The protection of persons exercising their participatory rights in environmental matters goes to the very heart of the Convention. I gave a presentation on this topic at the 8th meeting of the Task Force on Public Participation in Decision-making, on 8 October 2018. It is important to highlight the matter also for the WGP. So, I will give a shortened version for you today of the one I gave at the Task Force meeting last October.

According to The Guardian (2 Feb 2018), in 2017 about four environmental defenders were killed every week around the world. 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 last year 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 was emphasised throughout the negotiations of the Escazú Agreement and it is repeatedly emphasised when discussing it with colleagues, activists and governments in the region. 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 also in the Aarhus Convention region. 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, the protection of persons exercising their rights is addressed through a very explicit provision. 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.”
It is important to read the short provision in Article 3, paragraph 8, carefully: 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 each Party, 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 they try 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, seriously, upon communications, submissions or MOP requests.¹

The Committee has learned about existing procedures within some human rights regimes when setting out how to approach and examine violations of article 3, paragraph 8. This makes good sense, taking into account the many close links between the Aarhus Convention and human rights notions generally, and the particular links with respect to penalization, persecution and harassments for enjoying the rights set out in the Convention.

In a number of human rights regimes, anonymous complaints or complaints on behalf of anonymous are not accepted. According to decision I/7 communications to the Compliance Committee cannot be made anonymously, but it is possible for a communicant to request that the identity is not made public. Still, 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.

Fairness and due process require that the Party concerned must be able to adequately respond to all allegations against it. Yet, the Committee has not ruled out that in some cases the Party concerned may be able too reply without knowing the identity of the persons, and the Committee may be able to examine the case. This could be the case, for example, when systemic matters are raised or when the Committee has received reliable information from other sources. Even so, this will have to be examined on a case-by-case basis.

¹ Findings on communication ACCC/C/2014/102 (Belarus) (ECE/MP.PP/C.1/2017/19).
I move on to the Committee’s approach to examining a breach of article 3, paragraph 8, of the Convention. According to this scheme, four criteria must be met to establish non-compliance:

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 element in turn.

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

Article 3, paragraph 8, applies to all situations in which members of the public exercise their participatory rights under the Convention in order to protect their right to live in an environment adequate to their health or well-being.

The exercise of these rights includes a broad range of situations in which the provisions of the Convention concerning access to information, public participation in 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.

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, but the broadly worded provision aims to prevent retribution of any kind.

In determining whether the treatment complained of amounts to penalization, persecution or harassment, the Committee has taken note of the approaches taken in human rights regimes. These regimes 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.

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 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.

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

The next element 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.

With respect to the level and burden of proof, 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.

When applying this 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 unrelated to the fact that those persons sought to exercise 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

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.

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.

Thus the importance of Parties preventing any penalization, persecution or harassment of members of the public when they exercise their rights under the Convention.

I am pleased to have had this opportunity to inform you of the approach developed by the Committee to adequately examining these matters.

Thank you.

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2 See note 1.