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Your reference:
Our reference: 2024/157
Date: 21.05.2025
Publication no.: NIM-U-2025-001

REPORT

Norway and the Aarhus Convention

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1. Introduction

The Norwegian Human Rights Institution (NIM) is thankful for the opportunity to submit a report on Norway's implementation of the Aarhus Convention, in line with paragraph 7 of decision I/8 on reporting requirements.

NIM is the National Human Rights Institution of Norway,[1] and has a statutory mandate to protect and promote human rights, in line with the Norwegian constitution, the Human Rights Act, other legislation and international law.[2]

NIM has engaged and worked with several topics related to the Aarhus Convention, mainly providing legal analysis and advice to the authorities. Here we will focus on three topics, firstly the use of penalisation against environmental defenders, in section 3; the right to environmental information and public participation, in section 4; and the right of access to justice and prohibitively expensive legal costs, in section 5.

2. Interpreting the Aarhus Convention

As a treaty, the Aarhus Convention must be interpreted in line with standard methodology as expressed in the Vienna Convention on the Law of Treaties,[3] according to which a treaty shall be interpreted according to its "ordinary meaning (...) in their context and in the light of its object and purpose", see Article 31(1).

When interpreting the Aarhus Convention, account must therefore be taken of the specific context of that Convention, and its object and purpose. In that regard, the Convention sets out its own – and a very broad – purpose in Article 1, to:

> contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing

This is a recognition of the existence of a right, including for future generations, to a clean, healthy and sustainable environment.[4] This general purpose and right is operationalised through the three different pillars of the Aarhus Convention: (i) the right to environmental information; (ii) the right to participation; and (iii) the right to effective remedies and access to justice. These pillars, and thus the specific provisions and rights enshrined in the treaty, must be interpreted in light of the

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[1] NIM has 'A status' accreditation with the Global Alliance of National Human Rights Institutions (GANHRI), which means we comply with the requirements of independence, impartiality and integrity under the Paris Principles. See https://www.nhri.no/en/about/.

[2] See Act 22. May 2015 nr. 33, *Lov om Norges institusjon for menneskerettigheter (NIM-loven)*, Section 1.

[3] *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331.

[4] Also confirmed in recital 7.

broader right and purpose in Article 1.[5] This can be used to argue in favour of a *dynamic* interpretation and thus evolving the rights in the Convention, in the sense that the interpretation of the three pillars might change over time depending on what is necessary to best uphold the right to a clean, healthy and sustainable environment.[6]

The Aarhus Convention also establishes, in Article 15, the Aarhus Compliance Committee for "reviewing compliance with the provisions of this Convention", and the Parties have given this Committee the competence to review individual complaints. As the expert body established by the Parties to monitor compliance, its decisions are not legally binding, but they can still give important guidance on the interpretation of the Convention.[7] Furthermore, where the Aarhus Convention Meeting of the Parties has endorsed or made decisions in accordance with the views of the Committee, that could be considered *subsequent practice* under the Vienna Convention, which shall always be taken into account.[8]

Finally, the EU is a party to the Convention and has adopted legislation implementing the Convention. This means that there is extensive case-law from the Court of Justice of the European Union which directly or/and indirectly interpret the Aarhus Convention. While that court on its own does not have any authoritative role in interpreting the Convention, it could be considered a *supplementary means of interpretation*.[9] Despite these limitations, CJEU case-law is practically important due to the lack of other decisions or authoritative interpretations of the Aarhus Convention, and because the EU and its Member States make up over half of the State Parties.

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[5] As confirmed in recital 8.

[6] See for such an argument: Emily Barritt (2024) 'The Aarhus Convention and the Latent Right to a Healthy Environment' *Journal of Environmental Law 36*: 67–84, på s. 74. Such a view has also been advocated by the Aarhus Committee, stating that "concomitant implementation of the rights under the Convention, in general, should be strengthened over time", see *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 46.

[7] See the Opinion of AG Kokott in *FCC Česká republika*, C-43/21, EU:C:2022:425, para. 45 "The decision-making practice of the Aarhus Convention Compliance Committee (...) provides important guidance on the interpretation of that provision." Cf. also the statements of the ICJ on the UN Human Rights Committee, where «it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty», see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Report 2010, p. 369, para 66. Under the Vienna Convention (above), the Committee decisions would likely be considered a «supplementary means of interpretation» under Article 32.

[8] See the Vienna Convention (above), Article 31(3)(b).

[9] See the Vienna Convention (above), article 32 on "supplementary means of interpretation", and *Statute of the International Court of Justice* (1945), XV UNCIO 355, article 38(1)(d), on "judicial decisions" as a «subsidiary means for the determination of rules of law».

3. Penalisation of environmental defenders

3.1 Introduction

Under Article 3(8) of the Convention, Contracting Parties must ensure that environmental defenders are not penalised for exercising their rights in conformity with the provisions of the Convention.

This section of the report will discuss how penalties are typically applied under the Norwegian criminal justice system in cases where environmental defenders have, in pursuit of the objectives of the Convention, committed acts of civil disobedience or similar that are liable for criminal punishment. The goal is to analyse whether Norwegian law and practice in this area is consisted with Article 3(8) of the Convention.

This analysis is particularly relevant given the questions raised about Norway by the UN Special Rapporteur on Environmental Defenders under the Aarhus Convention, Mr. Michael Forst, and the ongoing dialogue with the Norwegian authorities.

Overall and on a general level, NIM believes that the Norwegian criminal justice system, the penalty levels and the way those are considered and applied by courts, are within the bounds of what the Aarhus Convention requires. The courts diligently evaluate the limits imposed by the rights to freedom of expression and assembly and association, and generally the penalty levels are low. However, the Aarhus Convention itself is usually not referenced by Norwegian courts in cases where it may be relevant. This could potentially affect how the courts interpret and balance relevant rights and interests in some cases. In particular, the provisions of the Convention concerning the right of present and future generations to a clean, healthy and sustainable environment and the protection of environmental defenders pursuing the public interest may not be given sufficient weight in such cases.

3.2 Regulation in Norway

3.2.1 General overview

Criminal penalties in Norway are regulated by the Penal Code,[10] whose framework also applies to criminal acts as set out in other laws, see Section 1. Though Norway has a *dualistic* legal system, whereby binding international conventions are not directly applicable, laws are generally assumed to be, and interpreted to be, in line with international obligations. According to Section 2, the Penal Code is also subject to the limitations that follow from international agreements. In other words,

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[10] Law No. 28, 20. May 2005, *Lov om straff* (straffeloven) – *The Penal Code*.

the Penal Code must be interpreted and applied in accordance with the provisions of the Aarhus Convention.

In the context of environmental defenders and civil disobedience, defendants are most commonly charged with violations of the following sections of the Penal Code: Sections 181 (disturbance of the peace), 267 (violation of privacy), 268 (unauthorised entry or presence), 351 (vandalism), 352 (aggravated vandalism), as well as Sections 5 and 30 (failure to comply with police orders) of the Police Act. A specific case (the *Monolith* case) also saw the activists charged with Section 242 of the Penal Code (cultural heritage crime). [11]

The criminal penalties for the civil disobedience cases examined by NIM include fines between 4 000 to 36 000 NOK (roughly 340 to 3050 EUR)[12], occasionally in conjunction with a suspended prison sentence in the range of 14 to 29 days. The penalties applied are relatively consistent across different cases, as the fines for various crimes that constitute civil disobedience are, for the most part, more or less standardised.

In certain circumstances, the Court has sentenced defendants to unconditional prison sentences[13] most notably in the *Monolith case*, in which the defendants were originally sentenced to 100 days in prison,[14] reduced to 36 days on appeal.[15]

3.2.2 Freedom of expression and assembly

Norway is bound by the European Convention on Human rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), which pursuant to the Human Rights Act[16] Section 2 and 3 have status as Norwegian law and, in case of conflict, have precedence over other legislative provisions. It follows that any criminal sanctions under Norwegian law must be applied in a way that does not unjustly interfere with the defendants right to freedom of expression or freedom of assembly and association.

In its jurisprudence on freedom of assembly, the Norwegian Supreme Court has acknowledged that civil disobedience – in the form of traffic blockades or sit-in protests – is protected under Article 11 of the ECHR.[17] Referencing *Kudrevičius and*

[11] TOSL-2023-193760. They were however acquitted on that point of the charge.

[12] Exchange rates as per 5. May 2025.

[13] TOSL-2024-109292; TOSL-2023-193760 (the *Monolith* case).

[14] See footnote above. This case is appealed and a decision is expected by the Borgarting Appellate Court shortly.

[15] Borgarting Appellate Court judgement of 15th May 2024, case number 24-102556AST-BORG/02.

[16] Law No. 30, 21. May 1999, *Lov om styrking av menneskerettighetenes stilling i norsk rett* (menneskerettsloven) – *Act relating to the strengthening of the status of human rights in Norwegian* Law (The Human Rights Act).

[17] HR-2022-981-A (XR-1) para 22; HR-2023-604-A (XR-2) para 29

others v. Lithuania, the court did, however, note that this form of protest is not at the core of the freedom protected by Article 11.[18]

Regarding the proportionality of the penalties imposed on protestors engaged in civil disobedience, the court stated that it must undertake to balance the rights to freedom of expression, assembly and association of people gathered in a public arena, with the interests prescribed in Article 11(2):

> Society must tolerate a certain level of disruption to daily life, and the authorities must demonstrate a degree of tolerance. In certain situations, this also implies that authorities should hold off from intervening immediately. However, the level of tolerance cannot be determined generally; it must be assessed case-by-case, particularly concerning the impacts of the disruptions. Where there is a risk to life and health, authorities can intervene immediately. Generally, there is a high threshold for an intervention against an action causing serious traffic disruption, which has not been notified and is contrary to national regulations, to be considered in violation of Article 11 of the European Convention on Human Rights (ECHR).[19]

In later judgments, the Supreme Court reiterated these principles for other forms of climate-related civil disobedience, including sit-in protests in government buildings and disruptions of debates.[20] A key part of the case-law of the Supreme Court under these provisions is that it does not consider or differentiate between protests and protestors based on their purpose or message, even if that message is one of environmental protection.[21]

3.2.3 Use of the Aarhus Convention in criminal cases

Although Article 3(8) is applicable to the determination of penalties under Norwegian criminal law, the Article is rarely used in Norwegian case law. NIM has analysed 53 cases dealing with environmental defenders and civil disobedience and

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[18] HR-2022-981-A para 22

[19] HR-2022-981-A para 34.

[20] See HR-2023-604-A (XR-2); HR-2024-144-U (XR-4)

[21] The Supreme Court has not directly considered the relevance of the *purpose*, but has not, in any case, adduced any weight to it and has stated in HR-2022-981-A (XR-1) para 64 that "[...] those who participate in peaceful demonstrations (...) will generally consider their demonstrations to have a worthy objective. Climate- and environmental questions are of particular importance (...), but freedom of expression determines that the imposition of penalties should not depend upon whether the Court is in agreement or disagreement with the political message of the action". (our translation). This was cited by the majority of the Appellate Court in LB-20204-79680 as meaning that Courts were prohibited from adducing weight to the message or purpose of a demonstration when considering the proportionality of penalties, whereas a (ruling) minority disagreed, but did so on the exceptional grounds of that case. The latter case has been accepted for appeal to the Supreme Court, see HR-2025-675-U, which might help clarify the law on this issue.

found only 3 explicit references to the Aarhus Convention. In two of those cases, the court rejected its applicability to the case at hand outright. Cases concerning penalties against environmental defenders are typically only discussed in relation to the rights to freedom of expression, assembly and association under the ECHR.[22]

In TOSL-2023-193760 (the *Monolith* case) the court stated the following regarding the applicability of the Aarhus convention: (our translation)[23]

> "The defence submits that A and B cannot be penalised according to the charges due to Article 3, number 8 of the Aarhus Convention of June 25, 1998, which states:
>
> "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..."
>
> The Court cannot see that the Aarhus Convention provides any protection beyond that of the Constitution and the ECHR. Moreover, the court cannot see that A and B's actions, which have been detrimental to the interests of third parties, constitute an exercise of rights "in conformity with the provisions" of the Aarhus Convention."

In the appeal of that case, the Appellate Court did not evaluate the Aarhus Convention in depth and simply stated that there was no basis for an interpretation granting more extensive protection than that offered by the freedom of expression, assembly and association.[24]

In a later judgement, the Oslo District Court came to a similar conclusion regarding the scope of the convention, vis-à-vis the right to freedom of assembly:[25]

> "The court concludes that imposing a short prison sentence will not constitute a violation of freedom of expression or freedom of assembly under Articles 10 and 11 of the European Convention on Human Rights (ECHR), as long as the sentence is otherwise proportionate, cf. HR-2022-981-A (XR-1).
>
> The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (Aarhus Convention) does not indicate a different conclusion in this case. The defendants did not exercise any rights under the Aarhus Convention during

[22] Cf. inter alia, HR-2022-981-A (XR-1); HR-2023-604-A (XR-2); HR-2023-976-U (XR-3); HR-2024-114-U (XR-4); HR-2024-471-U (XR-5); HR-2024-1097-U (XR-6); and HR-2024-2167-A (XR-7)

[23] TOSL-2023-193760, section 7.

[24] Borgarting Appellate Court judgement of 15th May 2024, case number 24-102556AST-BORG/02, section 3.5.

[25] TOSL-2024-109292

> the action, which regulates the public's right to access environmental information, decision-making processes, and legal remedies in environmental matters. They are not being penalized because of their involvement, cf. Article 3(8) of the Aarhus Convention. As mentioned, it is the manner in which the message was conveyed that the penalty is aimed at, not the content of the expression."

In these judgements, the Courts concluded that Article 3(8) did not apply to the demonstration, either assuming it does not apply to civil disobedience detrimental to the interest of third parties or assuming it does not apply beyond the exercise of specific Convention rights at all. The cases also seemed to assume that the Convention, in any case, did not give more wide-ranging protection than what follows from Articles 10 and 11 of the ECHR. The applicability of the Convention to determination of criminal penalties has not yet been tried by a Norwegian court of appeal or the Supreme Court.

3.3 Requirements of Article 3(8)

3.3.1 Scope of the prohibition

Article 3(8) of the Aarhus Convention states that:

> "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted, or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."

Both the English and French wording of the provision suggests immunity from punishment for certain actions taken by individuals in exercise of "their rights" (in French: *leurs droits*) when that is done "in conformity with the provisions of this Convention" (in French: *conformément aux*). However, the wording is ambiguous and raises interpretative challenges

In particular, the reference to "their rights" does not specify *which rights* these are. The wording does not contain any reference or limitation to only the specific rights set out in the Convention. On the contrary, it implies a protection of a broader set of "their rights" as long as they are exercised "in conformity with (...) this Convention". Taken literally, the wording has a potentially *very* broad scope of application, limited only by the *manner in which* the rights are exercised ("in conformity with").

Given the ambiguous and open wording, a more defined scope of application must be found by reading Article 3(8) in its context and in light of its object and purpose. On the one hand, Article 3(8) is found in Article 3, containing *general principles*, which could support an interpretation of it as a principle with more general application than the specific rights set out in Articles 4 to 9. If its only function were

to protect those specific rights, the inclusion of a general provision would be redundant, as criminalising the exercise of the rights in Articles 4 to 9 would inherently violate the rights themselves.

On the other hand, Article 3(8) is meant to achieve the overall *objective* of the Convention set out in Article 1 – to contribute to the right to live in an environment adequate for health and well-being. The Aarhus Convention is broadly based on the recognition that neither the environment nor future generations can vote, protest, or take legal action. Protection of the environment depends on the ability of the public to advocate on its behalf.[26] When members of the public do so, they do not act in self-interest, but, on the contrary, often take personal risks to protect the common interest in a healthy environment. Article 3(8) must be understood in this context, as one of several provisions recognising that individuals and organisations play a special role in the field of environmental law.[27]

Interpreted in this way, the scope of Article 3(8) likely extends somewhat beyond the specific procedural rights in Articles 4 to 9. However, it must remain anchored in the Convention's purpose and objectives. It seems likely that it protects against penalising the exercise of "their rights" (including *other* rights than set out in the Convention) when they are exercised in pursuit of the objectives of the Convention and fall within its thematic scope. For example, this could include more favourable rights protected under national law, or other rights related to and important for the exercise of the Convention, like the freedom of expression, assembly and association.[28]

The Aarhus Committee has adopted a similar interpretation. In a case against *Belarus*, the Committee did not limit the application of Article 3(8) to the specific rights in the Convention. Instead, it interpreted the provision as encompassing

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[26] See similarly in Advocate General Kokott's opinion in Edwards and Pallikaropoulos, C-260/11, EU:C:2012:645, paragraph 41: "the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations."

[27] See the Convention's preamble points 8 and 18 and Article 2(5). See also *Deutsche Umwelthilfe (Réception des véhicules à moteur),* C-873/19, EU:C:2022:857, paragraph 68, which states that "Imposing those criteria must not deprive environmental associations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest"; *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 34; *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, paragraph 74, which states that "[...] members of the public and associations are naturally required to play an active role in defending the environment."

[28] See for such an argument: Teresa Weber (2022) 'Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders' Review of European Community & International Environmental Law 32(1): 67–76, p. 72; Lien Stolle (2023) 'The need for protection of environmental defenders from digital intimidation: an analysis of Article 3(8) of the Aarhus Convention', *Opolskie Studia Administracyjno-Prawne 21(1)*: 199–219, section 5.2.

rights exercised within the Convention's thematic scope, even if those rights are not explicitly enumerated in the text:

> "The Committee considers that the rights referred to in article 3, paragraph 8, encompass the broad range of rights granted to members of the public by article 1 of the Convention, namely the rights of access to information, public participation in decision-making and access to justice (...) The exercise of these rights would include 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, but is not limited to them. Accordingly, the Committee finds that article 3, paragraph 8, applies to all situations in which members of the public seek access to information, public participation, or access to justice in order to protect their right to live in an environment adequate to their health or well-being."[29]

The Committee clarified in the same case that article 3(8) covers public gatherings or demonstrations, without relating it to the exercise of a specific Convention right:

> "The Committee considers that an authorized street action concerning an activity covered by the Convention, such as nuclear energy, constitutes a means through which the public can raise the awareness of public authorities and the wider public regarding their concerns about the potential environmental impacts of nuclear energy."[30]

The Committee has also, in other cases, considered that Article 3(8) extends and offers protection also *after* public participation has ceased,[31] and extends to a member of the public providing legal assistance to people exercising their rights in conformity with the Convention.[32]

The viewpoint of the Committee as expressed in the case against *Belarus* was endorsed by the Meeting of the Parties, which endorsed its conclusions, including

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[29] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus, UN Doc ECE/MP.PP/C.1/2017/19, para. 66;
[30] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus, UN Doc ECE/MP.PP/C.1/2017/19, para. 96. The Committee also considered that trying to petition the Russian embassy about the proposed construction of nuclear power plant was covered, see para 80.
[31] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2013/98 Concerning Compliance by Lithuania, UN Doc ECE/MP.PP/C.1/2021/15, para. 152. The overall conclusion was endorsed by the Meeting of the Parties in Decision VII/8l, (ECE/MP.PP/2021/2/Add.1), para 1(g).
[32] [32] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus, UN Doc ECE/MP.PP/C.1/2017/19, para. 80.

those that related to the street action or demonstration.[33] The subsequent practice of the Parties can there indicate that Article 3(8) has a wider scope, encompassing other rights than specifically those set out in the Convention articles 4 to 9, and at minimum at indicates that demonstrations and street actions as a form of public participation can be covered.

An interpretation of Article 3(8) as a more *general* provision protecting environmental defenders can also be supported by the fact that State Parties have established a rapid response mechanism in the form of an independent *Special Rapporteur on environmental defenders under the Aarhus Convention*, whose mandate is based specifically on Article 3(8).[34] However, the decision and mandate themselves do not actually interpret or clarify the limits of this provision.

In total, NIM is of the view that the wide (and somewhat unclear) wording, read in its context and in light of its wider objectives, along with the way it has been interpreted and practiced by the Committee and State Parties, indicate that Article 3(8) is a broader principle of non-penalisation for the exercise of rights, including *other rights*, that fall within the scope and purpose of the Convention – as long as those rights are exercised "in conformity" with the Convention.

The phrase "in conformity" essentially has the function of delimiting the reach of the non-penalisation principle, clarifying that certain manners of *exercising* "their rights" are not protected. The precise meaning of this term is not clear. NIM takes the view that its purpose is to clarify that some manners of action, or manners of exercising ones' rights, might be unacceptable – in light of the Convention – and should not be protected. It clarifies that the protection of Article 3(8) does not extend to all types of actions taken by environmental defenders.

The Aarhus Committee has not expressed any views on how far Article 3(8) extends to, for example, actions which could be considered civil disobedience. In one of the abovementioned cases, the Committee emphasised that the gathering was authorised by the state, which could imply that unauthorised or illegal actions were not protected.[35] However, the Committee only mentioned that as a factual element of that case. In our view, it would be difficult to argue that civil disobedience should be *automatically* excluded from the protection of Article 3(8), regardless of any assessment of the why the action is unlawful, or of its actual consequences. Such

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[33] See the Meeting of the Parties, Decision VI/8c, ECE/MP.PP/2017/2/Add.1, para 4(e).

[34] See the Meeting of the Parties, Decision VII/9 *on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, ECE/MP.PP/2021/2/Add.1, and the annexed mandate.

[35] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus, UN Doc ECE/MP.PP/C.1/2017/19, para. 96

an interpretation would allow states to circumvent their obligations under Article 3(8) by simply refusing to approve actions or prohibiting any behaviour they deem undesirable, which would undermine the purpose of both that provision and the Convention more broadly. In legal theory, it has therefore been argued that Article 3(8) should not automatically exclude civil disobedience.[36]

In some cases, depending on the state of facts and law in the relevant state, civil disobedience might very well be both a necessary and/or efficient way of achieving the objectives of Article 1. On the other hand, some manners of exercising civil disobedience, which cause damage to individuals and their interests, will clearly be contrary to the objective in Article 1 which focuses on the rights of persons to an environment adequate to their "health and well-being". The Aarhus Convention must also be read with in line with other relevant agreements between the Parties, which does not support a reading of the principle of non-penalisation that protects damage against rights that the Parties have agreed to protect in other instruments.

As will be discussed below in section 3.3.2, the *material content* of Article 3(8) allows for considerations of the proportionality of penalties. This suggests that the penalisation of civil disobedience should be dealt with as a *material* question of proportionality rather than a question of the *scope* of protection.

Overall, it is our view that Article 3(8) must be interpreted on the basis of its potentially broad wording and in line with the purpose of the Convention to cover all forms of public participation intended to uphold the right to a healthy environment in Article 1. In our view, this can include civil disobedience. However, given the limited case-law, it is hard to precisely delimitate the scope of application, especially in relation to civil disobedience that actively harms rights set out in other instruments, or other important interests. In any event, unlawful acts are generally only protected under the rights to freedom of expression, assembly or association if they are exercised peacefully and in a non-violent manner.[37]

3.3.2 Material content

According to Article 3(8), persons exercising their rights in conformity with the Convention "shall not be penalized, persecuted or harassed in any way for their involvement". This indicates an absolute rule against any form of penalisation

[36] Teresa Weber (2022) 'Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders' Review of European Community & International Environmental Law 32(1): 67–76, pp. 72–73

[37] See for example UN Human Rights Committee, General Comment No. 37 (2020); ECtHR, *Éva Molnár v. Hungary* (10346/05) 07.10.2008; *Taranenko v. Russia* (19554/05) 13.10.2014.

which, in a legal context, would likely refer to any criminal liability where a punishment can be imposed.

However, it is only rights exercised "in conformity with the provisions of this Convention" that cannot be penalised. As argued above – that should, in terms of scope, be interpreted broadly and not to the exclusion of environmental defenders exercising other rights.

That said, even if the exercise of a right as such falls within the scope of the Convention (as being "in conformity" with the Convention), the *manner in which that right is exercised* could be not "in conformity" with the Convention. This implies a possibility for states to penalise certain *manners of exercising a right*, even for rights that fall within the scope of the Convention and are protected by Article 3(8). As long as the rights can be effectively exercised with the choice of a different *manner of conduct*, it can be argued that it does not constitute punishment of "exercising their rights in conformity with the (...) Convention". The wording of Article 3(8) therefore allows for a certain *balancing*, where some manners of exercising one's rights can be considered not in conformity with the Convention.

Such balancing is common in other instruments that are binding between the parties, where a *proportional* interference with a right, in pursuit of a legitimate objective, is not seen to violate that right. In this sense it can be argued that actions involving disproportionate damage to another legitimate objective should not be considered "in conformity with" the Convention. This would allow Contracting Parties to penalise the actions of environmental defenders *in so far as it can be justified as a proportionate pursuit of a legitimate objective*.

This is the view also taken by the Aarhus Convention Compliance Committee, though on a *somewhat* different basis. They have taken the view that:

> Whether the treatment complained of amounts to penalization, persecution or harassment must be assessed on a case-by-case basis in 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 (...).[38]

Given this interpretation, Article 3(8) becomes similar, at least when applied to demonstrations and actions of civil disobedience, to the general protection offered

[38] ACCC, Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus, UN Doc ECE/MP.PP/C.1/2017/19, para 69.

by freedom of expression, association and assembly as enshrined in Articles 10 and 11 of the ECHR, which also allow restrictions that pursue a legitimate objective and are “necessary in a democratic society”.

That said, and even if both sets of rules essentially allow for a balancing test, article 3(8) may offer protection beyond what follows from the rights to freedom of expression, association and assembly. When the Aarhus Convention was negotiated, the parties were already bound by these obligations under Articles 10-11 of the European Convention on Human Rights (ECHR) and Articles 19-22 of the International Covenant on Civil and Political Rights (ICCPR). The Aarhus Convention acknowledges that individuals and organisations must play a special role in environmental protection, beyond what is applicable in other areas of society. This also entails recognition that environmental interests can be unpopular and controversial to advocate for, both democratically and economically, and those who do so must therefore have special protection against sanctions.

In this context, it could be argued that the Convention's system and purpose imply that Article 3(8) is intended to provide specific protection in environmental matters, and that both the wording, system, and purpose indicate that it provides greater protection for environmental defenders against penalties than what follows from the general rights to freedom of expression, association and assembly.

As the Aarhus Convention also allows for a balancing test including a proportionality assessment, NIM assumes that a possible difference between the tests can be found in the threshold and in the factors that are relevant for the balancing. Regarding the threshold, the wording of Article 3(8) sets out a clear premise of non-penalisation (“shall not be penalised”), which could indicate a heightened threshold. Regarding balancing, the Aarhus Convention pursues a specific objective, as set out in Article 1 of the Convention. Factors relating to achieving that objective could be relevant in the balancing. These include, for example: the relevance and importance of what is being protected, the fact that the environment cannot protect itself, how effectively the chosen form of activity contributes to environmental protection, and the potential chilling effect penalties may have on environmental defenders in general, in light of their special importance in the environmental area.

This can distinguish Article 3(8) from the more general protection offered by freedom of expression, association and assembly, which are more value- and content neutral and do not, as such, have a specific purpose of actively recognising or encouraging speech or actions taken in defence of one particular right.

3.4 Norwegian compliance with article 3(8)

NIM is of the opinion that that the criminal penalties for climate related civil disobedience generally fall within the margin afforded by the proportionality requirement that may be implied by the Aarhus convention, while also not, *generally*, being arbitrary or unforeseeable.

Within the domestic Norwegian context, penalties in the range of 8 000 to 36 000 NOK are relatively small, and our analysis indicates that the courts are hesitant when it comes to imposing unconditional prison sentences in civil disobedience cases. As the range of fines imposed for offences related to civil disobedience, such as failure to obey police orders, traffic disturbances and disturbances of the peace are more or less standardised, this ensures that the penalties generally are not arbitrary or unforeseeable.

One outlier is the Monolith case, in which the court imposed an unconditional prison sentence of 100 days for both defendants. The court also rejected the applicability of the Aarhus convention. That sentence was reduced to 36 days on appeal[39]. The case demonstrates some legal uncertainty regarding how strict liabilities can be imposed, which indicates some legal risks, but overall lands on a level that seems compliant with Article 3(8) and in line with previous cases.

On the level of the *regulatory framework*, even if the level of penalties imposed generally seems low, NIM still finds it unfortunate that article 3(8) in general is not taken into account in or discussed by the courts in civil disobedience cases pertaining to protection of the environment. It would appear that both the government and the courts in Norway seem to assume that peaceful demonstrators using civil disobedience are not covered by the provision, and that they interpret the provision as providing no protection beyond the general freedom of association. NIM has urged the authorities to monitor developments in case law and, on this basis, assess whether measures are needed to ensure that Norway adheres to its obligations under the Aarhus Convention.

This lack of considering article 3(8) can have practical consequences, because the proportionality test required under article 3(8) necessarily differs from the one conducted under the freedom of association. The former specifically acknowledges the purpose of upholding the right to an environment adequate for the well-being of persons and future generations, and the central role environmental defenders play in attaining that objective. The Aarhus Convention is, then, by definition, not *content neutral* – it acknowledges and protects a specific type of expression and assembly. The latter, on the other hand, is *content neutral* and does not allow for the

[39] Borgarting Appellate Court judgement of 15th May 2024, case number 24-102556AST-BORG/02.

differentiation between the objectives and purposes pursued by subjects exercising their rights.

In practice, therefore, NIM assumes that in specific cases the differing tests might lead to different results. This means that even if the *general level* of penalties seems in compliance with the Aarhus Convention, the *legal framework* applies a test which does not accurately acknowledge the importance, purpose and object of environmental defenders, as required by the Aarhus Convention. NIM would like to point out the risk that decisions made by the authorities or the courts could come to be found in breach of the Convention.

4. Environmental information and public participation

4.1 Introduction

In this section, NIM will set out some of the general requirements under the Convention, in section 4.2, and then discuss some potential issues for Norway in section 4.3.

4.2 General requirements under the Convention

Article 4 of the Convention regulates “access to environmental information”, article 5 regulates “collection and dissemination of environmental information”, and article 6 regulates “public participation”.

Access to environmental information is a central pillar in order to achieve the objective in article 1, to protect the right of present and future generations to live in an environment adequate to their well-being.[40] Environmental information is a precondition for all the other rights granted by the Convention, and for even being able to consider the status of the general objective in article 1.

Given the interconnectedness with environmental information and the other rights, in particular articles 4, 5 and 6, which form a coherent and integrated framework. Article 4 secures the right to access information, article 5 ensures that the relevant authorities actually possess the relevant information and establish systems for the effective dissemination of it, whereas article 6 ensures the right to participate on that basis and acknowledges, in article 6(6), the necessity of good environmental information for participation.[41]

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[40] Compare, *Communication ACCC/C/2017/147, Moldova,* ECE/MP.PP/C.1/2021/30, para 85.

[41] See *Communication ACCC/C/2013/90, United Kingdom,* ECE/MP.PP/C.1/2021/14, para 79(c), stating that failure to provide environmental information relevant to decision making in order to participate effectively in that decision making is a question for article 6(6).

The articles require relevant authorities to possess environmental information relevant to their functions,[42] to the decision-making processes the public participate in,[43] and in general to make that information available to the public. The government is only obliged to provide the information and the best available knowledge it possesses, including where necessary its interpretation of that information. It is not a breach of the Convention if it turns out that some of the information or its interpretation was less accurate or incomplete in hindsight, as long as the government did not knowingly provide inaccurate or incomplete information.[44] That said, the *amount* of information is not usually a relevant reason to not have or provide information – the state has many practical options for handling large amounts of information.[45]

Articles 4(3) and 4(4) provide for a list of exemptions for types of information not covered by a right to access. Article 4(4) states explicitly that the exemption is to be interpreted restrictively, taking into account the public interest served by disclosure. The Committee has confirmed that this is a general principle of legal interpretation, also applying, for example, to the exemptions in Article 4(3).[46]

4.3 Areas of concern for Norwegian compliance

4.3.1 Earlier complaint against Norway and its follow-up

NIM notes that the Compliance Committee has only considered one case against Norway. The case concerned access to environmental information,[47] specifically Norway's refusal to disclose an analysis of international law and the necessity for amendments to the Nature Diversity Act in relation to its applicability outside of Norway's territorial sea. Norway claimed that this request fell outside of "environmental information" and, regardless, constituted "internal communications".

In its draft report on the implementation of the Aarhus Convention, the Norwegian Government states that the Committee found the government's position in this case to be in accordance with the Convention, a conclusion that was also endorsed by the Meeting of the Parties.

However, as far as we can determine, this characterisation is only accurate with respect to the *substantive rules* on access to and disclosure of environmental information. The Committee did, in fact, find a violation of Article 9(1) and (4) due to

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[42] Article 5(1)(a) of the Convention.

[43] Article 6(6) of the Convention

[44] *Communication ACCC/C/2009/44, Belarus,* ECE/MP.PP/C.1/2011/6/Add.1, para 67.

[45] *Communication ACCC/2004/3, Ukraine*, ECE/MP.PP/C.1/2005/2/Add.3, para 33.

[46] See *Communication ACCC/C/2010/51, Romania*, ECE/MP.PP/C.1/2014/12, para 83.

[47] *Communication ACCC/C/2013/93, Norway*, ECE/MP.PP/C.1/2017/16.

the *excessive delay* in handling the request, including time spent on a complaint to the Parliamentary Ombudsman and a subsequent reconsideration. The Committee specifically noted an 11-month delay by the Ministry in reconsidering its decision, followed by an additional delay of nearly 8 months before the Ombudsman issued its conclusion.[48] Because the Committee did not have evidence showing that this was a *systemic* issue, it did not present any general recommendations. The Meeting of the Parties just *further noted* that Norway had failed to comply, but that no general recommendations had been made.[49]

That said, the Committee noted that if Norway routinely denied access to relevant assessments (legal, environmental, technical or otherwise) by referring to them as internal communications, that could very well constitute non-compliance with article 4(1).[50]

NIM cannot see that the government has addressed the substance and implications of this complaint, and in its draft report it does not comment on whether the time taken to consider the complaint represented a systemic issue or a one-off problem, nor how it potentially has been rectified. The report also does not address the remark of the Committee that, if the practice of such denial were done routinely, it could amount to a breach. NIM does not have data on how often access to environmental information is being denied by referring to it as internal communications.

Given the lack of information in the draft implementation report, and the lack of information regarding the general practices here, there may be a *risk* of non-compliance in this area.

4.3.2 Lacking information on the state of Norwegian ecosystems

Article 5(1)(a) requires the public authorities to "possess and update environmental information which is relevant to their functions". Article 5(1)(b) requires the establishment of mandatory systems to ensure an adequate flow of information to public authorities about activities which may significantly affect the environment. Article 5(4) foresees that the Parties should, at regular intervals, publish and disseminate a national report on the state of the environment, including on the quality of the environment.

It is unclear how far these obligations require the state to have a more general overview and systematisation of the state of its nature and ecosystems. The

[48] *Communication ACCC/C/2013/93, Norway*, ECE/MP.PP/C.1/2017/16, paras 87–92
[49] Report of the sixth session of the Meeting of the Parties, *decision VI/8 General issues of compliance*, ECE/MP.PP/2017/2/Add.1, para 11.
[50] *Communication ACCC/C/2013/93, Norway*, ECE/MP.PP/C.1/2017/16, para 72.

Committee has confirmed that "environmental information which is relevant to their functions" for a public authority engaged in decision-making regarding wind energy may include data concerning CO2-reductions.[51] The Committee has also confirmed that detailed and reliable data on the impact of a project on the environment, including on protected species and unique landscapes, are important to ensure public participation in line with Article 6(6)(b) and (e).[52] To our knowledge, the Committee has not commented on the degree to which authorities are obliged to have holistic ecosystem data, but given the interconnectedness of ecosystems it seems hard to comply with the abovementioned requirements without such data.

In the Norwegian context, both the Ministry of Climate and Environment and the Parliament have indicated that there is a lack of comprehensive information on the state of Norwegian ecosystems and the extent to which they have deteriorated.

This is clear from a parliamentary plenary decision in 2016, requesting that the government clarify which ecosystems were considered to be "in good condition", which were degraded, and to identify measures ensuring the restoration of 15 % of degraded ecosystems by 2025.[53]

The Ministry only followed up on that in 2024, in a white paper on the use and conservation of Norwegian nature,[54] which was also intended to follow up the target of restoring 30 % of degraded ecosystems by 2030 in the *Kunming-Montreal Global Diversity Framework*.[55] The white paper essentially acknowledges that Norway does not have sufficient information on which ecosystems are degraded.[56] The Norwegian goal for 2030 was therefore only to clarify "the extent of degraded and damaged areas in Norway".[57] NIM questions why, given a seemingly unanimous agreement on the problem, it has taken (and will take) so long to produce such data.

The lack of comprehensive information on the state of Norwegian ecosystems makes it difficult for the public to participate in environmental decision making and for institutions like NIM to assess whether legal requirements have been fulfilled, for example under Section 112 of the Norwegian Constitution on the right to a healthy

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[51] *Communication ACCC/C/2012/68, European Union and United Kingdom*, paras 85–88 and 91.
[52] *Communication ACCC/C/2013/98, Lithuania*, ECE/MP.PP/C.1/2021/15, paras 126–127
[53] Parliamentary decision 669, session 2015–2016, as a part of the consideration of Meld. St. 14. (2015-2016) *Natur for livet*, a previous white paper on the status of nature in Norway.
[54] See Meld. St. 35, *Bærekraftig bruk og bevaring av natur*. They formally answered it in the Ministry of Climate and Environments section of Prop. 1 S (2022–2023), but there they essentially refer to the work that ended up as the mentioned white paper.
[55] See the *Kunming-Montreal Global Biodiversity Framework*, annexed to *decision 15/4* adopted by the Conference of the Parties to the Convention on Biological Diversity, CBD/COP/DEC/15/4, section H, target 2.
[56] Meld. St. 35, *Bærekraftig bruk og bevaring av natur*, s. 93 (our translation).
[57] Meld. St. 35, *Bærekraftig bruk og bevaring av natur*, s. 97 (our translation).

and diverse environment. On a general level, the lack of information makes it difficult to examine how the government's environmental policy is working and what is being achieved, and to have any basis for knowing whether existing plans and frameworks are adequate. On a concrete level, it is difficult to critically assess the environmental impacts of a specific project without general information on the state and context of the ecosystems it exists in. Ecosystems can therefore be destroyed gradually in a piecemeal manner, because every individual decision or project involving degradation of ecosystems fails to consider broader cumulative impacts.

4.3.3 Policy on management of large predators set without public participation

Article 6(1)(b) of the Convention states that the rights of public participation apply to all activities which may have a "significant effect on the environment". The general purpose of that Article is to help uphold the right, in Article 1, to an environment adequate to the well-being of the present and of future generations. Public participation in environmental processes helps to ensure transparency, accountability, and the flow of information to and from the government.

In our consultations with civil society, NIM has been made aware that the policy basis for the management of large predators[58] was set, as far as we understand, without any public participation.

The management of large predators is a controversial topic in Norway, both factually, legally and politically, and involves the balancing of different interests and different legal regimes.

The predator management policy is to a large degree based on the principles and goals set out in a parliamentary *plenary decision* from 2011 setting out 48 principles on which the executive is to base its policy, including specific numeric targets for the main large predators. These were negotiated and decided amongst a coalition of parties in Parliament, without the usual practice of holding hearings or inviting public participation in that process.[59] The lack of public participation in these management principles has flow-on effects for subsequent administrative decisions concerning predator management.

NIM recognises that there must be leeway, including under the Aarhus Convention, for regular parliamentary work and the possibility of achieving compromises. Yet,

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[58] Large predators refers, in this context, to the lynx, wolverine, wolf and bear.

[59] See the issue connected to the proposal Dokument 8:163 S (2010–2011) *Representantforslag om endringer i forvaltningen av rovvilt*, resulting in Decision No. 687, 17. June 2011 (session 2010–2011).

we question whether it is fully consistent with the Convention that the Parliament adopts principles which will be used in all relevant administrative decisions, without having ensured public participation.

4.3.4 *Partial* access to environmental information contained in documents also containing exempted information

According to Article 4(6) of the Convention, if a document contains the exemptible information listed in Articles 4(3)(c) or 4(4), as a general rule, it should be *redacted* or separated out in another way and the rest of the document should be provided.[60]

Based on the statistics in the government's draft report on the implementation of the Aarhus Convention, access is fully granted in roughly 73% of cases, partially granted in 5% of cases and denied in 22% of cases. NIM notes that the low percentage of partially granted access and the high percentage of denials might indicate that the government is not properly considering article 4(6) of the Convention. NIM notes that refusal to disclose is an *exception* to be interpreted narrowly, and when done, refusal should be limited only to the necessary information only.

4.3.5 Difficulties of accessing information, and of participating in decision making, in the forestry and logging sector

Articles 4 and 5 set out broad requirements for collecting, disseminating and accessing environmental information. This includes, for example, in Article 5(3), making sure that such information "progressively becomes available in electronic databases which are easily accessible to the public". The Committee has taken a strict view on what "easily accessible" requires in previous cases.[61] These duties primarily concern the *state*, but article 5(6) also requires states to encourage the private sector to regularly inform the public about the environmental impact of their activities.

Access to such information is central to public participation. Article 6(1)(b) of the Convention states that the rights of public participation apply to all activities which may have a "significant effect on the environment". It is clear from Article 6(6) of the Convention that access to information must be available "at the time of the public

[60] *Communication ACCC/C/2014/118, Ukraine,* ECE/MP.PP/C.1/2021/18, para 109. See also the endorsement and recommendation by the Meeting of the Parties in Decision VII/8r, ECE/MP.PP/2021/2/Add.1), para 1(a) and 2(a).
[61] See for example *Communication ACCC/C/2015/131, United Kingdom*, ECE/MP.PP/C.1/2021/23, paras 102–103, where it was not sufficient that the information could be found in some meeting protocols available online, if there was no guidance making it obvious that this was where the information would be found. See also *Communication ACCC/C/2009/36, Spain*, ECE/MP.PP/C.1/2010/4, para 57, where the Committee stated that the state had a duty torespond individually, at minimum by referring the people asking to the correct website where the information is public.

participation procedure", with Article 6(4) stating that "Each Party shall provide for early public participation". The Committee has found a breach of Article 6(6) where access to a report was not granted *prior* to the decision to grant a planning permission.[62]

NIM notes that the forestry and logging sector in Norway is largely comprised of private parties and it is their obligations to collect, disseminate and provide access to certain information that is in question. Where the state relies on the private sector collecting and disseminating certain information, and delegates certain responsibilities and/or decision-making to such actors, these private actors should be taken into account in the evaluation of the compliance with the Convention. NIM would like to point out that the state is responsible for creating rules for private actors that ensure compliance with its obligations regarding access, collection and dissemination of information.

Based on our discussions with civil society in the writing of this report, there appear to be far-reaching problems regarding access to information and participation with regard to the forestry and logging sector. Problems that have been raised include the following:

Firstly, land owners generally have a right to conduct logging, with no obligations concerning public notification or consultation, but rather a system based on self-review and consideration of environmental values before logging.[63] This makes it particularly difficult to know the extent of logging plans and to participate in that process.

Secondly, even for logging areas where there are notification or application obligations, there are instances of the requirements being breached without any consequences. Applications are rarely publicised in anything but public post journals, and even there with no standardised wording or marking. In practice, this makes it hard to participate, complain or raise concerns even in instances where notifications or applications are required.

The concerns raised by civil society are echoed in a report on illegal forestry and logging published by the National Authority for Investigation and Prosecution of

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[62] *Communication ACCC/C/2013/90, United Kingdom*, ECE/MP.PP/C.1/2021/14, paras. 97. See also the endorsement and recommendations by the Meeting of the Parties in Decision VII/8s, ECE/MP.PP/2021/2/Add.1, para 3(a) and (b), and 4(a).

[63] This industry standard is also enshrined in delegated regulations, see Act no. 31, 27. May 2005, *Lov om skogbruk (skogsbrukslova)*, and Regulation 7. June 2006 nr. 593, *Forskrift om bærekraftig skogbruk*, section 4. The latter obliges land owners to either register the environmental interests in an area, or apply the *precautionary* measures set out in the industry's own voluntary standard.

Economic and Environmental Crime (*Økokrim*) in late 2023. The report describes, among other things, breaches of both substantive and procedural rules, and notes that even well-reasoned and substantiated complaints, concerns or reports from environmental defenders often are ignored.[64]

The National Audit Office pointed out already in 2012 that the mechanisms for ensuring compliance in the forestry sector were insufficient, and that the system of self-review rarely worked well in practice.[65]

A Norwegian professor of environmental law, Ole Kristian Fauchald, has also stated that those affected by forestry and logging have "limited access to information and few possibilities of participation".[66] NIM notes that this general view is backed up by other types of research, indicating that those who are not land-owners have fewer opportunities for participation in decision-making regarding forests in their municipality.[67]

These hindrances to participation are further compounded by the significant time and cost barriers that can exist to even *accessing* the relevant information needed. For example, in one case the Nature Conservation Association (*Naturvernforbundet*) had requested information from the logging company *Nortømmer* on 22 June 2024, which was denied on 5 July. On 15 July, a complaint was lodged with the Environmental Information Complaints Board, which rendered its decision three and a half months later, on 28 November, siding with the complainants. However, Nortømmer did not comply and in a letter dated 11 April 2025, sought a *reconsideration* of the previous decision. They did also signal that the case will be taken to court if not overturned by the Complaints Board. If such disputes are taken to court, it is the complainant and logging company that are parties before the Court – not the company and the state.[68]

This case illustrates that even a simple request for information could potentially take well over a year for a final decision at the Complaints Board. The long

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[64] Økokrim (2023), *Temarapport – Ulovleg hogst*.

[65] Riksrevisjonen, Dokument 3:17 (2011-2012) *Riksrevisjonens undersøkelse av bærekraftig forvaltning av norske skogsressurser*. See for the latter, also, Økokrim (2023), *Temarapport – Ulovleg hogst*. Stokland m.fl. (2023) 'Warranty for a better world? The politics of environmental knowledge in bioeconomic sustainability certificates' *Ambio 52: 1056–1064*, s.1059 til 1061, peker på at selvreguleringen har "ended up favoring forestry concerns over environmental ones".

[66] See Ole Kristian Fauchald (2022) 'Er norsk skogslovgivning utdatert?' *Norsk skogbruk nr. 10/2022*.

[67] See Helseth m.fl. (2023) 'Value asymmetries in Norwegian forest governance: The role of institutions and power dynamics *Ecological Economics 214, 107973*.

[68] Regulation 14. December 2003 nr. 1572 *Regulation on the Environmental Information Complaints Board* section 10 states that it is the complainant and the party which the complaint concerns that are the parties in a dispute before the Courts, such that it is the complainant and not the state that face the prospects of court disputes.

processing times could render the right to access to environmental information ineffective, and information will in many instances be given too late to ensure actual compliance or to be of any help for the public in their efforts to participate in decision-making.

The threat of prohibitively expensive court proceedings to further prolong the delay, where the complainants will risk being held liable for both their own costs and those of the company if they lose (see section 5) is likely to add an additional chilling effect.

A previous complaint that the Nature Conservation Association won before the Complaints Board was appealed all the way to the Supreme Court. The procedure lasted from 2005 to 2010, with over 60000 EUR[69] in costs on the side of the Association, and a risk of being held liable for likely a comparable sum on the other side if they had lost the case.[70]

In sum, NIM is concerned that access to environmental information in the forestry and logging sector may be ineffective given the delays and obstacles in accessing information and the prohibitive costs and lengthy court proceedings involved. In practice, it is only the very largest civil society associations that can withstand these barriers, and only in a few principled cases.

5. Access to justice and prohibitively expensive remedies

5.1 Introduction

Access to justice is the third pillar of the Aarhus Convention, as enshrined in Article 9, which is necessary to protect the right to an environment adequate for health and wellbeing in article 1. According to Article 9(4):

> (...) the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair equitable, timely and not prohibitively expensive. (...)

The Norwegian system ensures, in many ways, broad access to justice for individuals and NGOs affected by, or working with, environmental and climate-related issues. However, a recurring concern has been high legal costs, combined with rules offering low foreseeability for costs, and a lack of alternatives to litigation with few possibilities for receiving legal aid.

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[69] Inflation adjusted and by currency exchange rates as of 8. May 2025.

[70] See HR-2010-562-A. The Nature Conservation Association won on all counts and were therefore *awarded* costs in that case, but that is obviously an uncertain outcome and a huge risk, liable to have a chilling effect.

Section 5.2 will set out the Norwegian regulatory framework for legal costs, including the (low) relevance and use of the Aarhus Convention in this field so far. Section 5.3 will set out our interpretation of Article 9(4) and what the Convention means by “prohibitively expensive” costs. Section 5.4 will examine whether the Norwegian regulatory framework is consistent with Article 9(4).

5.2 Norwegian regulatory framework for legal costs

5.2.1 The general framework

Legal and litigation costs are generally high in Norway, a problem acknowledged by both the Expert Committee and the Ministry of Justice during the drafting of the current Norwegian Disputes Act.[71]

The Disputes Act regulates civil cases and dates from 2005.[72] The rules for legal costs are outlined in Chapter 20. The stated goal is for these rules to be easy to understand and predictable, but at the same time fair and reasonable.[73]

Each party is responsible for providing a detailed statement of legal costs and must make a claim for award of compensation of costs for the judge to consider it.[74] These costs include fees to the state, the party's own expenses, attorney fees, and any expenses related to experts. The attorney's fees are usually the highest single item. The general rule is based on the principle of "loser pays", where the successful party is entitled to full compensation for their legal costs.[75] A party is considered “successful” when the court finds in their favour “in the whole or in the main”, as defined in section 20-2(2). Occasionally, a party can be awarded costs where even where the court only found partly in their favour.[76] The court can also, occasionally, exempt the opposite party from liability for legal costs under section 20-2(3), if “compelling grounds justify exemption”.[77] The threshold for this is high.[78]

The costs that can be awarded cover “all necessary costs incurred by the party”, limited by those costs having to be *reasonable*.[79] In practice, the level of “necessary costs” can be high. In our own analysis of a set of 30 available environmental cases (from 16 different disputes) we identified eight cases where the applicants

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[71] NOU 2001: 32 A, *Rett på sak – Lov om tvisteløsning (tvisteloven)*, p. 547; Ot.prp. No. 51 (2004-2005), p. 42–43.
[72] Act no. 90, 17th June 2005, *relating to mediation and procedure in civil disputes (The Dispute Act)*.
[73] See from the preparatory works: NOU 2001: 32 A, *Rett på sak – Lov om tvisteløsning (tvisteloven)*, p. 531.
[74] See the Dispute Act, section 20-2(1), and from case law, HR-2008-112-U, para 15.
[75] See section 20-2(1).
[76] Where there are “compelling grounds for doing so, see section 20-3.
[77] The court considers whether there was a just court to have the case heard, whether the successful party can be reproached for bringing the action or rejecting a settlement, and whether the case is important to the welfare of the party and the relative strength of the parties, see section 20-2(3) (a) to (c).
[78] See from the preparatory works, Ot.prp. No. 51 (2004-2005), p. 444.
[79] See section 20-5.

representing the public had been held liable for legal costs.[80] The lower amount was € 1216 and the highest amount was € 124 700, with a median of € 20 264.[81] While this is a non-representative handful of cases, it illustrates the high level of costs that can be imposed on the losing party can be high, which come in addition to that party's own – and often high – legal fees.

In other words, Norway uses a "loser pays" system as its baseline for cost allocation, with certain exemptions that can go both ways and the possibility for the judge to deem some costs unnecessary. On the one hand it can encourage access to justice by allowing successful parties to recoup their costs, but on the other hand the unpredictable and potentially very significant litigative costs heightens the risk. The system leaves a lot of discretion to the individual judge called upon to decide whether costs should be awarded, and the level of costs to be awarded.

5.2.2 Application of the Aarhus Convention by Norwegian courts

In Norway there are no specific tribunals, courts or procedural rules solely for environmental cases. Like all civil cases, they are governed by the Dispute Act. Norwegian law is *presumed* to be in accordance with international law, and is interpreted in line with it as far as possible ("the principle of presumption"). The Dispute Act also has a specific reservation in Section 1-2 stating that the act only applies subject to such limitations as are recognised in international law.

It was presumed at the time of transposing the Aarhus Convention that the level of legal costs in Norway did not violate the Convention, and that the existing rules on civil procedure provided room and leeway for an interpretation in compliance with the Convention.[82]

Courts have not extensively engaged with the Convention, so the limits of what can be achieved by an interpretation of the Dispute Act in line with the Convention have not been clearly tested. Recent years have seen an increased use of the Convention, especially following a Frostating Appellate Court decision from 2021, where it was clarified that the Aarhus Convention and its rules were relevant for the consideration of whether there are "compelling grounds" to not award full

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[80] See (in Norwegian), NIM-B-2024-009, *Sakskostnader og reell tilgang til domstolene i miljøsaker*, annex. Available here: https://www.nhri.no/2024/sakskostnader-og-reell-tilgang-til-domstolene-i-miljosaker/.

[81] All numbers are inflation-adjusted to 2024 NOK and converted at current (11. February) exchange rates to EUR.

[82] See the preparatory works to the Act No. 31, 9th May 2003, *on the right to environmental information and participation in public processes of relevance to the environment (Environmental Information Act)*, Ot.prp. No. 116 (2001-2002), p. 137, section 18.6.1. The legislation department considered in JDLOV-1998-4839 that the threshold was high for costs being considered "prohibitively expensive", and regardless that the discretionary rules on awarding legal costs could be interpreted in line with the Aarhus Convention if and where necessary.

compensation of costs under the Dispute Act, section 20-2(3).[83] The case was sent back to the District Court, who interpreted the Aarhus Convention as setting a sort of “cap” or upper limit on legal costs, and lowered the awarded costs from 1.2 million NOK (around 103 000 EUR) to 450 000 NOK (around 38 500 EUR), not adjusted for inflation.[84] This is the case which has given the most weight to the Aarhus Convention. The applicants in that case had already been held liable for over 100 000 EUR for losing a temporary injunction,[85] meaning they were held liable for roughly 140 000 EUR of legal costs in a single environmental dispute.

In a later case, the Oslo District Court referred to the same Appellate Court decision as a basis for lowering the costs from 1.7 million NOK (around 146 000 EUR) to 1.4 million NOK (around 120 000 EUR). More principally, the Court took the view that a Convention-compliant practice could be achieved within existing rules and that the *general* level of costs was not so high as to exceed the requirements of the Convention.[86] The Court did the same in a later case, where it reduced the imposed costs from 688 805 NOK (around 59 100 EUR) to 500 000 NOK (around 42 900 EUR). The latter case also acknowledged that a *subjective* evaluation of costs can be relevant (see further under 5.3), but without that having any impact on the evaluation of that case.[87]

The Convention has also been referenced by the Borgarting Appellate Court as a supporting argument for not awarding compensation for costs in a case that was of principled importance.[88] In another case, that Court referenced the Aarhus Convention but found it to have no relevance because the costs were so low as to clearly not be unreasonable.[89] This Court has also twice declined to give any interpretive effect to the Convention, on the basis of the abovementioned statement

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[83] LF-2021-101193.

[84] TMOR-2020-118161-2. The Court states, inter alia, that “on this basis, the limit for what is prohibitively expensive has previously been considered to be around 500 000 NOK [42 850 EUR] (...)”, but that considering the Norwegian level of cost and inflation over some years, the “limit for being considered prohibitively expensive today must be significantly higher” (our translation).

[85] See the decision of the same Court, 9 November 2020, unpublished but facts are referenced by the applicant in LF-2021-101193, but were not relevant for the cost decision appealed (and overturned) in that case.

[86] TOSL-2022-165021.

[87] TOSL-2024-81980.

[88] In LB-2024-36810-3.

[89] In LB-2023-2375. Not adjusted for inflation, the total costs for the District and Appellate Court were 25600 NOK (about € 2200).

from the Ministry presuming that the rules on awarding legal costs and the general level of costs were in conformity with the Convention.[90]

In our view, the use of the Convention by the courts does not fundamentally alter how the "loser pays" principle, works. It furthermore does not alter or change the discretion or uncertainty inherent in the rules. As used and interpreted by the Norwegian courts, the Aarhus Convention seems to be a protection against the imposition of costs that are, by themselves, unusually high, without really comparing the costs to the object of the dispute or the economic capacity of the parties. The use of the Convention is sporadic and unprincipled – generally not considered in-depth because it is not a part of the main dispute or legal arguments of the case.[91]

In the draft Norwegian report on compliance with the Aarhus Convention, the Norwegian government argued, as we read it, that the median level of costs we submitted to them (€ 20 264) was not prohibitively expensive because it was below levels that the Committee and CJEU have criticised in previous cases. Like the courts, the government therefore also seems to view the rule against "prohibitively expensive costs" as setting a sort of an upper cap or protection against costs that are unusually and extremely high, but not really providing anything beyond that.

While NIM recognises the increasing use and awareness of the Convention by the courts, we question whether the current interpretation and practice is entirely in accordance with the Aarhus Convention.

5.3 The prohibition on 'prohibitively expensive' costs

5.3.1 Introduction to Article 9(4)

The wording of Article 9(4) prohibits "prohibitively expensive" costs. The use of "prohibitive" seems to imply a focus not on the costs themselves – but on the *consequences* of the costs for the relevant party, namely whether the costs *prohibit* environmental defenders from having access to justice. This is even clearer from the French wording, which omits the word "expensive" and just says "*sans que leur coût soit prohibitif*". The wording makes it clear that it is the prohibitive

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[90] See LB-2007-14564 and LB-2018-128035. In the first case, the environmental organisation were held liable for € 15 856 in legal costs (inflation adjusted to 2024). In the latter case the environmental organisation mostly won, but not so much as to be considered a "successful party" that has a right to have full legal cost covered, so the Court awarded costs partly based on abovementioned discretionary rules. The Eidsivating Appellate Court made similar statements as a basis for not giving the Convention interpretive effect in LE-2023-22977, with the environmental organisation were held liable for € 7945 in legal costs (inflation adjusted)

[91] The referenced cases are, to our knowledge, all the cases in which the Aarhus Convention has been used for questions of legal costs.

consequence of costs that is central – indicating a *consequence*-oriented prohibition and analysis.

The prohibition of "prohibitively expensive" costs is set out, in article 9(4), in the context of a broader obligation to "provide adequate and effective remedies". When the wording is read as a whole, it indicates that costs should be considered *prohibitive* if they are of a level where access to justice is not an *effective remedy* for environmental defenders.

The wording must also be read in light of its purpose in achieving the right enshrined in Article 1. The environment cannot, by itself claim rights or have access to justice. It relies on individuals or NGOs to advocate on its behalf in the interests of the broader public.[92] As acknowledged by the CJEU in several cases, individuals or NGOs act in the public interest when seeking to uphold environmental rules.[93]

The purpose of the "not prohibitively expensive" rule is thus to recognise that environmental cases differ from other cases where applicants act in their own interest. Individuals and NGOs that seek access to justice in the public interest should not be dissuaded by an excessive personal economic risk.[94]

In our view, that recognition means the threshold for what is considered prohibitively expensive must not be set too high. It should be sufficient to show that the costs are of a level where it dissuades individuals or NGOs from upholding public interest and environmental rules in court.

Taken together, both the wording and objective support a broad reading of Article 9(4) where it is focused on the dissuasive effect (the *chilling effect*) of high costs if they render access to justice an ineffective way of ensuring that environmental rules are upheld. This supports a reading of "prohibitively" as referring to all the ways in which legal costs, and the framework for imposing costs, can have a dissuasive

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[92] Se similarly by AG Kokott in her Opinion in *Edwards and Pallikaropoulos*, C-260/11, EU:C:2012:645, para. 41: «the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations". See also the recognition of the right of organisations and the public in the Convention, recital 8 and 18, and article 2(5).

[93] See *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, C-873/19, EU:C:2022:857, para 68, stating that «Imposing those criteria must not deprive environmental associations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest», and *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, para 74, stating that «members of the public and associations are naturally required to play an active role in defending the environment». See also *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, para. 34.

[94] This has also been emphasised by the Aarhus Committee, see *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, para 69 and 75, emphasising the "contribution made by appeals by NGOs to improving environmental protection and (...) implementation" and the "public interest nature of the environmental claims".

effect on upholding environmental rules, and therefore negatively affect the right to a clean, healthy and sustainable environment as set out in Article 1.

We also find support for such a reading by considering the *context* and *system* in which the wording applies. In particular, in Article 9(4) must be read in conjunction with the general obligation in Article 3(1), requiring each party to "establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention".[95] Read in conjunction, this implies that costs can be *prohibitive* if the provisions regulating them and their imposition are not clear, transparent and consistent. Essentially, the lack of legal and economic foreseeability could be dissuasive and have a chilling effect for potential applicants, reducing their *effective* access to justice.

In summary, we find that "prohibitively expensive" refers to both the *level* of costs and the *foreseeability* of the legal framework, [96] in so far as either can have a *dissuasive* effect – the threshold for which should not be set too high. Costs could likely have dissuasive effects both if they are disproportionate to the dispute, if they are too high for the means and resources available to an applicant, and if they are difficult to foresee, both the imposition and the amount.

Such an interpretation is supported by both the practice of the Aarhus Committee and of the CJEU, which both take a *holistic* view of the cost systems of the Party concerned where they considering all the costs arising from the proceedings.[97] In doing so they consider both the proportionality or excessiveness of the costs [98] and the foreseeability of the costs.[99] The overarching focus seems to be on whether the

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[95] Such a *systemic* reading is also supported by the practice of the Aarhus Committee, see: Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, para. 140 and Decision IV/9i, ECE/MP.PP/2011/2/Add.1 of the Meeting of the Parties para 3(a) and (d); *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, para. 118–121 and Decision VII/8j, ECE/MP.PP/2021/2/Add.1, of the Meeting of the Parties, para 1(f) and (g) and 2(e) and (f).

[96] Compare also Geert De Baere and Janek Tomasz Nowak (2016) 'The right to not prohibitively expensive judicial proceedings under the aarhus convention and the ecj as an international (environmental) law court: Edwards and Pallikaropoulos' *Common Market Law Review* 53(6): 1727-1752, similarly interpreting it as a requirement both regarding the *proportionality* and the *foreseeability* of costs.

[97] *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 45; *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, para 65 ; *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, para 27–28.

[98] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, paras 72–75; *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, paras 66–84; *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paras 38–48.

[99] *Communication ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, paras 135 and 140; *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 108–112; *Commission v Ireland*, C-427/07, EU:C:2009:457, paras 93–94; *Commission v United Kingdom*, C-530/11, EU:C:2014:67, para 35.

level of cost is such as to decrease the number of environmental appeals (i.e. whether they are *dissuasive*).[100]

We note that none of these requirements categorically prevent a court from imposing costs. Article 9(4) must here be read in conjunction with article 3(8), which specifies that "reasonable costs" may be awarded in judicial proceedings.[101]

In the sections below it will first be considered when costs are "prohibitive" on account of their amount or *excessiveness* (5.3.2) and second when costs are "prohibitive" on the account of being *unforeseeable* (5.3.3).

5.3.2 Costs must not be excessive

The practice of both the Aarhus Committee and the CJEU indicates that the requirement of costs not being prohibitively expensive in the form of being *excessive* has both objective and subjective components.[102] However, neither the Committee nor the CJEU distinguishes clearly or consistently between these components.

Objectively, the Convention requires that the level of costs not be excessive. In evaluating this, costs cannot be viewed completely in *isolation*[103] – but have to be considered in relation to the form and object of a dispute. It is clear from the practice of the Committee that even very small costs can be considered objectively "prohibitive", including costs as low as (not inflation adjusted) 3000 DKK (roughly 400 EUR), which were payable as a fee for complaining to an environmental tribunal.[104] The point seems to be that the fee is excessive *in relation* to the form and objective of disputes in such a tribunal, which precisely was meant as a low-cost alternative where environmental rules can be upheld even in smaller disputes. Small costs have also been found to be *prohibitive* in another case against Italy, with regard to a 650 and 975 EUR filing fee for access to administrative courts.[105]

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[100] Se *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 50; *Communication ACCC/C/2015/130 concerning compliance by Italy*, ECE/MP.PP/C.1/2021/22, paras 79, 96 og 104, talking about "deterrent effect". This, however, cannot be taken to mean that because the specific applicant has *not* been deterred, the costs are therefore *not* of a level dissuasive or prohibitively expensive to applicants more generally, see *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221 para 43 and 47.

[101] See for such a reading: *North East Pylon Pressure Campaign and Sheehy*, C-470/16. EU:C:2018:185, para 60: *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, para 72.

[102] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, para 72; *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, para 74 "(...) the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable".

[103] Contrary to how some Norwegian courts seem to have interpreted it, see above, section 5.2.2.

[104] See *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, paras 43–52.

[105] See *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, para 72–80, endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1, para 1(a) and (b).

The cases indicate that small costs can be *prohibitive* and that an analysis of costs must consider the object of dispute, the form of the proceedings and the type of costs imposed.

Such an interpretation is in line with the general wording and purpose of Article 9(4). If "prohibitively" was interpreted as setting a general *norm* for what is prohibitive, it would be ineffective for small-scale comparatively cheap proceedings dealing with local environmental issues, which are less costly than large-scale litigation over constitutional principles. The small cases are very important for ensuring compliance and implementation, and even moderate costs can be very *dissuasive* for applicants – precisely because such cases are rarely matters of *principle*. Article 9(4) should therefore be interpreted so that even smaller costs can be *prohibitively expensive* if they are disproportionate to the form and object of the dispute at hand.

That conclusion makes it hard to state generally when legal costs will be considered *objectively* "prohibitively expensive". It will require a holistic consideration of several factors, including the level of income and costs in that country, the costs in the specific case, the form and object of the dispute, and an evaluation of whether costs like that are likely to be *dissuasive*. It will also be relevant to consider how large the *public interest* in the case is,[106] in line with the broader purpose of the Convention in Article 1. For example, the public and environmental interests may be important because similar appeals often lead to the repeal of illegal decisions.[107]

The Committee has dealt with some cases that can give guidance on when costs are likely to be prohibitively expensive. Most cases deal with costs being imposed on the losing party. In a case against the UK, the Committee considered costs of 8000 GBP (not inflation adjusted) imposed on the losing party, Greenpeace, as causing the proceedings to be "prohibitively expensive", despite the Court having lowered the costs compared to the original amount of 11 813 GBP. In arriving at that conclusion, the Committee emphasised the importance of the object of dispute, the importance of the public interests and lack of other avenues to defend them, and the costs incurred by Greenpeace for its own lawyers.[108]

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[106] See from the CJEU: *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, paras 74–75. This includes being able to consider, to the detriment of an applicant, whether the claims are potentially frivolous. For the latter, see also *North East Pylon Pressure Campaign and Sheehy*, C-470/16. EU:C:2018:185, paras 59–65.

[107] As the Committee emphasised in *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 49.

[108] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, paras 72–77. The conclusion was endorsed by the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 3.

The UK amended its regulatory framework by introducing a system of "Aarhus claims", with a cap for the imposition of legal costs amounting to 5000 GBP for individuals and 10 000 GBP for organisations. This was evaluated by the Committee, which was "not convinced" that this would not be prohibitively expensive, noting that applicants would have to cover their own cost in addition to these.[109] The Committee also expressed scepticism towards a lower range of costs from 2000 EUR to 5000 EUR imposable *per defendant*, in a complaint against Italy.[110] However, in an earlier case, the Committee found, in relation to a cost order of 5130 GBP (not inflation adjusted), that the "quantum of the order" was not prohibitively expensive.[111]

These cases illustrate that the *imposition* of legal costs on the losing party can be prohibitively expensive even at rather low levels, but that it has to be analysed specifically and individually in related to the case at hand.

The Committee has also dealt with cases concerning the costs an applicant has to pay for their own lawyers. The Court found, in a case against the UK, that a general level of costs for "private nuisance claims" which typically exceeded 100 000 GBP, without any adequate alternative procedures, was prohibitively expensive.[112] This makes clear that a very high level of costs can be prohibitive even in the absence of being held liable for the opponents legal costs.

Subjectively, legal costs can be prohibitively expensive in relation to the specific applicant, their economic situation and the importance of the case for that applicant.

This can likely include consideration of all aspects of the applicant's economic situation. For NGOs, the Committee has mentioned factors like the number of members, the membership fee and the resource allocation of the NGO to judicial activities as compared to other activities.[113] The CJEU has clarified that this can include the importance of what is at stake for the claimant.[114]

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[109] *Compliance by the United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/2014/23, para 47. The Committees general findings were endorsed by the Meeting of the Parties in Decision V/9n, ECE/MP.PP/2014/2/Add.1, para 2.

[110] *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, paras 89–98. The Committee's conclusion was endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1), para 1(c).

[111] *Communication ACCC/C/2008/23, United Kingdom of Great Britain and Northern Ireland*, para 49.

[112] *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 105–114, endorsed by the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 5, see also the recommendation in para 6.

[113] *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 47.

[114] *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, para 42.

A subjective evaluation can also likely include the degree to which the applicant is to blame for the costs incurred or not.[115] The fact alone that the applicant has not been deterred, in practice, from asserting a claim cannot by itself establish that the proceedings are not prohibitively expensive for them.[116]

Given that a subjective evaluation will vary widely from case to case, there is not much guidance from the Committee or the CJEU in terms of amounts. However, in a case against Belgium the Committee did view costs of 3700 EUR (not inflation adjusted) as imposing "a considerable financial burden on the communicants" and that "costs of this level could effectively prevent small environmental NGOs from challenging decisions, acts and omissions", but found that the specific applicants had not supplied sufficient evidence as to their economic situation.[117] This at least provides an indication of sums that might typically be *prohibitive* for smaller applicants.

Some types of cases are naturally more expensive than others, due to the complexity or object of the case. It seems unlikely that the Aarhus Convention would require that the level of costs in the most complex cases not exceed the financial resources of the smallest NGOs. The purpose of the Convention in Article 1 can be upheld as long as there is a sufficient group of NGOs or individuals that can act as applicants in all types of cases. The Aarhus Convention also, most likely, does not intend to encourage the formation of smaller NGOs with less economic resources for use in strategic litigation as a means to avoid legal costs. In evaluating how important the case is for the applicant at hand, recourse may therefore likely be had to how the object of the dispute relates to the work of the NGO, its representativeness, members and the reasons for its establishment.

5.3.3 Costs must not be unforeseeable

The lack of foreseeability is at the core of the criticism from both the Committee and the CJEU in several cases. As mentioned above, Article 9(4) of the Convention must here be read in conjunction with Article 3(1), requiring the states to establish a "clear, transparent and consistent" framework for implementing the Convention.

If access to justice and *effective* remedies are to help attain the objective in Article 1, the rules regulating them must be as clear as possible. In particular, lack of clear rules when it comes to the imposition of costs on the losing party could be very

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[115] Cf. *Communication ACCC/C/2008/23, United Kingdom of Great Britain and Northern Ireland*, para 52, where the Committee emphasised that the applicants had initiated cheaper methods of resolution, which had been declined.
[116] *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, para 47; *Commission v United Kingdom*, C-530/11, EU:C:2014:67, para 50.
[117] *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, para 77, more generally paras 78–84.

dissuasive for environmental defenders, often not having extensive resources, nor any economic incentive or reward themselves in cases. One's own legal costs, on the other hand, are by nature more foreseeable.

The Committee has extensively considered the system for considering and imposing costs in the UK, which employs a principle of 'loser pays' which also leaves a lot of discretion to the judge. The Committee found this system to be problematic, pointing to the lack of clarity in the criteria, the lacking consideration of public interest in the environmental issues at hand and the lack of adequate legal aid or protective costs orders.[118] It found that the UK was in violation of Article 9(4), because:

> the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest.[119]

The Committee has also pointed to the discretion of courts being a problem in a complaint against Italy:

> the wide discretion conferred on the courts when deciding litigation costs leads to a lack of certainty and clarity regarding the costs that claimants will face when exercising their right to access to justice in environmental matters[120]

The CJEU has considered similar discretion in both the Irish and British judicial systems, and has stated that:

> [a]lthough it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure

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[118] Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, paras 129–135.

[119] Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, para 135, see also 141, endorsed by the Meeting of the Parties in Decision IV/9i, ECE/MP.PP/2011/2/Add.1, para 3(a). The Committee concluded similarly in *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 108–112, followed up by the recommendations of the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 6.

[120] *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, para 118. The general point of the framework being unclear and untransparent was endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1, para 1(f) and the recommendation in para 2(e).

> incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.
>
> That mere practice which cannot, by definition, be certain [...].»[121]

In a later case against the UK, the CJEU stated that:

> [i]t is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.[122]

That said, the CJEU has clarified that Article 9(4) does not prevent courts from exercising some discretion in determining costs,[123] nor does it require a detailed determination of costs in national legislation.[124]

In a case concerning Belgium, the Committee seemed to approve of a "loser's pays" system. In that system, the losing party was held liable for a flat contribution to the successful party's costs and legal fees, with a basic amount of 1320 EUR, a minimum amount of 82.50 EUR and a maximum amount of 11000 EUR (not inflation adjusted). The basic amount was applied in most cases, but the judge had discretion to modify it within the given range on request, taking account of the nature of the case, the importance of the litigation, its complexity, the unreasonable nature of the situation and the unsuccessful party's financial capacity. The Committee found this system to provide more *foreseeability* and therefore distinguished it from their previous considerations of the UK system.[125]

In total, therefore, "prohibitively expensive" in Article 9(4) of the Convention must be interpreted as meaning that the *lack of foreseeability* in relation to the costs of legal proceedings, including the costs being imposed, can be considered *prohibitive* and thus in breach of the Convention. Based on the practice of the Committee and the CJEU it is particularly the combination of high legal fees, the use of a "loser's pays" system, and the use of full judicial discretion both as to the imposition of costs and as to their amount, which is problematic. A "loser's pays" system might

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[121] *Commission v Ireland*, C-427/07, EU:C:2009:457, paras 93–94. Gjentatt i *Commission v United Kingdom*, C-530/11, EU:C:2014:67, para 35.

[122] *Commission v United Kingdom*, C-530/11, EU:C:2014:67, para 58.

[123] *Commission v United Kingdom*, C-530/11, EU:C:2014:67, para 54.

[124] *Societatea Civilă Profesională de Avocaţi Plopeanu & Ionescu*, C-252/22, EU:C:2024:13, para 81.

[125] *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/2, paras 66–71.

be more acceptable in terms of *foreseeability* if the amounts that can be imposed and the criteria to guide the use of judicial discretion are set out in legislation.

Further guidance on the use of "loser pays" systems and foreseeability can also be found in the EU Commissions *Notice on access to justice in environmental matters*, which among other things discussed the "prohibitively expensive" criteria and the use of loser's pays-systems. It recommends that:

> 189. Where the 'loser pays principle' applies, a cost-allocation approach involving cost-capping may prove useful. This provides greater predictability on — and greater control over — cost exposure. (...) In a one-way cost cap, the costs which have to be borne by a claimant if a case is lost are limited to a certain amount, thereby increasing the predictability of the financial risk. However, in reciprocal cost-capping, the public authority's liability to pay a successful claimant is also limited and any excess will have to be met by the claimant alone. (...)
>
> 192. 'One-way cost shifting' is an approach to cost-allocation under which a successful environmental claimant can recover their own costs (as under the 'loser pays principle') but an unsuccessful one is spared, in whole or in part, from having to pay the costs of the other side. Cost shifting may extend to the state paying part of an unsuccessful claimant's costs — as where the litigation is deemed to reflect a strong public interest. Thus, one-way cost shifting can present features which address potential shortcomings of other cost-allocation approaches (in terms of the need for costs not to be objectively unreasonable and in terms of procedures needing to be fair and equitable).
>
> 193. Some cost shifting regimes are conditional in order to limit their use, with the national court charged with allocating costs having to apply criteria such as the significance of the case, the impact for the environment, the seriousness of the breach of law or the conduct of the parties. However, a discretion which is too wide may undermine cost predictability, an aspect that the CJEU case-law identifies as important, particularly where judicial proceedings entail high lawyers' fees. It may also result in the regime failing to meet the overall criterion of costs not being objectively unreasonable.[126]

[126] EU Commission, *Notice on access to justice in environmental matters*, OJ C 275, 18.8.2017.

The Commission also points to *legal aid* as another possible solution that can help in compliance with Article 9(4), including with foreseeability, but notes that legal aid typically only applies to individuals – thus not helping with the costs of NGOs.[127]

NIM also notes the Commission's scepticism towards *reciprocal* cap systems because they might *dissuade* the public from trying to ensure that environmental rules are upheld.[128].

5.4 Norwegian compliance with article 9(4)

NIM questions whether the rules pertaining to legal costs in Norway are fully consistent with Article 9(4) of the Convention. Firstly, and noting that the level of costs must be assessed on a case-by-case basis, there does not seem to be any limitations preventing *excessive* costs. Secondly, the general framework employs a "loser pays" model with considerable uncertainty and judicial discretion. This, in total, creates a high risk of costs being dissuasive and *prohibitive* – rendering access to justice ineffective.

Costs may be excessive firstly because they are objectively very high. Norway has a high level of costs in general and employs a "loser's pays" model of liability for legal costs, with no forseeable cap or limitations. The general level of costs set out in section 5.2.1 illustrates that liability for costs over 20 000 EUR is normal as a median level, and imposed costs in individual cases can easily reach several times that amount. This comes in addition to the own legal costs of the applicant party, which often tend to be substantially larger than those imposed.[129]

In our view this makes it likely that *the general level of costs* might be objectively too high, particularly for certain types of cases dealing with smaller or local breaches of environmental law, given the lack of any alternative complaint mechanisms. In practice, environmental cases often rely on law firms taking them *pro bono* with the hope and expectation of being able to recoup the costs if the case is won. While such practices might remediate the situation, we agree with the Committee's view in an earlier case, stating that claimants should not have to rely on lawyers taking their case *pro bono*.[130]

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[127] EU Commission, *Notice on access to justice in environmental matters*, OJ C 275, 18.8.2017, paras 194–195.
[128] See similarly, Day m.fl., *A Pillar of Justice II; The continuing impact of legislative reform on access to justice in England and Wales under the Aarhus Convention*, june 2023, https://elflaw.org/wp-content/uploads/2023/06/A-Pillar-ofJustice_Report.pdf, p. 35 ("there is a clear risk that the reciprocal cap, particularly when set at the level that it is, can make cases too expensive to win").
[129] Both because private lawyers often charge higher rates than the rates government attorneys use when calculating which costs to demand in proceedings, and because not all costs can be, or are, in practice, claimed.
[130] Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, para 132.

The *level of legal costs imposed on the losing party* is also clearly above levels that the Committee has previously expressed scepticism of, even in comparably high-income countries. The high costs being imposed seem likely to have a clear *dissuasive* effect on all but the most principled and important environmental cases, and particularly for potential claims dealing with smaller or local breaches of environmental law. At minimum, there is nothing in the current framework that prevents the imposition of costs that are *objectively* prohibitively expensive, as illustrated by some of the cases mentioned in section 5.2.

Secondly, the *subjective* level of costs is at risk of being too high. Under the existing framework, Courts *can* consider subjective factors when it considers whether there are "compelling grounds" to justify an exemption from imposing legal costs, like the impact on the welfare of the party. However, the threshold here is high because that provision is not intended for general balancing but is an exemption to be used rarely in more imperative cases.

In our view, that is likely not in line with the requirement of the Convention that costs should *generally* not be prohibitively expensive, also on account of subjective elements. There are, to our knowledge, no examples of environmental cases where a subjective evaluation of the applicant in line with Convention criteria has given rise to reduced or significantly reduced imposed costs. Therefore, simply because of the high threshold and the small role subjective evaluations play in existing legislative criteria and case-law, there is likely a risk that costs could be prohibitive in relation to specific applicants and their situation. At minimum, the current framework does not prevent or preclude applicants from being held liable for costs that, *subjectively* are prohibitively expensive.

Costs may be unforeseeable. As discussed, Norway employs a "loser's pays" system of cost allocation where the successful party can have its legal costs recouped. This has no cap, aside from the costs needing to be *necessary* for the case, which allows for judicial discretion. Exemptions from the main rule also rely on vague criteria like "compelling reason", giving rise to judicial discretion. An applicant cannot plan or foresee the legal costs of an opponent, nor the judicial exercise of discretionary criteria. The lack of foreseeability, therefore, essentially creates a large economic risk in accessing justice, which can be very *dissuasive*.

In NIM's view, the Norwegian system suffers from the same lack of foreseeability and reliance on judicial discretion that both the Committee and CJEU have criticised in other countries. While the Convention does not require applicants to be

able to plan costs "to the last euro",[131] it does require enough foreseeability to ensure that the costs will not be *prohibitively expensive*.

In total, there are good indications that the abovementioned factors actually have a dissuasive effect on applicants, leading to a very low level of environmental cases before Norwegian courts. A study which looked at cases in the period of 1996–2005 found that 0,4 % of civil litigation and 0,7 % of criminal litigation could be termed *environmental* disputes.[132] The Norwegian Courts Commission looked at the period from 2008–2018 and found that cases on environmental law only made up 1 % of all administrative cases.[133] The number of environmental cases in Norway seems low in a comparative context, even compared to our Nordic neighbours.[134]

The low level of cases underpins the general view expressed by professor of Environmental Law, Ole Kristian Fauchald, in 2022 that "cases on environmental law are a marginal part of the caseload. This must lead to the conclusion that the courts play only a very limited role in the environmental field."[135]

Several actors have expressed concerns to the Government about compliance with the Convention requirement of costs not being prohibitively expensive, including NIM[136] and others,[137] over a longer period of time.

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[131] As stated by the Committee in *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, para 117.
[132] Ole Kristian Fauchald (2010) 'Environmental Justice in Courts – a Case Study from Norway' *Nordic Environmental Law Journal 2010(1)*, p. 49, on p. 54.
[133] NOU 2020:11, *Den tredje statsmakt – Domstolene i endring*, p. 66 (in Norwegian). The Commission does not explain how they defined what cases dealing with *environmental law* were.
[134] Helle Tegner Anker, Ole Kristian Fauchald, Annika Nilsson and Leila Suvantola (2009) 'The Role of Courts in Environmental Law – A Nordic Comparative Study' *Nordic Environmental Law Journal 2009: 9–33*: Anna Nylund (2019) 'Klima, miljø og domstoler i et komparativt perspektiv' *in Ole Kristian Fauchald and Eivind Smith (eds.) Mellom Jus og Politikk – Grunnloven § 112*, Fagbokforlaget, p. 101–117, on p. 101–102.
[135] Ole Kristian Fauchald, 'Domstolens rolle i miljørelaterte saker', in Eivind Smith (ed. 2022) *Våre perifere domstoler*, p. 45 (our translation).
[136] See in our report from 2020 on Climate and Human Rights, section 7.3.4, available here https://www.nhri.no/NIM-R-2020-004-v02-EN; our letter of 5. March 2024 to the Ministry of Climate and Environment and the Ministry of Justice and Public Security, here: https://www.nhri.no/2024/sakskostnader-og-reell-tilgang-til-domstolene-i-miljosaker/; our input to the Norwegian draft report on their implementation of the Aarhus Convention, here: https://www.nhri.no/NIM-H-2024-041. We have also expressed these concerns in a meeting with both the Ministry of Justice and Public Security and the Ministry of Climate and Environment.
[137] International Commission of Jurists, Norwegian section (2020), *Ikke uoverkommelig dyrt: En rapport om Århuskonvensjonen artikkel 9 i Norge*, p. 18: "Norway is far from upholding the requirements of the Aarhus Convention when it comes to access to justice in the environmental field" (our translation); Hans Christian Bugge (2022) *Lærebok i miljøforvaltningsrett 6. utg.*, p. 207: "Finally, our rules on legal costs in judicial proceedings also matter a lot. Applicants risk not just having to cover own legal costs, but also being held liable for the costs of the opposing party in case of a loss – and with current rates that could be very expensive. This probably does not comply with the Aarhus Convention" (our translation); and Inge Lorange Backer, 'Eivind Smith (red): Våre perifere domstoler' *Lov og Rett 2023(4): 261–274*, section 4.3: "In my view, the legal costs imposed in practice makes it

NIM therefore concludes, on the basis of the Norwegian legal framework, that there is a high risk of legal costs being “prohibitively expensive”. This means that access to procedures before Norwegian courts may not constitute “effective remedies” for environmental defenders seeking to uphold environmental rules. NIM questions whether their right of access to justice under Article 9(4) is fully respected.

Best regards

for the Norwegian Human Rights Institution

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challenging to defend the state’s view that “there is (...) insufficient evidence for the cost level in environmental cases being prohibitively expensive”. In that regard, there is little to be gained from the rules on legal aid” (our translation).