

THE ROLE OF THE AARHUS CONVENTION IN PROMOTING GOOD GOVERNANCE AND HUMAN RIGHTS

Submission by the UNECE Aarhus Convention Secretariat

provided as input to the report being prepared by the Office of the High Commissioner for Human Rights pursuant to resolution 19/20 “The role of good governance in the promotion and protection of human rights”

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I. General impact of the Aarhus Convention on good governance and protection of human rights

1. In recent decades, the concept and practice of participatory democracy has gained increasing support and recognition as a key characteristic of good governance. Involving the public in decision-making processes is widely believed to improve the quality of the resulting decisions and to strengthen the credibility of the decision-making process and its outcome.

2. Entered into force on 30 October 2001, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)¹ contributes to good governance and performing such public services as environmental protection and law enforcement. It is generally acknowledged as the world’s foremost international instrument that links environmental and human rights.

3. The Convention grants public rights, and imposes on Parties and their public authorities, obligations regarding access to environmental information, public participation in environmental decision-making and access to justice in environmental cases. It focuses on interactions between the public and public authorities, and supports the development of an open administrative culture. This contributes to governmental accountability, transparency and efficiency.

4. The origin of the Convention can be traced back to Principle 10 of the Rio Declaration on Environment and Development (Principle 10)². Within the ECE region, Principle 10 was taken up and further developed through the preparation of a set of non-binding Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making. These guidelines were endorsed by ECE Environment Ministers at the Third Ministerial ‘Environment for Europe’ Conference in Sofia in October 1995 and are hence known as the Sofia Guidelines.

5. The Convention’s provisions are closely linked with article 6 (right to life), article 19 (right to information), article 14 (right to a fair trial), article 25 (right to take part in the government), and other provisions of the International Covenant on Civil and Political Rights.

6. The rights under the Convention are bestowed on all natural and legal persons, regardless of citizenship, nationality or domicile. Moreover, persons exercising their rights under the Convention must not be penalized, persecuted or harassed in any way for their involvement.

7. A unique feature of the Aarhus Convention process has been the unprecedented level of involvement of non-governmental organizations that contributes to greater transparency and openness of the process itself.

8. The Convention requires the same standards of access to environmental information and public participation in decision-making by both State bodies and non-State actors performing public

¹ The text of the Convention is available at:
<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

² The text of the Declaration is available at:
<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

administrative functions. In accordance with article 2, paragraph 2, of the Aarhus Convention public authorities are understood not only as government at national, regional and other level or natural or legal persons performing public administrative functions under national law but also as any other natural or legal person having public responsibilities or functions, or providing public services in relation to the environment, under the control of an above mentioned body or person. For example, in its findings on communication ACCC/C/2004/01 (Kazakhstan), the Aarhus Convention Compliance Committee held that a state-owned enterprise with responsibilities for the atomic power industry was a legal person performing administrative functions under national law, including activities in relation to the environment, and thus fell under this subparagraph of the definition.³ Bodies acting in a judicial or legislative capacity are excluded from the definition of public authority, although judiciary is expected to apply the Convention in a wide range of cases relating to the environment and provide access to justice in accordance with article 9 of the Convention.

9. The strength of the Aarhus Convention lies in its binding obligations on public authorities to ensure proper access to environmental information, public participation in decision-making procedures and effective access to justice, supported by a compliance mechanism, subsidiary bodies and a work programme to support the implementation of these obligations. The Convention also has a Strategic Plan 2009-2014⁴ which considers the development of the Convention into the future. The Convention establishes minimum standards but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice.

10. The implementation of the Convention's provisions is supported by national implementation reporting (article 10 of the Convention and Decision I/8 of the Meeting of the Parties⁵) and the compliance mechanism (article 15 of the Convention and Decision I/7 adopted by the Meeting of the Parties⁶). The compliance mechanism has a public trigger. More than 70 communications from the public⁷ have been brought before the Aarhus Convention Compliance Committee since the Convention's entry into force.

11. The development of education and training of public authorities in this area is closely related to the implementation of the UNECE Strategy for Education for Sustainable Development⁸ (ESD), phase III of which aims to create and strengthen synergies and links between the Strategy and other relevant processes. ESD should be recognized for its contribution to an interactive and integrated policymaking and decision-making process, based on a wide participatory approach and accountability in accordance with Principle 10 and the Aarhus Convention.

II. Access to Environmental Information (articles 4 and 5 of the Convention)

12. Access to information as the first pillar of the Convention is essential for effective public participation in environmental decision-making and access to justice. The Convention imposes concrete obligations on the public authorities both with regard to ensuring the public has access to information upon request and with respect to the active collection and dissemination of environmental

³ See questions 1, 3 and 4 of the OHCHR questionnaire. More information on the communication is available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/01TableKazakhstan.html>

⁴ See question 2 of the OHCHR questionnaire. The text of the Strategic Plan is available at: http://www.unece.org/fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_16_e_StPl.pdf

⁵ See question 2 of the OHCHR questionnaire. The text of the decision is available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.9.e.pdf>

⁶ See question 2 of the OHCHR questionnaire. The text of the decision is available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>

⁷ For more information, please see: <http://www.unece.org/env/pp/pubcom.html>

⁸ See question 2 of the OHCHR questionnaire. The text of the strategy is available at: <http://www.unece.org/fileadmin/DAM/env/documents/2005/cep/ac.13/cep.ac.13.2005.3.rev.1.e.pdf>

information by the public authorities. It is well-accepted that access to information contributes to transparency, accountability and combating corruption at all levels of governance.

13. The Convention gives special attention to new forms of information, including electronic information. The Convention takes into account developments in information technology, in particular the shift towards electronic forms of information and the ability to transfer information over the internet and other systems. Annexed to decision II/3⁹ are recommendations on the more effective use of electronic information tools to provide public access to environmental information.

14. Regarding the identification of points of contact for the public to obtain environmental information, the Aarhus Convention Compliance Committee in its findings concerning communication ACCC/C/2009/37 (Belarus)¹⁰ stated that the possibility to delegate some functions related to the maintenance and distribution of environmental information to private entities should be seen in the context of article 5; in particular the obligation to ensure that public authorities possess environmental information which is relevant to their functions and the obligation to establish practical arrangements to ensure that environmental information is effectively accessible to the public.

15. To increase corporate accountability and facilitate public access to information on pollutants released into and transferred in and through communities, the Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention (Protocol on PRTRs)¹¹ was adopted on 21 May 2003 and entered into force on 8 October 2009. The Protocol obliges the Parties to make publicly available and free of charge, information on periodic and reliable data on emissions (releases) and transfers of pollutants, including greenhouse gases (GHGs), heavy metals and toxic chemical compounds primarily through electronic means such as the internet. The Protocol recognises that this information is essential in facilitating public participation in environmental decision-making as well as in contributing to the prevention and reduction of pollution of the environment.

III. Improving quality of environmental decision-making by ensuring adequate, timely and effective public participation (articles 6, 7 and 8 of the Convention)

16. In order to protect the environment, most UNECE countries require some type of assessment of the potential environmental impact of specific projects or activities before issuing a permit. This assessment is typically carried out by authorities at the level most relevant to the proposed activity or by an applicant or proponent of a project under their supervision. More recently, draft plans, programmes and policies relating to the environment as well as executive regulations and generally applicable legally binding normative instruments are also being subjected to environmental assessment in some UNECE countries.

17. The Convention sets out key elements of public participation in the environmental decision-making process. Its provisions have become widely recognized as a minimum standard for effective participatory decision-making regarding specific projects or activities, programmes, plans and policies, and general rules and regulations. The Convention's requirements for public participation include access to information relevant to the decision-making process, early and ongoing involvement of the public in decision-making, a broad scope of participation, a transparent and user-friendly process, an obligation on authorities to take due account of public input, a supportive infrastructure and effective means of enforcement/appeal.

⁹ The text of the decision and recommendations:

<http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.4.e.pdf>

¹⁰ See questions 1, 3 and 4 of the OHCHR questionnaire. More information on the communication is available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/37TableBelarus.html>

¹¹ The text of the Protocol is available at:

http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf

18. The specific requirements with regard to decision-making on specific activities include timely and effective notification of the public concerned; reasonable timeframes for participation, including provision for participation at an early stage when all options are open; the right for the public concerned to inspect all information which is relevant to the decision-making free of charge; an obligation on the decision-making body to take due account of the outcome of the public participation; and prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible.

19. Analysing the role of the public authorities in organizing public participation on specific activities, the Aarhus Convention Compliance Committee has underlined that it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from a public authority, and the comments should be submitted to the public authority. The reliance solely on the developer for providing public participation does not provide the necessary level of impartiality and is not in line with the provisions of the Convention (ACCC/C/2006/16 (Lithuania)¹² and ACCC/C/2009/37 (Belarus)¹³).

20. The above observations do not mean, however, that the responsibility for performing some or even all the above functions related to the public authorities should always be placed on the authority competent to issue a decision whether to permit a proposed activity. In fact, in many countries the above functions are being delegated to various or even private persons. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a “public authority” under the Convention. To ensure proper conduct of the public participation procedure, the administrative functions related to its organization are usually delegated to bodies or persons which are quite often specializing in public participation or mediation.¹⁴

21. In the hope of creating a positive business and investment climate, some administrations are tending to undermine public participation in decision-making. In contrast however, such actions may result in less efficient procedures, because relevant considerations that might have been identified by the involvement of the public may not be taken into account at an early stage in the project, leading to later costly problems. Moreover, the decision-making itself will have considerable environmental impact, be less acceptable to the public, increasing the likelihood of community opposition and the smooth running of the project, none of which is conducive to good governance.

22. The Convention requires Parties to make practical and/or other provisions for the public to participate in decision-making on plans or programmes within in a transparent and fair framework, having provided the necessary information to the public. The public participation process must provide for early public participation when all options are open and effective public participation can take place, with reasonable time-frames for the public to prepare and participate effectively. Due account must be taken of the outcome of the public participation. Decision-making on policies relating to the environment is also covered by the Convention, albeit in a more recommendatory form.

23. The Convention also applies to the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. Although the Convention does not apply to bodies acting in a legislative capacity,

¹² See questions 1 and 3 of the OHCHR questionnaire. More information on the communication is available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/16TableLithuania.html>.

¹³ See questions 1 and 3 of the OHCHR questionnaire. More information on the communication is available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/37TableBelarus.html>.

¹⁴ See questions 1, 3 and 4 of the OHCHR questionnaire.

this article clearly would apply to the executive stage of preparing rules and regulations even if they are later to be adopted by a parliament.

IV. Effective access to judicial and administrative review as a guarantee of other two pillars (article 9 of the Convention)

24. Through its article 9, the Convention aims to provide access to justice in three contexts: with regard to information requests, public participation in decision-making and enforcement of national law relating to the environment in general.

25. The procedures in each of the three contexts referred to above are required to be 'fair, equitable, timely and not prohibitively expensive'. Decisions must be given or recorded in writing, and in the case of court decisions, made publicly accessible. Assistance mechanisms to remove or reduce financial and other barriers to access to justice are to be considered.

26. Regarding the enforcement of environmental law, the Aarhus Convention Compliance Committee has noted that the more direct route for the communicants to challenge the contravention of environmental laws would have been to make a lawsuit directly against the polluting company, but the communicants were concerned about the financial risk and therefore opted for the second route of taking a lawsuit against the relevant public authorities. This concern over what is known as strategic lawsuits also point out to obstacles in access to justice (ACCC/C/2004/6 (Kazakhstan)¹⁵).

27. Improving access to justice is proven to be an effective tool in law enforcement and ensuring good governance.

28. Similar provisions on access to justice are included in the Protocol on PRTRs which recognises the right of any person who considers that his or her request for information has been ignored, wrongfully refused or inadequately answered, to access a review procedure before a court of law or another independent and impartial body established by law (article 14).

V. Conclusions

29. The implementation of the Aarhus Convention and Protocol on PRTRs has made a valuable contribution to enhancing good governance and promoting human rights in environmental matters in those countries party to each instrument.

30. The global relevance of the Convention and its Protocol on PRTRs is further enhanced by the fact that both are open for accession not only by ECE Member States but also by other States which are members of the United Nations.

31. The Parties to the Convention, both in their participation in international policymaking and in their national implementation activities, seek to achieve synergies between the Convention and other international environmental and human rights agreements.

32. The UNECE Aarhus Convention Secretariat looks forward to continuing its cooperation with partner organizations to raise awareness, enhance synergies, build capacities, and deepen the implementation of the Convention and the issues it addresses at the national, subregional and regional level.

¹⁵ See question 3 of the OHCHR questionnaire. More information on the communication is available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/06TableKazakhstan.html>