggression and hostilities” under Resolution No. 1010/2017 of the Cabinet of Ministers (see paras. 80-83 above) should likewise cease to apply.

86. Since the narrow, military-related meaning of “serving national defence purposes” will apply as soon as the war is over, there is no legal basis under the Convention to exempt all “restoration works to eliminate the consequences of armed aggression and hostilities” to be carried out during “the reconstruction period after the end of hostilities” from public participation under article 6 of the Convention.

87. Rather, from that time on it will not be consistent with article 6 (1) (a) of the Convention for the Party concerned to permit any activities listed in Annex I of the Convention, including any “restoration works to eliminate the consequences of armed aggression and hostilities”, without those activities being first subject 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. 75 above); and
- (b) The Party concerned has deemed that subjecting the proposed activity to a public participation procedure meeting the requirements of article 6 (2) – (10) will have an adverse effect on those national defence purposes.

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<sup>33</sup> Comments by the Party concerned on the Committee’s draft advice, 23 March 2023, p. 4.

88. Based on the foregoing, the Committee recommends that article 3 (1), second paragraph, of the Law “On Environmental Impact Assessment” is amended to delete the words “and in the reconstruction period after the end of hostilities”.

*Concluding remarks regarding the exclusion of “restoration works” from public participation*

89. In view of the considerations in paragraphs 69-87 above, the Committee concludes that it would not be consistent with the Convention for the Party concerned, either during the war or after its end, to exempt all “restoration works to eliminate the consequences of armed aggression and hostilities” from public participation under article 6 of the Convention.

90. The Committee therefore welcomes Resolution No. 1010/2017 of the Council of Ministers as a potential mechanism through which to determine, while the war remains ongoing, 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 therefore may qualify as “serving national defence purposes” under article 6 (1) (c) of the Convention.

91. In conclusion, drawing together the recommendations in paragraphs 83 and 88 above, the Committee recommends that the Party concerned amend article 3 (1), second paragraph, of the Law “On Environmental Impact Assessment” by:

- (a) Making it clear that the scope of “restoration works to eliminate the consequences of armed aggression and hostilities during martial law” is to be determined “in accordance with criteria approved by the Cabinet of Ministers” (see para. 83 above); and
- (b) Deleting the phrase “and in the reconstruction period after the end of hostilities” (see para. 88 above).

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

92. The observer Right to Protection submits that, given the state of environmental security in the Party concerned prior to the war and 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 is subject to strategic environmental assessment (SEA).<sup>34</sup>

93. 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).<sup>35</sup>

94. In line with the foregoing, the role of the Committee is not to determine whether the “Environmental Security” (*Екологічна безпека*) chapter of the draft Recovery Plan of Ukraine should be subject to SEA, but rather to

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<sup>34</sup> See comments from observer Right to Protection, 28 July 2022, p. 4.

<sup>35</sup> *The Aarhus Convention: An Implementation Guide* (2<sup>nd</sup> edition, 2014), para. 122.

determine whether that chapter should be subject to public participation meeting the requirements of article 7 of the Convention during its preparation.

95. With respect to 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”.<sup>36</sup>

96. Having examined the text of the “Environmental Security” (*Екологічна безпека*) chapter of the draft Recovery Plan of Ukraine<sup>37</sup> in the light of the above criteria from 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 the draft Recovery Plan of Ukraine (criteria (a) and (b)) or 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, and therefore whether public participation meeting the requirements of article 7 would in fact be required during that chapter’s preparation.

97. Without reaching any conclusion on whether the “Environmental Security” chapter is a plan or programme within the scope of article 7 of the Convention, the Committee considers that it may nevertheless be helpful to clarify one point regarding the implementation of article 7 more generally. The Party concerned has informed the Committee that representatives of members of the public were included in the working groups created by the Ministry of Environmental Protection to prepare the “Environmental Security” chapter of the draft Recovery Plan.<sup>38</sup> The Committee clarifies that, for any plan or programme within the scope of article 7, the inclusion of representatives of the public in a working group is not sufficient to implement the obligation to provide for public participation under article 7. On this point, the Committee recalls its findings on communication ACCC/C/2010/51 (Romania), in which it held that: “The inclusion of representatives of NGOs and “stakeholders” in a closed advisory group cannot be considered as public participation under the Convention.”<sup>39</sup>

98. However, in the light of the considerations in paragraph 96 above, the Committee does not make any conclusion on whether the “Environmental Security” chapter of the draft Recovery Plan of Ukraine is a plan or

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<sup>36</sup> ECE/MP.PP/C.1/2021/16, paras. 126-128 (footnotes omitted).

<sup>37</sup> See link in comments from observer Right to Protection, 28 July 2022, p. 4.

<sup>38</sup> Comments by the Party concerned on the Committee’s draft advice, 23 March 2023, p. 5.

<sup>39</sup> ECE/MP.PP/C.1/2014/12, para. 109.

programme relating to the environment under article 7 and whether the chapter was therefore 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”**

99. 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.<sup>40</sup>

100. As noted in paragraph 93 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.

101. Applying the criteria set out in paragraph 93 – 95 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.

102. The Committee therefore concludes that, irrespective of whether regional restoration plans and programmes are subject to strategic environmental assessment, public participation fully meeting the requirements of article 7 of the Convention must be provided for during the preparation of such plans.

**IV. Conclusion**

103. 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 in time of war, in order for the public to be able to exercise its rights under the Convention effectively during the war, the means used to implement the Convention’s provisions may, as explained in paragraphs 16 to 102 above, in some cases require adjustment.

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<sup>40</sup> See comments from observer Right to Protection, 28 July 2022, p. 4.