The Compliance Committee’s approach to the protection of persons exercising their rights in conformity with the Aarhus Convention

*Presentation by Jonas Ebbesson, Chair of the Aarhus Convention Compliance Committee, to the 8th meeting of the Task Force on Public Participation in Decision-making*

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Thank you for inviting me to speak about the protection of persons exercising their rights in conformity with the Aarhus Convention. This topic goes to the very heart of the Convention. I will come back to that shortly. First a bit of context.

According to *The Guardian* (2 Feb 2018), around the world about four environmental defenders are killed every week. This figure seems to be on the rise. The concern for environmental and human rights defenders in environmental matters was highlighted when I participated at an event in New York on 27 September to celebrate the signing of the *Escazú Agreement* on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. This matter has been emphasised throughout the negotiations of the Escazú Agreement and it is repeatedly emphasised when discussing it with colleagues, activists and governments in the region.

In the Escazú Agreement, this matter has been highlighted by a separate article, which sets out that the Parties are obliged to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity. This is understandable, knowing that the majority of brutal cases in the world involving environmental defenders take place in the region of the Escazú Agreement.

Having said that, we know of penalization, persecution and harassment when members of the public exercise their rights under the Aarhus Convention too. We should also keep in mind that while such brutal actions as killing activists or others exercising their rights represent the worst part, there are a number of other means, acts and decisions – along a continuum – that amount to penalization, persecution or harassment.

In the Aarhus Convention, as opposed to the Escazú Agreement, the protection of persons exercising their rights is not addressed through a separate article, but in one very explicit provision, which is not less strict. According to article 3, paragraph 8:

“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. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.”
This is a key provision in the entire Aarhus Convention regime. If this requirement is not met, if members of the public are being penalized, persecuted or harassed for enjoying or trying to enjoy their Convention rights, then it may not matter whether environmental information should be made available within a month, or if 20 or 30 days are set out for making comments on a development proposal. You may not dare making that request or providing these comments – or in other ways make your voice heard – in the first place.

Article 3, paragraph 8 makes one thing very clear:
It does not say “Each Party shall abstain from penalizing, persecuting or harassing persons exercising their rights”. It says “Each Party shall ensure that persons exercising their rights ... shall not be penalized, persecuted or harassed...”. This means that the Parties, ie the governments and legislators and courts of all Parties, must ensure that neither public bodies nor private persons nor corporations nor associations nor gangs nor media nor pressure groups nor what have you may penalize, persecute or harass members of the public when trying to exercise their rights under the Convention.

This is what the Convention sets out, and this is what the Compliance Committee is there to check, upon communications, submissions or MOP requests.

In its jurisprudence on article 3, paragraph 8, the Committee has made a number of general points that apply to all Convention Parties. I will read them for you. As you know, there are many close links between the Aarhus Convention and human rights notions generally, but there are particular links with respect to penalization, persecution and harassments for enjoying the rights set out in the Convention. When reading its findings, you can also see that the Committee considered existing procedures within some human rights regimes when setting out how to approach and examine violations of article 3, paragraph 8.

One thing that may come up in future cases, that the Committee has already considered, is that a communicant or a person to which the communicant refers wants to be anonymous. As you know, it is possible for a communicant to request that the identity is not made public, although the Committee must be able to know who the communicant is. This has happened a few times, although not so often, and it may be more likely in cases concerning article 3, paragraph 8.

With respect to allegations concerning anonymous victims, the Committee stated that:

“The Committee considers that fairness and due process of its procedure require that the Party concerned must be able to adequately respond to all allegations against it. If the Party concerned is not able to identify the specific incident in question, it may not be in a position to adequately prepare its response to the communicant’s allegation concerning that incident. The Committee notes that a number of other human rights bodies do not accept
either anonymous complaints or complaints made by someone else on behalf of persons who remains anonymous.”

While in that specific case, the Committee did not consider the specific allegations concerning the person XX, it expressly did not rule out that there may be cases of alleged non-compliance with article 3, paragraph 8, where a Party concerned would be able to adequately respond to the allegations concerning its compliance without knowing the identity of the person concerned. Thus, the Committee did not preclude that there may be cases in which the Committee may be able to take into account the treatment of anonymous persons, for example, in certain systemic cases or where the Committee has received reliable information from other sources.

So I will set out how the Committee examines the very allegations concerning non-compliance with article 3, paragraph 8:

In order to demonstrate a breach of article 3, paragraph 8, of the Convention by the Party concerned, four elements must be established:

1. One or more members of the public have exercised their rights in conformity with the provisions of the Convention,
2. The member of the public or those members of the public have been penalized, persecuted or harassed;
3. The penalization, persecution or harassment was related to the member(s) of the public’s exercise of their rights under the Convention;
4. The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur.

I will explain each of these four elements in turn.

1. One or more members of the public have exercised their rights in conformity with the provisions of the Convention

The rights referred to in article 3, paragraph 8, encompass the broad range of rights granted to members of the public by article 1 of the Convention, namely the rights of access to information, public participation in decision-making and access to justice, which contribute to the right of every person of present and future generations to live in an environment adequate to their health and well-being.

The exercise of these rights would include situations in which the provisions of the Convention concerning access to information, public participation in

1 Findings on communication ACCC/C/2014/102 (Belarus) (ECE/MP.PP/C.1/2017/19), paras 62-63.
2 Ibid., para. 65.
decision-making and access to justice set out in articles 4 to 9 of the Convention are applicable and also situations covered by the general provisions of article 3 of the Convention, but is not limited to them.

Accordingly, article 3, paragraph 8, applies to all situations in which members of the public seek access to information, public participation or access to justice in order to protect their right to live in an environment adequate to their health or well-being.³

2. The member of the public or those members of the public have been penalized, persecuted or harassed

The terms “penalized”, “persecuted” and “harassed” are not defined in the Convention and they are to be understood according to their ordinary meaning in their context and in the light of the Convention’s object and purpose.⁴ As the Aarhus Convention Implementation Guide states,⁵ article 3, paragraph 8, “is a broadly worded provision which aims to prevent retribution of any kind.”⁶

In determining whether the treatment complained of amounts to penalization, persecution or harassment, the Committee has taken note of the approaches taken within the framework of human rights instruments. Such instruments generally provide wide protection against human rights violations combined with possibilities for the State concerned to claim its actions served a legitimate aim or at least did not relate to the special characteristics of the person concerned. This approach envisages that, depending on the particular facts of the case at hand, an action taken by the State may be objective and reasonable, pursue a legitimate purpose and be proportional in one set of circumstances, and not in another.⁷

Whether the treatment complained of amounts to penalization, persecution or harassment must be assessed on a case-by-case basis in the light of the particular circumstances, including whether the action taken by the State is objective and reasonable, and pursues a legitimate purpose.

When making this assessment, the Committee considers whether the treatment complained of could be reasonable and proportional and pursue a legitimate public purpose. If so, the treatment could be in compliance with article 3, paragraph 8, of the Convention. However, the Committee must also consider whether acts taken ostensibly in order to serve a legitimate purpose (such as protecting public order) may in fact have another, illegitimate, purpose, for

³ Ibid., para. 66.
⁴ Ibid., para. 67, citing the Vienna Convention on the Law of Treaties, article 31.
⁵ Second edition (United Nations publication, Sales No. E.13.II.E.3).
⁷ Ibid., para. 68.
example to prevent persons from exercising their rights to participate under the Convention. If that were the case, such acts or treatment may amount to persecution, penalization and harassment within the meaning of article 3, paragraph 8, of the Convention.\(^8\)

Please note that the wording of article 3, paragraph 8, is not limited in its application to acts of public authorities as defined in article 2, paragraph 2, of the Convention, but rather covers penalization, persecution or harassment by any State body or institution, including those acting in a judicial or legislative capacity.

It also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent.\(^9\)

3. The penalization, persecution or harassment was related to the member(s) of the public’s exercise of their rights under the Convention

A key element of article 3, paragraph 8, is causation. The treatment amounting to penalization, persecution or harassment must have occurred because the communicant has sought to exercise his or her rights under the Convention. If a person has been penalized, persecuted or harassed but that was entirely unrelated to his or her exercise of his or her rights under the Convention, then there is no breach of article 3, paragraph 8.\(^10\)

With respect to the level and burden of proof, the Committee has considered that useful guidance may be drawn from the approach taken by the European Court of Human Rights to cases of alleged discrimination under article 14 of the European Convention on Human Rights. For example, when determining whether discrimination has occurred, the European Court of Human Rights has held that the applicant is only required to show evidence of a difference in treatment, after which the onus passes to the State to demonstrate that the difference in treatment can be justified.\(^11\)

Applying the above approach to article 3, paragraph 8, the Committee has held that the communicant must first establish a prima facie case that members of the public were penalized, persecuted or harassed because they sought to exercise their rights under the Convention.

The burden of proof then moves to the Party concerned to show, on the balance of probabilities, that the penalization, persecution or harassment was entirely

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\(^8\) Ibid., para. 69.
\(^9\) Ibid., para. 70.
\(^10\) Ibid., para. 71.
\(^11\) Ibid., para. 72, citing *Timishev v. Russia*, European Court of Human Rights, Applications 55762/00 and 55954/00 (2005), para. 57.
unrelated to the fact that those persons sought to exercise their rights under the Convention.\textsuperscript{12}

4. The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur

The final element required to establish a breach of article 3, paragraph 8, looks at the extent to which the penalization, persecution or harassment has already been fully redressed through domestic remedies, for example by compensation to the persons concerned or other appropriate means.\textsuperscript{13}

The sixth Meeting of the Parties (Budva, September 2017) endorsed the Committee’s findings in the case presented, meaning that the Committee’s approach to examining such non-compliance was also endorsed.

In its report to the sixth session of the Meeting of the Parties, the Committee emphasised the seriousness of a finding that a Party concerned is in non-compliance with article 3, paragraph 8, of the Convention. If members of the public are penalized, harassed or persecuted for exercising their rights under the Convention, it puts in grave jeopardy the implementation of the Convention as a whole by the Party concerned.\textsuperscript{14}

In light of the seriousness of penalization, persecution and harassments when members of the public are exercising their rights under the Convention, I am pleased to have had this opportunity to inform you that the Committee has developed its approach to adequately examining such matters.

Thank you.

\textsuperscript{12} Ibid., para. 73.
\textsuperscript{13} Ibid., para. 74.
\textsuperscript{14} Ibid., para. 110.