



Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters
(Aarhus Convention)

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Excellencies,

I have the honour to address you in my capacity as UN Special Rapporteur on Environmental Defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). I would like to thank you for the opportunity to comment, in the context of the public consultation, on the draft text of the Committee of Ministers' (CM) Recommendation on Countering Strategic Lawsuits against Public Participation (SLAPPs).¹

As you may be aware, article 3 (8) of the Aarhus Convention requires that “each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.”

Of the forty-six Member States of the Council of Europe, forty-three are also Parties to the Aarhus Convention and are thus bound by its provisions, including article 3 (8).

At its seventh session (Geneva, 18 – 20 October 2022), the Meeting of the Parties to the Aarhus Convention adopted decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention.² Decision VII/9 establishes the rapid response mechanism in the form of an independent Special Rapporteur on environmental defenders under the authority of the Meeting of the Parties. At its third extraordinary session (Geneva, 23 – 24 June 2022), I was elected, by consensus, by the Meeting of the Parties as the Special Rapporteur on environmental defenders under the Aarhus Convention.

In accordance with my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention, I wish to provide the following comments on the current draft text of the CM Recommendation on countering SLAPPs, and in particular the guidelines set out in the Appendix to the Recommendation:

¹ Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member states on countering the use of SLAPPs, available at: [Public consultation on draft CM Recommendation on Countering Strategic Lawsuits against Public Participation \(SLAPPs\) - Freedom of Expression \(coe.int\)](https://www.coe.int/en/web/cm-recommendations/draft-cm-recommendation-on-countering-strategic-lawsuits-against-public-participation-slapps-freedom-of-expression)

² Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf

1. Welcome the Committee of Ministers’ timely and necessary initiative

As I set out in my “Vision for the Mandate” which I delivered to Parties and interested stakeholders on 23 November 2022,³ the use of SLAPPs against environmental defenders has been on the rise across Europe and Parties to the Aarhus Convention generally. In my “Vision”, I therefore specifically identified action against such abuse of court proceedings as a key component of my mandate.⁴ I thus most warmly welcome and congratulate the Council of Europe’s Committee of Ministers on its timely and very much needed initiative to adopt a recommendation on this pressing issue.

As I will further expand below, in this regard, I would like to specifically applaud the intent of the drafters to ensure the broadest possible scope and implementation of its Recommendation. This is reflected clearly in the Preamble, which expressly provides that (i) there is “little scope for restrictions on political expression or debate on questions of public interest”,⁵ and require that (ii) public interest “is to be understood broadly as it covers all issues that affect and concern the public”.⁶ In this context, I would like to re-emphasize States’ positive obligation to ensure a safe and favourable environment for public participation, as recognized in preambular paragraph (d) of the Recommendation. As I pointed out in my Vision for the Mandate,⁷ securing a safe and enabling environment for environmental defenders is a key component of my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention. Restrictions on civic space are one of the main tools to penalize, persecute and harass environmental defenders. It is therefore imperative that Member States are reminded not just of their passive obligation to refrain from interference, but are also mindful of their positive obligation to protect and ensure full exercise of rights of freedom of expression, assembly and other related fundamental rights. Member States should strictly adhere to these guiding principles when implementing the Recommendation into national law.

2. Welcome the broad substantive scope of the Recommendation and broad definitions of key terms

Definitions of “public participation” and “public interest”

I strongly support the broad scope of the Recommendation, including the broad and inclusive definitions of “public participation and “public interest”.⁸ As I set out in my Vision for the Mandate, because environmental defenders, like other human rights defenders, are not defined by who they are but by what they do, they comprise a diverse range of people, profiles and trajectories.⁹ As such, those environmental defenders targeted by SLAPPs may not necessarily label themselves as environmental defenders, but are simply individuals exercising their fundamental rights of freedom of expression,

³ Available at: [Vision for mandate.pdf \(unece.org\)](https://unece.org/vision-for-mandate.pdf)

⁴ Ibid, pages 7 and 9.

⁵ Draft Recommendation, preambular paragraph (e).

⁶ Ibid, preambular paragraph (f).

⁷ Vision for Mandate, page 9.

⁸ Draft Recommendation, paragraph 4(i) and (ii) of Appendix.

⁹ Vision for Mandate, page 4.

of association, and of assembly, to protect their right to a clean, healthy and sustainable environment. In keeping with this, the definition of “public participation” in paragraph 4(i) of the draft Recommendation acknowledges that public participation includes a wide variety of activities by a variety of actors. It also helpfully recognizes that public participation is not only limited to the actual act of public participation but extends to actions to prepare, support or assist such public participation.

Equally, the definition of “public interest” in paragraph 4(ii) in the Recommendation aligns with the ethos of the Aarhus Convention by recognizing that effective public participation hinges on access to information and ideas and thus the importance that journalists and others be allowed to openly impart such information and ideas to the public.

However, since an increasing number of SLAPPs in Europe target environmental defenders, I consider it would be important in paragraphs 4(i) and (ii) to address the work of environmental defenders more explicitly. Concerning the definition of “public participation”,¹⁰ I recommend that the phrase “being parties in litigation designed to advance social change” be amended to “being parties in litigation designed to advance social change *or environmental protection*”. Regarding the definition of the “public interest”,¹¹ I recommend that the phrase “affecting the well-being of individuals or the life of the community” be amended to “affecting the well-being of individuals, the life of the community, *or the environment*”.

All stages of legal action

I welcome the fact that the Recommendation specifically includes pre-litigation stages within its scope.¹² As the Recommendation acknowledges, legal intimidation tactics and the threat of legal action can in themselves be sufficient to silence a defendant. To achieve the objective of creating the civic space and safe environment necessary for meaningful public participation, it is critical to recognize such strategies as part and parcel of SLAPPs and therefore to effectively address them.

Clear, transparent and consistent framework

I welcome that the Recommendation calls on Member States to “ensure their national legal systems and their implementation provide a comprehensive legal framework and coherent set of structural and procedural safeguards”, including “a culture of transparency around legal claims that have been found to constitute SLAPPs”.¹³ This is in line with article 3 (1) of the Aarhus Convention, which requires that Parties, inter alia, “establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”.¹⁴

¹⁰ Draft Recommendation, paragraph 4(i) of Appendix.

¹¹ Draft Recommendation, paragraph 4(ii) of Appendix.

¹² Ibid, paragraphs 6-7 of Appendix.

¹³ Draft Recommendation, paragraph 17 of Appendix; see also paragraphs 18-20 of Appendix.

¹⁴ Aarhus Convention, article 3 (1), <https://unece.org/environment-policy/public-participation/aarhus-convention/text>.

3. Delete the “main purpose” requirement from the definition of SLAPPs

I have serious concerns about the current proposal to restrict the Recommendation’s scope only to those SLAPPs whose “main purpose” is to prevent, restrict or penalize the exercise of rights associated with public participation.¹⁵ I see significant risk in adopting such a “main purpose” requirement as it opens the door to lengthy litigation in each case on whether the prevention, restriction or penalization of public participation was in fact the claim’s “main purpose”. Abusive proceedings may serve more than just one purpose and nevertheless prevent, restrict or penalize public participation. I am therefore deeply concerned about the inclusion of the “main purpose” requirement and strongly recommend to delete this requirement from both paragraph 1 and 5 of the draft Recommendation.

4. Welcome the specific inclusion of civil law actions in the administrative or criminal law context

I strongly support the draft Recommendation’s acknowledgment that SLAPPs do not only take the form of civil law actions brought in civil proceedings, but also may trigger misdemeanors, administrative measure and criminal charges.¹⁶ SLAPPs that expose the defendant not only to a civil suit but also the risk of administrative or criminal sanctions have a particularly grave impact on the individual and, in turn, a severely chilling effect on public participation. It is therefore key that the Recommendation acknowledges this type of weaponization of the legal system and raises awareness to increase action against SLAPPs outside the purely civil law context.

5. Retain and broaden key procedural safeguards, including early dismissal of SLAPPs

The impact of a SLAPP on the defendant increases exponentially the longer the SLAPP goes on. I therefore strongly support the prominence given in the draft Recommendation to the early and swift handling of abusive proceedings.

Besides the general need for effective case management,¹⁷ a key procedural safeguard are early dismissal procedures. In this regard, I particularly welcome the draft Recommendation’s stance on burden of proof and strict timelines for handling such applications.¹⁸ These provisions ensure that while a claimant’s right to a fair trial is respected, fully or partially abusive claims are dismissed as early and as efficiently possible. Putting the burden on the claimant to specify its claim early on and show that its claims are not fully or partially unfounded is conducive to procedural efficiency and protect the defendant from abusive litigation. In relation to this, I also welcome the provisions on stay of proceedings pending an early dismissal application.¹⁹ This is very

¹⁵ Draft Recommendation, paragraphs 1 and 5 of Appendix.

¹⁶ Ibid, preambular paragraph (k) and paragraph 6 of Appendix.

¹⁷ Ibid, paragraph 21 of Appendix.

¹⁸ Ibid, paragraphs 22, 25, 28 and 34 of Appendix.

¹⁹ Ibid, paragraphs 31-33 of Appendix.

important as a failure to stay the proceedings while an early dismissal application is pending can significantly increase the burden on the defendant, having to argue both for early dismissal and proceed with the defense on the merits of the SLAPP proceedings at the same time.

While I welcome the availability of such procedural safeguards, I am concerned that the draft Recommendation subjects their availability entirely to national law (“when national laws allow”).²⁰ In practice, this may mean that, in many Member States, procedures for early dismissal are simply not available, thereby unnecessarily prolonging the harm suffered by SLAPP victims in those jurisdictions. This would not only go against the intention behind the Recommendation but would also remove one of the most important mechanisms through which to stop SLAPPs. I therefore recommend that the Recommendation instead clearly calls on Member States to change national laws to provide the defendant with these key procedural safeguards.

6. Adopt a victim-centric approach with extensive support to victims

The impact of SLAPPs on the victim are multi-faceted and far-reaching. Beyond the chilling effect on public participation, SLAPPs impose material and non-material harm on the defendant, including psychological harm. I welcome the draft Recommendation’s provisions both on remedies and on support for targets of SLAPPs.²¹ In particular, I support the Recommendation’s broad spectrum of support measures and the flexibility adopted in relation to such measures. As I outlined above, SLAPPs have a wide range of targets, meaning that every victim is different and therefore has different needs. Consulting with the victim in order to identify effective support – whether in the form of legal, financial or other support – is key.

While the Recommendation envisages a wide range of support measures for defendants of SLAPPs, it presently fails to acknowledge and address the significant impact of SLAPPs on secondary or indirect victims, such as the family of a defendant, colleagues of the victim and lawyers acting on the victim’s behalf. As such individuals are often subjected to intimidation and other forms of harassment in an effort to silence the direct target of the SLAPP, it is important to include such secondary or indirect victims in the group of protected individuals.

While I welcome the Recommendation’s provision on discontinuation of cases after the death of the defendant,²² the Recommendation should go further to also provide for other forms of redress and support to secondary and indirect victims of SLAPPs. Excluding such victims from the scope of the Recommendation risks leaving a loophole which would allow abusers of the system to target family, lawyers and others in order to intimidate or harass the actual target into silence.

²⁰ Ibid, paragraph 22 of Appendix.

²¹ Ibid, see, in particular, paragraphs 38-42 and 46-51 of Appendix.

²² Ibid, paragraph 37 of Appendix.

7. Broaden measures for redress and prevention

While I welcome the fact that the draft Recommendation specifically envisages a system of dissuasive penalties for claimants as well as the possibility to cap immaterial damages for claimants,²³ I consider that the envisaged measures are not sufficient to comprehensively deter abusive proceedings.

Award of legal and other procedural costs

I welcome that the draft Recommendation recognizes that the “actual legal costs spent should be awarded to targets of SLAPPs”.²⁴ The draft Recommendation does not however make express reference to recovery of the other procedural costs a defendant may incur in defending a SLAPP. I therefore recommend that the draft Recommendation is revised to make clear that these other procedural costs are to be recovered in full too. To emphasize this point, I recommend that the heading of this guideline is amended to “Award of legal and other procedural costs”.

Compensation of damages for the SLAPP victim

While I strongly welcome the statement that “[w]here a judicial or other authority determines that a claim is a SLAPP costs must be awarded to the defendant on a full indemnity basis”,²⁵ the award of costs, even on a full indemnity basis, is not “compensation for damages”. Compensation of damages and costs recovery are different matters. This statement should therefore be moved to a section on “Award of legal and other procedural costs” instead.

Dissuasive measures

An important, yet often overlooked, aspect of abusive proceedings is the role played by the lawyer pursuing the claim on behalf of the claimant. Aggressive conduct of lawyers often adds to the emotional distress and pressure on the defendant, thereby exacerbating the impact of the proceedings. Imposing ethical rules on the legal profession in Member States that would prevent abusive conduct by lawyers in court proceedings against environmental defenders is long overdue. I therefore recommend that a provision is included in the Recommendation that Member States should put in place ethical standards for their legal profession to prohibit conduct that supports or enables SLAPPs, and to include appropriate sanctions for legal professionals engaging in such conduct.

Culture of transparency

I welcome the proposal to expressly empower judges to publish court findings that a case was a SLAPP and the names of the legal or natural persons who filed the SLAPP.²⁶ In addition to more direct dissuasive measures such as penalties and costs awards, such publicity may act as a further deterrent to future SLAPPs. Moreover, in line with my comment on the critical role that the legal profession plays in enabling SLAPPs and exacerbating their impact, I recommend that the names of the claimant’s legal representatives be included in any information published by judicial or other authorities

²³ Ibid, paragraphs 40-41 of Appendix.

²⁴ Ibid, paragraph 38 of Appendix.

²⁵ Ibid, paragraph 39 of Appendix.

²⁶ Ibid, paragraph 40 of Appendix.

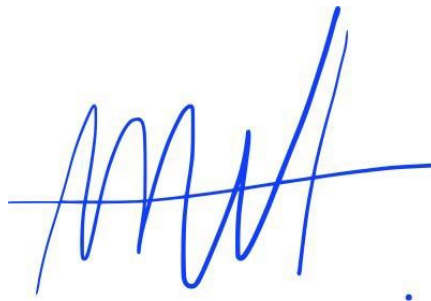
on a court's findings that a case was a SLAPP.²⁷ I also recommend that the names of the claimant's legal representatives are included in the public register of cases that have been classified as SLAPPs.²⁸

Awareness-raising

Another key preventative step is awareness-raising. I welcome the Recommendation's provisions in this respect, including on collection and dissemination of data²⁹ and on training programmes for legal professionals, public authorities as well as journalists³⁰. Despite the rapid increase in SLAPPs across Member States of the Council of Europe, there remains an astonishing lack of awareness, at all levels of government and within the judiciary and legal profession themselves, about the misuse of legal action to silence those raising their voices on matters of public concern. Such ignorance often leads to SLAPPs continuing for a prolonged period of time, thereby increasing the harm on the victims. I therefore recommend that, in addition to training programmes for legal professionals, public authorities and journalists, the Recommendation recommends that institutions engaged in judicial training also carry out training on the recognition and early dismissal of SLAPPs.

In conclusion, I would like to thank you for the opportunity to provide my comments on the draft text of the Committee of Ministers' Recommendation on countering SLAPPs. I express my willingness to engage with all relevant stakeholders regarding my comments and I stand ready to provide input during the further development of the language of the draft Recommendation if that may be helpful.

Please accept the assurances of my highest consideration.



Michel Forst

UN Special Rapporteur on Environmental Defenders under the Aarhus Convention

To: Committee of Experts on Strategic Lawsuits against Public Participation
Council of Europe
Strasbourg

²⁷ Ibid, paragraphs 42-43 of Appendix.

²⁸ Ibid, paragraph 44 of Appendix.

²⁹ Ibid, paragraphs 43-45 of Appendix.

³⁰ Ibid, paragraphs 52-54 of Appendix.