

# The Aarhus Convention: Between Environmental Protection and Human Rights

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## I. Introduction

1. International environmental law and international human rights law have to a great extent developed separately. Dinah Shelton, a well known scholar working in both fields of international law, observed in this connection: “*The international community has adopted a considerable array of international legal instruments, and created specialized organs and agencies at the global and regional levels to respond to identified problems in human rights and environmental protection, although often addressing the two topics in isolation from one another.*”<sup>1</sup> This observation is somewhat disturbing, as the link between environmental protection and human rights is made quite often on the national level, because over a hundred national constitutions presently contain a provision by which the protection of a healthy environment as a basic right or a duty of the State is recognized in some form or other<sup>2</sup>. Also on the international level there is recognition in non-binding declarations that there is a clear link between human rights and the protection of the environment. According to the Preamble of the Stockholm Declaration of the United Nations Conference on the Human Environment of 16 June 1972: “*Both aspects of man’s environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself*”. Prin-

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<sup>1</sup> D. SHELTON, “Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration”, paper presented on the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November – 1 December 2009, p. 2.

<sup>2</sup> L. LAVRYSEN and J. THEUNIS, “The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective”, in I. LARMUSEAU (ed.), *Constitutional rights to an ecologically balanced environment*, Ghent, 2Impact, 2007, p. 9-14.

principle 1 of this Declaration states: “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*”. In a few more recent International Human Rights Instruments there is some attention to environmental protection. The International Covenant on Economic, Social and Cultural Rights contains a right to health in article 12 that expressly calls on States parties to take steps “*for the improvement of all aspects of environmental and industrial hygiene*”. The Convention on the Rights of the Child refers to aspects of environmental protection in Article 24, which provides that States Parties shall take appropriate measures to combat disease and malnutrition “*through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution*”.

The United Nations has, so far, not approved any general normative instrument on environmental rights, although the UN Human Rights Commission has had under consideration since 1994 a draft declaration on human rights and the environment<sup>3</sup> and has appointed a Special Rapporteur on a particular environmental problem, the *Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*<sup>4</sup>. The UN Human Rights

<sup>3</sup> The Commission adopted several resolutions linking human rights and the environment, such as Resolution 2005/60 entitled: “*Human Rights and the environment as part of sustainable development*. It called on States “*to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development and reaffirms, in this context, that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.*” It stresses “*the importance for States, when developing their environmental policies, to take into account how environmental degradation may affect all members of society, and in particular women, children, indigenous people or disadvantaged members of society, including individuals and groups of individuals who are victims of or subject to racism, as reflected in the Durban Declaration and Program of Action adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*”. It “*encourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy*”.

<sup>4</sup> The Special Rapporteur was appointed by Resolution 1995/81 (E/CN.4/RES/1995/81). In this Resolution one can read: “*Affirming that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to the human rights to life and health of individuals, particularly in developing countries that do not have the technologies to process them.*” Similar language can be found in subsequent resolutions whereby the mandate was renewed: e.g. Resolution 2001/35 on the Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (E/CN.4/RES/2001/35) and Resolution 2004/17 “*Affirming that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work, particularly of individual developing countries that do not have the technologies to process them*” (E/CN.4/RES/2004/17). See on this issue S. SENS, “*Background note on: Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes*”.

Council, in its turn, adopted on 25 March 2009 Resolution 10/4 on human rights and climate change in which it notes that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation. The Resolution recognizes that while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability<sup>5</sup>.

Some regional human rights treaties contain specific provisions on the right to a healthy environment. That is the case with the African Charter on Human and Peoples' Rights<sup>6</sup> and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights<sup>7, 8</sup>. As far as Europe is concerned, there is no explicit recognition in the European Convention on Human Rights of a right to a healthy environment, but, as is well known, serious harm to the environment may, according to the case law of the European Court of Human Rights<sup>9</sup>,

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on the enjoyment of human rights" and "The Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights", papers presented at the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November – 1 December 2009.

<sup>5</sup> <http://www2.ohchr.org/english/issues/climatechange/index.htm>. See on this issue: M. LIMON, "Linking Human Rights and the Environment. Key Issues Arising from Human Rights Council Resolution 10/4 and the June 2009 Council Debate on the Relationship between Human Rights and Climate Change", paper presented at the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November – 1 December 2009.

<sup>6</sup> Article 24: "All peoples shall have the right to a general satisfactory environment favorable to their development".

<sup>7</sup> Article 11: "Right to a Healthy Environment :

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment."

Only 15 out of the 25 Parties to the American Convention on Human Rights have ratified this Additional Protocol. The USA has not ratified this Protocol. See on this issue J.D. TAILLANT, "Environmental Advocacy and the Inter-American Human Rights System" in R. PICCOLOTTI and J.D. TAILLANT (eds.), *Linking Human Rights and the Environment*, Tucson, The University of Arizona Press, 2003, p. 149-153.

<sup>8</sup> D. SHELTON, *op. cit.*, p. 2-4; C. REDGWELL, "Access to Environmental Justice" in F. FRANCONI (ed.), *Access to Justice as a Human Right*, Oxford University Press, 2007, p. 156-157; D. SHELTON, "The Environmental Jurisprudence of International Human Rights Tribunals" in R. PICCOLOTTI and J.D. TAILLANT, *op. cit.*, p. 1-30.

<sup>9</sup> C. SCHALL, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?", *J.Env.L.*, 2008, p. 417-453.

constitute a violation of Article 8 (right to respect for private and family life)<sup>10</sup> and, in particular circumstances, of Article 2(right to life)<sup>11</sup>.

A particular link between the protection of human rights and environmental protection is, as far as the UNECE Region<sup>12</sup> is concerned, laid down in the so-called Aarhus Convention, which we will discuss in this contribution.

## II. From the Rio Declaration to the Aarhus Convention

### A. Rio Declaration and Sofia Guidelines

2. The origin of the Aarhus Convention goes back to Principle 10 of the Rio Declaration on Environment and Development, adopted during the United Nations Conference on Environment and Development (Rio de Janeiro, 3 – 14 June 1992), which reads as follows: “*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*”

This principle was further developed for the UNECE Region<sup>13</sup> in the so-called Sofia Guidelines<sup>14</sup>, endorsed at the Third Ministerial Conference «Environment

<sup>10</sup> ECHR, 21 February 1990, *Powell en Rayner*; 9 December 1994, *Lopez Ostra*; 19 February 1998, *Guerra*; 2 October 2001, *Hatton I*; 8 July 2003 (Grand Chamber), *Hatton II*; 10 November 2004, *Taskin*; 16 November 2004, *Moreno Gomez*; 9 June 2005, *Fadayeva*; 2 November 2006, *Giacomelli*; 26 October 2006, *Ledayeva*; 26 February 2008, *Fägerskiöld*; 7 April 2009, *Brândue*. Article 6 of the ECHR may also be of relevance, especially when Member States fail to obey a court order to stop environmentally harmful or polluting activities: ECHR, 22 May 2003, *Kyrtatos*; 12 July 2005, *Okyay*.

<sup>11</sup> ECHR, 18 June 2002, *Öneryildiz I*; 30 November 2004 (Grand Chamber) *Öneryildiz II*; 20 March 2008, *Budayeva*.

<sup>12</sup> The UNECE (United Nations Economic Commission for Europe) region covers more than 47 million square kilometres. Its member States include the countries of Europe, but also countries in North America (Canada and United States), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Western Asia (Israel). Today, UNECE has 56 member States.

<sup>13</sup> On the global level, the UNEP Secretariat recently developed “Draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters” (UNEP/GCSS.CI/8 – 3 December 2009), which were presented to the Eleventh special session of the Governing Council/Global Ministerial Environment Forum (Bali, Indonesia, 26-26 February 2010). By Decision 25/11, the Governing Council/Global Ministerial Environment Forum *took note* of the draft guidelines and requested the secretariat to carry out further work on the guidelines with a view to adoption by the GC/GMF at its next special session.

<sup>14</sup> Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making, submitted by the ECE Working Group of Senior Government Officials “Environment

for Europe» in Sofia, Bulgaria, 1995. At its special session on 17 January 1996, the Economic Commission for Europe Committee on Environmental Policy (“CEP”) decided to establish an Ad Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making. After two years of negotiations, final agreement on the text of the Convention could be reached.

## B. The Aarhus Convention

**3.** The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the ‘Environment for Europe’ process, in the framework of the United Nations Economic Commission for Europe (Geneva). The Convention, which entered into force on 30 October 2001, has now been ratified by 44 parties, including the European Union and, with the exception of Ireland, all Member States of the European Union. The GMO Amendment to the Convention, which is not yet in force, has been ratified by 25 parties, including the European Union and 21 of its Member States. The PRTR Protocol, which entered into force on 8 October 2009, has been ratified by 25 Parties, including the European Union and 21 of its Member States.

The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements. The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is therefore not only an environmental agreement; it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice<sup>15</sup>.

As the Convention has been ratified by the European Union<sup>16</sup> it has taken some implementing measures that complement the Aarhus Convention within the Euro-

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for Europe”, Ministerial Conference Environment for Europe, Sofia, Bulgaria, 23-25 October 1995, ECE/CEP/24.

<sup>15</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, p. 12; C. REDGWELL, *op. cit.*, p. 153-154.

<sup>16</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17 May 2005.

pean Union. For the Member States of the EU, the Convention and the related EU legislation constitutes a complex whole, so that we will discuss the content of the Convention along with the related EU provisions<sup>17</sup>.

### **III. The substance of the Aarhus Convention and related EU law**

#### **A. Introduction**

**4.** As its title suggests, the Convention contains three broad themes or ‘pillars’: access to information, public participation and access to justice in environmental matters. These three pillars are discussed below. However, the Convention also contains a number of important general features that should be addressed first.

#### **B. General Features**

**5.** The preamble to the Aarhus Convention connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment<sup>18</sup>. It then concludes that, to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. The preamble recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public. When governments make environmental information publicly accessible and enable the public to participate in decision-making, they help to meet society’s goal of sustainable and environmentally sound development.

The first three articles of the Convention comprise the objective, the definitions and the general provisions. The Convention adopts a rights-based approach. Article 1, setting out the objective of the Convention, requires Parties to guarantee rights of

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<sup>17</sup> J. JENDROSKA, “Public Information and Participation in EC Environmental Law”, in R. MACRORY (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?*, Groningen, Europa Law Publishing, 2006, p. 61-84; Ch. PIROTTE, “L'accès à la justice en matière d'environnement en Europe: État des lieux et perspectives d'avenir», *Amén.*, 2010, p. 27-28.

<sup>18</sup> In the initial draft there was no explicit link with human rights and the right to a healthy environment. In an early stage of the negotiations the delegation of Belgium proposed to include such a link (see CEP/AC.3/2, Annex I). This proposal was replaced in a later stage of the negotiations by a common proposal of the delegations of Belgium, Denmark and Italy (see CEP/AC.3/12, Annex II). The latter proposal found its way into a slightly adapted version to the Convention.

access to information, public participation in decision-making and access to justice in environmental matters. It also refers to the *goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being*. These rights underlie the various procedural requirements in the Convention.

The Convention establishes *minimum standards* to be achieved 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 (Art. 3.5 and 3.6). The Convention prohibits *discrimination* on the basis of citizenship, nationality, domicile, registered seat or effective centre of its activities against natural or legal persons seeking to exercise their rights under the Convention (Art. 3.9).

The main thrust of the obligations contained in the Convention is towards public authorities, which are defined so as to cover governmental bodies from all sectors and at all levels (national, regional, local, etc.), and bodies performing public administrative functions. Although the Convention is not primarily focused on the private sector, privatised bodies having public responsibilities in relation to the environment and which are under the control of the aforementioned types of public authorities are also covered by the definition. However, according to Article 2.2 *in fine*, the definition of “public authority” contained in the Convention does not include bodies or *institutions acting in a judicial or legislative capacity*. This has given rise to the question whether decisions that are normally taken by administrative bodies, but are taken exceptionally by Parliament on the basis of a specific Act of Parliament, such as permitting decisions for activities covered by the Convention, are excluded from the scope of the Convention or not<sup>19</sup>.

<sup>19</sup> See questions 2a en 2b contained in the reference for a preliminary ruling to the Court of Justice of the EU by the Belgian Constitutional Court in its judgment No. 30/210 of 30 March 2010 concerning a Walloon Decree of 17 July 2008 “concerning some permits for which there are urgent reasons of public interest”. Similar questions (2c en 2d) were raised in relation to Art. 1.5 of Directive 85/337/EEC according to which: “This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.” In the *Aarhus Convention Implementation Guide* one can read in respect to this discussion: “Bodies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the fundamentally different character of decision making either in a legislative capacity, where elected representatives are more directly accountable to the public through the election process, or in a judicial capacity, where tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention should not apply to bodies acting in a judicial capacity in order to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings. (...) This exception applies not only to parliaments, courts or local councils, but also to executive branch authorities, when they perform legislative or judicial functions. An example of the former can be found in municipal councils, which sometimes serve in both legislative and executive capacities. Where they are acting in an executive capacity they are covered by the Convention; where they are acting in a legislative capacity they are not. The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in



The Meeting of the Parties to the Convention is, according to Article 15, required to establish, on a consensus basis, optional arrangements for reviewing compliance with the provisions of the Convention. At their first meeting in October 2002, the Parties adopted decision I/7 on review of compliance<sup>20</sup> and elected the first Compliance Committee. The Compliance Committee consists of 9 members who serve in a personal capacity and do not represent the countries of which they are nationals. The compliance mechanism may be triggered in four ways: (1) a Party may make a submission about compliance by another Party; (2) a Party may make a submission concerning its own compliance; (3) the secretariat may make a referral to the Committee; (4) members of the public may make communications concerning a Party's compliance with the convention<sup>21</sup>. In addition, the Committee may examine compliance issues on its own initiative and make recommendations, prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under Article 10.2 of the Convention. Since its establishment, the Committee has reached a number of findings with regard to compliance by individual Parties.

*The Meeting of the Parties* may, upon consideration of a report and any recommendations of the Compliance Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures: a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention; b) Make recommendations to the Party concerned; c) Request the Party concerned to submit a strategy, including a time

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*law-making is recognized in Article 8. As the activities of public authorities in drafting regulations, laws and normative acts are expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention.*

*Conversely, if legislative branch authorities engage in activities outside their legislative capacity, they might fall under the definition of "public authority" under the Convention. For example, when the European Parliament adopts resolutions on environmental questions or in relation to international environmental agreements, it is possibly not acting in a legislative capacity, and some provisions of the Convention might apply.*

*It should be mentioned that there is nothing in the Convention that would prevent parliaments or other legislative bodies from applying the rules of the Convention mutatis mutandis to their own proceedings. At the same time as legislative activities are excluded from the scope of the Convention, the preamble, in its eleventh paragraph, invites legislative bodies to implement the Convention's principles."*

<sup>20</sup> Amended since by Decision II/5.

<sup>21</sup> In practice, nearly all the submissions to the Compliance Committee are introduced by members of the public, mainly environmental NGOs. In early 2010, there was 1 submission by a party about compliance by another party versus 48 submissions from the public. The other possibilities of submission have not been used so far. See <http://www.unece.org/env/pp/pubcom.htm>.



schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public; e) Issue declarations of non-compliance; f) Issue cautions; g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Finally, it should be mentioned that the Convention is open to accession by non-ECE countries, subject to approval of the Meeting of the Parties (Art. 19.3).

### C. The First Pillar: Access to Information

6. The information pillar – Articles 4 and 5 of the Convention – covers both the ‘passive’ or reactive aspect of access to information, *i.e.* the obligation on public authorities to respond to public requests for information, and the ‘active’ aspect dealing with other obligations relating to providing environmental information, such as collection, updating, public dissemination and so on<sup>22</sup>.

Environmental information is defined in a broad sense. Environmental information means, according to Article 2.3, any information in written, visual, aural, electronic or any other material form on:

“(a) *The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(b) *Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;*

(c) *The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment*

<sup>22</sup> See on this issue: Ch. LARSEN, “L'accès aux informations sur l'environnement en droit international: la convention d'Aarhus”, in Ch. LARSEN (ed.), *Ten years of access to environmental information in international, European and Belgian law: Stock-taking and perspectives*, Brussels, Bruylant, 2003, p. 25-38; J. JENDROSKA, *op. cit.*, p. 73-74; R. HALLO, “Access to Environmental Information in Europe: an Ongoing Story” in Th. ORMOND, M. FÜHR and R. BARTH (eds.), *Environmental Law and Policy at the Turn to the 21st Century*, Berlin, Lexxion Verlagsgesellschaft, 2006, p. 51-61.

or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”.

The *reactive* aspect is addressed in Article 4, which contains the main essential elements of a system for securing the public’s right to obtain information on request from public authorities. There is a presumption in favour of access. Any environmental information *held by a public authority*<sup>23</sup> must be provided when requested by a member of the public, unless it can be shown to fall within a finite list of exempt categories. The right of access extends to any person, without his or her having to prove or state an interest or a reason for requesting the information. The information must be provided as soon as possible, and at the latest within one month after submission of the request. However, this period may be extended by a further month where the volume and complexity of the information justify this. The requester must be notified of any such extension and the reasons for it. There is a qualified requirement on public authorities to provide it in the form specified by the requester. Public authorities may impose a charge for supplying information provided the charge does not exceed a ‘reasonable’ amount.

There are exemptions to the rule that environmental information must be provided. Public authorities *may* withhold information where disclosure would adversely affect various interests, *e.g.* national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, the confidentiality of the proceedings of public authorities; or where the information requested has been supplied voluntarily or consists of internal communications or material in the course of completion. There are, however, some restrictions on these exemptions, *e.g.* the commercial confidentiality exemption may not be invoked to withhold information on emissions which is relevant for the protection of the environment.

To prevent abuse of the exemptions by over-secretive public authorities, the Convention stipulates that the aforementioned exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account. Refusals, and the reasons for them, are to be issued in writing where requested. A similar time limit applies as for the supply of

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<sup>23</sup> “Public authority” means (Art. 2.2):

“(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity.”

information: one month from the date of the request, with provision for extending this by a further month where the complexity of the information justifies this. Where a public authority does not hold the information requested, it should either direct the requester to another public authority which it believes might have the information, or transfer the request to that public authority and notify the requester of this.

The Convention also imposes *active information duties* on Parties (Article 5). These include quite general obligations on public authorities to be in possession of up to date environmental information which is relevant to their functions, and to make information ‘effectively accessible’ to the public by providing information on the type and scope of information held and the process by which it can be obtained. The Convention also contains several more specific provisions. Parties are required to ‘progressively’ make environmental information publicly available in electronic data-bases which can easily be accessed through public telecommunications networks. The Convention specifies certain categories of information (*e.g.* state of the environment reports, texts of legislation related to the environment) which should be made available in this form.

Public authorities are also required to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.

**7.** As far as the European Union is concerned, the original Directive 90/313/EEC on the subject was replaced by Directive 2003/4/EC<sup>24</sup>, to bring EU law into line with the requirements of the Aarhus Convention. The Directive, based on Article 175 (1) of the EC Treaty, contains minimum requirements for the Member States, so that they may maintain or introduce legislation that is more favourable to access to information. Although the Directive in general closely follows the Aarhus Convention, in some respects, it provides more details, restricts even more the conditions under which access to information may be refused, or imposes extra obligations on the Member States. The definitions of “environmental information” (Art. 2.1) and of “public authority” (Art. 2.2), for instance, are slightly more detailed than those of the Aarhus Convention. The Directive is not only applicable to environmental information held by public authorities, but also to information held by others “for” such authorities. The Directive contains a specific provision on how public authorities should act in a case they believe that a request is formulated in too general a manner

<sup>24</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14 February 2003. This Directive had to be implemented by the Member States by 14 February 2005 at the latest; J. JENDROSKA, *op. cit.*, p. 73-74; J.H. JANS and H.H.B. VEDDER, *European Environmental Law*, 3<sup>rd</sup> ed., Groningen, Europa Law Publishing, 2008, p. 327-330; Ch. PIROTTE, *op. cit.*, p. 28.

(Art. 3.3) and imposes on Member States a series of practical arrangements to make access to information provisions work (Art. 3.5). It specifies that some of the grounds for refusal may not be invoked when the request relates to information on emissions into the environment (Art. 4.2). The Directive also goes a little more into detail with respect to the dissemination of environmental information (Art. 7 and 9).

As far as the EU institutions and bodies themselves are concerned, access to environmental information held by such institutions and bodies is regulated by Title II of Regulation (EC) No 1367/2006<sup>25</sup>.

## **D. The Second Pillar: Public Participation in Environmental Decision-making**

**8.** The Aarhus Convention sets out minimum requirements for public participation in various categories of environmental decision-making (Articles 6 to 8)<sup>26</sup>.

Article 6 of the Convention establishes certain public participation requirements for decision-making on whether *to license or permit certain types of activity which may have a significant effect on the environment*. Article 6, paragraph 1 (a) requires in the first place that each Party *shall* apply the provisions of this article with respect to decisions on whether to permit proposed activities *listed in annex I*. This list is similar to the list of activities for which an Environmental Impact Assessment<sup>27</sup> or Integrated Pollution Prevention and Control licence<sup>28</sup> is required under the relevant EU legislation. It

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<sup>25</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ L* 264, 25 September 2006; J.H. JANS and H.H.B. VEDDER, *op. cit.*, p. 331-332. The Commission has adopted two decisions to implement the Regulation further. Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts, specifies the evidence to be provided by NGOs, the calculation of time-limits for reply to applications and cooperation between EU institutions and bodies. Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies, ensures that the general principles and minimum standards for consultation of interested parties by the Commission [COM(2002) 704] apply to public participation concerning plans and programs relating to the environment. It also assigns clear responsibilities and decision-making powers to the appropriate bodies or persons within the Commission with respect to the provisions of the Regulation concerning requests for internal review.

<sup>26</sup> J. JENDROSKA, *op. cit.*, p. 75-77.

<sup>27</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *OJ L* 175, 5 July 1985.

<sup>28</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), *OJ L* 24, 29 January 2008, replacing Council

should be noted that according to paragraph 20 of Annex I to the Convention: “Any activity not covered by paragraphs 1–19 above *where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation*” is subject to the obligation of Article 6. Similarly, according to paragraph 22 of the same annex: “Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to Article 6, paragraph 1 (a) of this Convention”. Secondly (Article 6, paragraph 1 (b)), each party shall also apply, *in accordance with its national law*, the provisions of this article to decisions on proposed activities not listed in annex I *which may have a significant effect on the environment*. To this end, Parties shall determine whether such a proposed activity is subject to these provisions. Finally, Parties may decide, on a case-by-case basis if so provided under national law, *not* to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

The public participation requirements include timely and effective notification of the public concerned, reasonable timeframes for participation, including provision for participation at an early stage, a right for the public concerned to inspect 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. The ‘public concerned’ is defined as ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’, and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law. So, Parties to the Convention may set requirements for NGOs under national law, but these requirements should be consistent with the Convention’s principles, such as non-discrimination and avoidance of technical and financial barriers to registration. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary<sup>29</sup>.

Article 7 requires Parties to make «appropriate practical and/or other provisions for the public to participate during the preparation of *plans and programmes relating to the environment*». It can be argued that the term ‘relating to the environment’ is quite broad, covering not just plans or programmes prepared by an environment ministry, but also sectoral plans (transport, energy, tourism etc.) where these have significant environmental implications. Though the Convention is less prescriptive with respect to public participation in decision-making on plans or programmes than in the case of

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Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10 October 1996.

<sup>29</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New-York and Geneva, 2000, p. 41.

projects or activities, the provisions of Article 6 relating to reasonable timeframes for participation, opportunities for early participation (while options are still open) and the obligation to ensure that «due account» is taken of the outcome of the participation are to be applied in respect of such plans and programmes. Article 7 also applies, in more recommendatory form, to decision-making on *policies relating to the environment*.

Article 8 applies to public participation during 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, this article clearly would apply to the executive stage of preparing rules and regulations even if they are later to be adopted by parliament<sup>30</sup>.

**9.** The EU took several legal initiatives to implement the second pillar of the Aarhus Convention. Provisions for public participation consistent with the requirements of Article 6 of the Aarhus Convention in environmental decision-making concerning concrete activities (projects and installations) that could have adverse environmental impacts were introduced in both the EIA and the IPPC Directive<sup>31</sup>. As far as Article 7 is concerned, public participation requirements can be found in Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. Furthermore, similar provisions can be found in a number of other environmental directives, such as Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy. As far as the EU institutions and bodies themselves are concerned, public participation requirements were laid down in Title III of Regulation (EC) No 1367/2006<sup>32</sup>.

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<sup>30</sup> *Ibid.*, p. 119.

<sup>31</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25 June 2003. See especially Articles 6, 8 and 9 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and Article 15 of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, replacing Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

<sup>32</sup> J. JENDROSKA, *op. cit.*, p. 77-79; C. REDGWELL, *op. cit.*, p. 166-172; J.H. JANS and H.H.B. VEDDER, *op. cit.*, p. 332-334; Ch. PIROTTE, *op. cit.*, p. 28.

## E. The Third Pillar: Access to Justice

**10.** The third pillar of the Convention (Article 9) aims to provide access to justice in three different contexts: a) review procedures with respect to information requests, b) review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and c) challenges to breaches of environmental law in general. Thus the inclusion of an ‘access to justice’ pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law<sup>33</sup>.

### 1. Access to Justice in relation to Access to Environmental Information

**11.** Article 9.1 of the Aarhus Convention deals with Access to Justice concerning *information* appeals. A person whose request for information has not been dealt with to his satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law. The latter option was included to accommodate those countries which have a well-functioning office of Ombudsperson that – and this is an explicit requirement – takes decisions that are “binding on the public authority holding the information”. If such an office can only mediate or issue non-binding opinions, such an option is not sufficient. The Convention attempts to ensure a low threshold for such appeals by requiring that where review before a court of law is provided for (which can involve high costs), there should be also, before it comes to a court case, access to an expeditious review procedure “for reconsideration by a public authority or review by an independent and impartial body other than a court of law” which is *free of charge or inexpensive*. Final decisions must, as has been said, be binding on the public authority holding the information, and the reasons must be stated in writing where information is refused. Standing must, under this provision, be granted to “any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with under the provisions of that article”. No additional standing requirements may be imposed<sup>34</sup>. A very similar provision is contained in Article 6 of Directive 2003/4/EC. Art. 6.2 adds that Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

<sup>33</sup> See on this issue: Ch. LARSEN and B. JADOT, “L'accès à la justice en matière d'environnement au regard de la convention d'Aarhus”, in Ch. LARSEN and M. PALLEMAERTS (eds.), *L'accès à la justice en matière d'environnement*, Brussels, Bruylant, 2005, p. 195-261; J. JENDROSKA, *op. cit.*, p. 80-82.

<sup>34</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, p. 126.



## 2. Access to Justice in relation to Environmental Permitting Decisions

**12.** Article 9.2 of the Aarhus Convention deals with Access to Justice concerning *environmental decision-making with regard to activities that may have a significant effect on the environment*. The Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6 (*supra* n° 8). The review procedure should be organized before a court of law and/or another independent and impartial body established by law and make it possible “to challenge the *substantive* and *procedural* legality of any *decision, act* or *omission* subject to the provisions of Article 6”. So, the review procedure should not be restricted to the question whether the public participation requirements of Article 6 were observed in preparation of permits for activities that fall under that provision, but should extend to all questions of legality, both of substance and of procedure. The decisions may be reviewed against all binding law, be it international, European or domestic law. The review procedure should also encompass material “acts” connected to those activities and omissions. Where so provided for under national law, this review procedure is also applicable to decisions, acts and omissions subject to other relevant provisions of the Convention. Parties may apply the review procedure to other provisions of the Convention by providing for review in those cases. Those may include decisions covered by Article 7 (plans, programmes and policies relating to the environment) or Article 8 (executive regulations and generally applicable legally binding normative instruments).

The review procedure should be open to “members of the public”, that is to say “the public affected or likely to be affected, or having an interest in the environmental decision making”, including environmental NGOs “meeting any requirements under national law” (Art. 2.5) in so far as they have “a sufficient interest” (notion often used in the legal systems inspired by those of France) or “maintain impairment of a right, where administrative procedural law of a Party requires this as a precondition” (concept used in the legal systems inspired by German law). So, State Parties may impose certain standing requirements for members of the public and environmental NGOs, but their room for manoeuvre in this respect is not unlimited. Article 9.2, subparagraph 2, states: “[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and *consistent with the objective of giving the public concerned wide access to justice within the scope of this Convention*. To this end *the interest of any non-governmental organization* meeting the requirements referred to in Article 2, paragraph 5, *shall be deemed sufficient* for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above”. While it is clear that State Parties are not obliged to introduce the *actio popularis*, they may not introduce strict standing requirements for natural or legal persons who may be affected or likely to be affected by decisions, acts or omissions concerning such activities, and,

as the case may be, plans, programmes, policies and regulations. The same holds true for environmental NGOs. The Aarhus Compliance Committee was, in this connection, of the opinion that the criteria that have been applied by the Belgian Council of State with respect to the right of environmental organizations to challenge Walloon town planning permits would not comply with Article 9, paragraph 2. The Compliance Committee noted in particular: “*As stated, in these cases environmental organizations are deemed to have a sufficient interest to be granted access to a review procedure before a court or an independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided “with the objective of giving the public concerned wide access to justice” within the scope of the Convention. As shown by the cases submitted by the Communicant with respect to town planning permits this is not reflected in the jurisprudence of the Council of State. Thus, if the jurisprudence is maintained, Belgium would fail to comply with Article 9, paragraph 2, of the Convention*”<sup>35</sup>.

Finally, according to Article 9.2, third subparagraph, this provision on access to justice shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. The administrative appeal system is not intended to replace the opportunity of appeal to the courts, but it may in many cases resolve the matter expeditiously and avoid the need to go to court<sup>36</sup>.

Very similar provisions were laid down in Article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC, as regards public and private projects that are subject to environmental impact assessment in view of that Directive<sup>37</sup>, and in Article 15a of Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the present Art. 16 of Directive 2008/1/EC concerning integrated pollution prevention and control), as regards installations that fall within the scope of that Directive<sup>38</sup>.

The Court of Justice of the European Union has ruled that members of the public concerned within the meaning of Article 1(2) and 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, *regardless of the*

<sup>35</sup> Belgium ACCC/2005/11; ECE/MP.PP.1/C.1/2006/4, Add.2, 28 July 2006, para 33.

<sup>36</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, p. 130.

<sup>37</sup> The only difference being that Article 10a provides also that Member States shall determine at what stage the decisions, acts or omissions may be challenged.

<sup>38</sup> *Ibid.*

role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views. The right of access to a review procedure within that meaning does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law<sup>39</sup>, and participation in an environmental decision-making procedure under Directive 85/337/EEC is distinct and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure. Furthermore, the Court ruled that Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, *precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2 000 members*. The Court is indeed of the opinion that while it is true that Article 10a leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure ‘wide access to justice’ and, second, render effective the provisions of Directive 85/337/EEC on judicial remedies. Accordingly, those national rules must not be liable to nullify EU provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts. From that point of view, a national law may require that such an association has as its object the protection of nature and the environment. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337/EEC and in particular the objective of facilitating judicial review of projects which fall within its scope. Furthermore, Directive 85/337/EEC does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with<sup>40</sup>.

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<sup>39</sup> In Sweden, development consents are delivered in first instance by Environmental Tribunals. The decisions of the Environmental Tribunals may be appealed before the Environmental Appeal Court whose judgments may in turn be subject to appeal before the *Högsta domstolen* (Supreme Court).

<sup>40</sup> ECJ, 15 October 2009, C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*; confirmed in ECJ, 11 March 2010, C-24/09, *Djurgården-Lilla Värtans Miljöskyddsförening*. The Belgian Constitutional Court referred in its judgment No. 30/210 of 30 March 2010 some questions (questions 3a and 3b) concerning this provision in relation to a Walloon Decree of 17 July 2008 “concerning some permits for which there are urgent reasons of public interest” for a preliminary ruling to the ECJ.

### 3. Access to Justice and Breaches of Environmental Law

**13.** Article 9.3 concerns violations of environmental law in general. The Convention requires Parties to provide access to administrative or judicial procedures to challenge *acts and omissions* by *private persons* and *public authorities* which *breach laws relating to the environment*. The Convention introduces in so doing a form of direct citizen enforcement which can be used not only against administrative acts, but also against material acts and omissions. Omissions include the failure to implement or enforce environmental law with respect to other public authorities or private entities<sup>41</sup>. The Convention uses the terms “which contravene provisions of its national law relating to the environment.” In the absence of a specific definition of “national law”, it includes not only domestic law (both federal and regional), but also European and international law that is binding on the Member States, in particular those provisions of international or European law that have direct effect. Such access is to be provided to members of the public ‘where they meet the criteria, if any, laid down in national law’ – in other words, the issue of standing is primarily to be determined at the national level, as is the question of whether the procedures are judicial or administrative. Members of the public include natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups (Art. 2.4). The Aarhus Compliance Committee has observed that while referring to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. “*On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment. Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a*

<sup>41</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, p. 131; Kazakhstan ACCC/2004/6; ECE/MP.PP.1/C.1/2006/4, Add.1, 28 July 2006, para. 30. The Aarhus Compliance Committee acknowledged in a case concerning Armenia that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to Articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of Convention (Armenia ACCC/2004/8; ECE/MP.PP.1/C.1/2006/2, Add.1, 10 May 2006, para. 38).

*self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“actio popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of Article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of Decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under Article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice”<sup>42</sup>.*

The European Commission tabled on 24 October 2003 a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters<sup>43</sup>. The proposal aims to establish a framework of minimum requirements for access to the judicial and administrative proceedings in environmental matters in order to achieve a better implementation and application of environmental law in the European Union, and to implement Art. 9.3 of the Aarhus Convention. The proposed directive grants legal standing to certain members of the public, enabling them to have access to judicial or administrative proceedings against the actions and omissions of public authorities which contravene environmental law. The proposal met resistance from various Member States and for the time being no qualified majority could be found within the Council, despite the fact that the Parliament endorsed the proposal in the first reading on 18 March 2004, subject to certain amendments designed in particular to recall the objective of the Aarhus Convention, to extend the right to institute legal proceedings to local organisations and/or to organisations promoting sustainable development, to clarify the mechanisms for access to justice in transboundary environmental cases and to make it easier to exercise the right to go to court, and the European Economic and Social Committee delivered a positive opinion.

As far as the EU institutions and bodies themselves are concerned, some provisions concerning internal review and access to justice were laid down in Title IV of Regulation (EC) No 1367/2006 in an attempt to overcome the strict standing requirements used in the case law of the Court of Justice and the General Court while reviewing the legality of acts adopted by EU institutions and bodies on the basis of Article 263 TFEU (ex. Art. 230 EC) (actions for annulment)<sup>44</sup>. Any non-governmental organisa-

<sup>42</sup> Belgium ACCC/2005/11; ECE/MP.PP.1/C.1/2006/4, Add.2, 28 July 2006, paras. 35-36.

<sup>43</sup> COM(2003) 624; B. DETTE, “Access to Justice in Environmental Matters: the Aarhus Convention and Legislative Initiatives for its Implementation”, in Th. ORMOND, M. FÜHR and R. BARTH (eds.), *op. cit.*, p. 63-80; Ch. PIROTTE, *op. cit.*, p. 28-31.

<sup>44</sup> J.H. JANS and H.H.B. VEDDER, *European Environmental Law*, 3<sup>rd</sup> ed., Groningen, Europa Law Publishing, 2008, p. 209-214; J.H. JANS, “Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions

tion which meets the criteria set out in Article 11<sup>45</sup> is entitled to make a request for *internal review* to the EU institution or body that has adopted an administrative act<sup>46</sup> under environmental law or, in case of an alleged administrative omission, should have adopted such an act. Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review. The EU institution or body shall consider any such request, unless it is clearly unsubstantiated. The EU institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request. Where the EU institution or body is unable, despite exercising due diligence, to act in accordance with said obligation, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the aforementioned period of the reasons for its failure to act and when it intends to do so. In any event, the Community institution or body shall act within 18 weeks from receipt of the request. Article 12 of the Regulation provides that the non-governmental organisation which made the request for internal review may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty. Where the EU institution or body fails to act in accordance with Article 10(2) or (3) of the Regulation the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty<sup>47</sup>. It is, however, doubtful that the actual standing requirements used by the Court of Justice

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and Bodies" in R. MACRORY (ed.), *Reflections on 30 Years of EU Environmental Law*, *op. cit.*, p. 477-489; M. PALLEMAERTS, *Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention*, An IEEP Report for WWF-UK, London – Brussels, June 2009.

<sup>45</sup> According to Article 11: "A non-governmental organization shall be entitled to make a request for internal review provided that: (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of those criteria."

<sup>46</sup> Regulations and directives are thus excluded from this review procedure. Only decisions, except those mentioned in Article 2(2) of the Regulation, fall within the scope of the review procedure. Article 2(2) states: "Administrative acts and administrative omissions shall not include measures taken or omissions by Community institution or body in its capacity as an administrative review body, such as under: (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules); (b) Articles 226 and 228 of the Treaty (infringement proceedings); (c) Article 195 of the Treaty (Ombudsman proceedings); (d) Article 280 of the Treaty (OLAF proceedings)."

<sup>47</sup> See for a critical analysis of the Regulation: J.H. JANS and H.H.B. VEDDER, *op. cit.*, 214-219.

and the provisions of the aforementioned Regulation are in line with the requirements of the Aarhus Convention<sup>48</sup>.

#### **4. Minimum requirements concerning Access to Justice**

**14.** Art. 9.4 and 9.5 set minimum requirements concerning access to justice which should be provided for under Art. 9.1, 9.2 and 9.3 of the Aarhus Convention. Article 9.4 stipulates that these procedures should provide *adequate and effective remedies, including injunctive relief as appropriate*, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible, of other bodies, shall be publicly accessible. Injunctive relief is a remedy to prevent or remedy injury. The Convention requires injunctive relief and other remedies to be “adequate and effective”. Adequacy requires the relief to fully compensate past damage, prevent future damage, and may require it to provide restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement<sup>49</sup>. Article 9.5 prescribes that in order to further the effectiveness of the provisions of Article 9, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

The requirements of Art. 9.4 and 9.5 are partially relayed by Article 10a of Directive 85/337 and Article 16 of Directive 2008/1/EC where they require that the procedures “shall be fair, equitable, timely and not prohibitively expensive” and that “Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures”. For the moment, there is no requirement in the European Directives issued for the implementation of the Aarhus Convention concerning the remedies that should be provided for by those procedures, or for the establishment of appropriate assistance mechanisms to remove financial and other barriers to access to justice. Therefore, for those important requirements, one should refer directly to the Aarhus Convention.

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<sup>48</sup> M. PALLEMAERTS, *Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention*, *op. cit.* This author also explores the solutions to overcome the shortcomings. Note that the Aarhus Compliance Committee is investigating a communication by Client Earth about non-compliance of the EU with Art. 9.2, 9.3, 9.4 and 9.5 of the Aarhus Convention (ACCC/C/2008/32 – European Community).

<sup>49</sup> *The Aarhus Convention: An Implementation Guide*, United Nations, New York and Geneva, 2000, 133.



## IV. The Aarhus Convention and national judiciaries

**15.** Art. 9 of the Aarhus Convention is of particular relevance for the national judiciaries<sup>50</sup>. In most EU countries – but not all – there is a Constitutional Court. Access to the Constitutional Court, however, is not always regulated in the same way. The right to lodge an appeal directly with the Constitutional Court is usually only open to political authorities, sometimes with diversification according to the nature of the regulation against which the appeal is lodged (e.g. Poland: the President; Germany: the Government; France: the Prime Minister; Portugal: the House of Representatives, etc). Direct access for natural and legal persons to the Constitutional Court exists only in the minority of EU countries. But in most of the countries, ordinary courts can refer constitutional questions to the Constitutional Court or a constitutional complaint can be lodged against a judicial decision in the last instance. Constitutional Courts can play an important role in the enforcement of the Aarhus Convention. They generally can combine provisions of their national constitution with relevant provisions of international treaties and review not only the constitutionality of federal or regional Acts of Parliament (or sometimes also regulations), but also their conformity with international provisions, such as those of the Aarhus Convention. Several Constitutional Courts have already been confronted with the application of the Aarhus Convention. The Belgian Constitutional Court partially annulled by Judgment N° 137/2006 of 14 September 2006 an Act of the Walloon Parliament for violation of Article 23 of the Constitution in conjunction with Directive 2001/42/EC and Article 7 of the Aarhus Convention. The Constitutional Court of Slovenia also found an Act (the Act Amending the *Lipica Stud* Farm Act) inconsistent with the Aarhus Convention as it prevents the public from participating in the development of a detailed plan of national importance<sup>51</sup>.

In the vast majority of the EU Member States, a dual judicial structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil and criminal cases, and on the other hand administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal matters, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It can be expected that admi-

<sup>50</sup> L. LAVRYSEN, "National Judges and the Convention – How the Judiciary can further the Implementation of the Third Pillar", paper presented at the Conference: *The Aarhus Convention: how are its access to justice provisions being implemented?*, Brussels, 2 June 2008, <http://ec.europa.eu/environment/aarhus/conf2.htm>.

<sup>51</sup> Slovenian Constitutional Court, U-I-406/06-21, March 29th 2007. See also: U-I386/06, March 13th 2008. The Constitutional Court of the Republic of Latvia annulled by its judgment of 17 January 2008 in case N° 2007-11-03 the Riga Land Use Plan 2006-2018 Covering the Territory of the Freeport of Riga for violation of Art 115 of the Constitution (right to a healthy environment), linking this article to *inter alia* the Aarhus Convention.

nistrative courts will be confronted in the first place with Aarhus-related cases as the decisions and acts referred to in Article 9.1 and 9.2 and, as far as acts of public authorities are concerned, Article 9.3, will normally fall under the jurisdiction of administrative courts<sup>52</sup>. It should be pointed out, however, that the powers of the administrative courts might differ from Member State to Member State<sup>53</sup>. Due to the different legal history and legal culture, the various legal systems of Member States have taken different approaches to legal standing. They range from an extensive approach where standing is broadly recognised by way of an “*actio popularis*”, to a very restrictive approach allowing standing only in cases where the impairment of an individual legally granted right can be shown<sup>54</sup>. In most of the countries, the legislation uses a rather vague formula in describing the conditions to have standing. E.g. in Belgium a natural or legal person who requests suspension or annulment of an administrative act or a regulation by the Council of State must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be directly and unfavourably affected by the challenged act or regulation. This concept can however be interpreted broadly or narrowly. As we look at the Belgian situation, more or less the same criterion applies for the Council of State as for the Constitutional Court. So far, the Constitutional Court has almost never declined an environmental NGO for lack of standing. As far as the Supreme Administrative Court is concerned, there are some variations in time and even between the different Chambers. Where the Council of State developed a broad view on standing for NGOs in the eighties, there was a tendency later on to become stricter, maybe in view of an ever growing case load. Where the Chambers dealing with environmental legislation generally continued to have a broad view, the Chambers dealing with land use planning legislation gradually developed a stricter view<sup>55</sup>. In my opinion, the Council of State may reinterpret the existing national provisions on standing without any problem in conformity with Article 9 of the Aarhus Convention. To overcome possible further resistance from the Council of State, some Members of Parliament introduced, with reference to the Aarhus Convention and the Findings and Recommendations of the Aarhus Compliance Committee, a bill to clarify under which conditions environmental

<sup>52</sup> A search in the database of the case law of the Belgian Council of State revealed that already in 62 cases there was some reference to the Aarhus Convention.

<sup>53</sup> L. LAVRYSEN, “The Role of National Judges in Environmental Law”, in Th. ORMOND and M. FÜHR (eds.), *Environmental Law and Policy at the Turn to the 21st Century*, Lexxion, Berlin, 2006, p. 85.

<sup>54</sup> See on this subject: Milieu Environmental Law and Policy, *Summary Report on the inventory of EU Member States’ measures on access to justice in environmental matters*, September 2007, p. 6-11; Ch. PIROTTE, *op. cit.*, p. 16-19.

<sup>55</sup> L. LAVRYSEN, “Chapter 2. Belgium” in J. KOTZÉ and A.R. PATERSON (eds.), *The Role of the Judiciary in Environmental Governance. Comparative Perspectives*, Kluwer Law International, Alphen aan den Rijn, 2009, p. 108-110.

NGOs have standing before the Council of State<sup>56</sup>. The proposal was adopted by the Senate in an amended form and is still pending in the House of Representatives<sup>57</sup>. The Legislation Section of the Council of State has, meanwhile, delivered an opinion in which it suggests different amendments to the text adopted by the Senate<sup>58</sup>.

As we have seen, according to Article 9.3 of the Aarhus Convention, Member States must also ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of their national law relating to the environment. If one opts for judicial procedures, such procedures will, in most Member States, be the competence of the ordinary judiciary. Here we face similar problems of standing and the views taken by ordinary courts are often even narrower than those of the administrative courts. In some of our jurisdictions there is a wide access to civil courts, while in others (*e.g.* the Netherlands, Belgium and France) the legislator introduced special provisions to allow Environmental NGOs to ask for injunctions or even damages. But the impression remains that in the majority of the Member States the situation is far from satisfactory and that a legislative intervention is necessary if the courts cannot or are not willing to review their jurisprudence on standing<sup>59</sup>.

Finally, there is Article 9.4 and 9.5 which sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. These requirements are perhaps the most difficult of all to fulfil. In many Member States the judiciary faces a large backlog of cases. Waiting a long time for a final decision, in some cases more than 5 years, is an everyday reality in more than one jurisdiction. In such circumstances, only interim relief is an adequate solution, but unfortunately the conditions under which one can obtain interim measures are often very severe and not in accordance with the Treaty requirements. In other countries judicial procedures and lawyer's fees are very costly. These issues are difficult to solve by the courts themselves and raise more general questions of judicial management, State investment in the judiciary and appropriate legal aid schemes. A long-term work program seems necessary to solve these problems in an acceptable way. And of course these are cross-cutting issues that go far beyond the environmental sector.

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<sup>56</sup> Doc. Belgian Senate, 2006-2007, N° 3-1953/1.

<sup>57</sup> Doc. Belgian Senate, 2006-2007, N° 3-1953/7.

Doc. Belgian House of Representatives, 2008-2009, N° 52 1939/001.

<sup>58</sup> Opinion of the Council of State, N° 46.643/AG-AV, 9 March 2010, Doc. Belgian House of Representatives, 2009-2010, N° 52 1939/001.

<sup>59</sup> See: Milieu Environmental Law and Policy, *op. cit.*, p. 11-16.