# Application of the Aarhus Convention in Southeast Europe

**Lana Ofak**

## 1 Introduction

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in Aarhus, Denmark, at the Fourth Ministerial Conference in the 'Environment for Europe' process. It came into force on 30 October 2001.

The Aarhus Convention is generally considered as a new kind of international agreement in the field of environmental protection that links environmental rights and human rights.[1] For the first time in a legally binding international agreement adopted in Europe, the right to a healthy environment is stated as a human right:

> In order 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 well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention. (Article 1 on the objective of the Convention).

Although the Convention does not expressly guarantee the right to a healthy environment, it does refer to it as an accepted fact.[2] The rights of access to information, public participation in decision-making, and access to justice in environmental matters, in literature often considered as procedural environmental

[1] United Nations Economic Commission for Europe (2013a), p. 1.

[2] Ibid, p. 31.

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S. Rodin, T. Perišin (eds.), *Judicial Application of International Law in Southeast Europe*, DOI 10.1007/978-3-662-46384-0_4

rights, are not an end in itself, but represent a meaningful instrument for the realisation of the substantive right to a healthy environment.[3]

As of 30 June 2013, there were 46 Parties to the Aarhus Convention. The dates of ratification and accession of the seven countries of Southeast Europe that are parties to the Convention are as follows: Albania—27 June 2001, Bosnia and Herzegovina—1 October 2008, Croatia—27 March 2007, Macedonia—22 July 1999, Montenegro—2 November 2009, Slovenia—29 July 2004, Serbia—31 July 2009.[4] Kosovo is not a party to the Convention.

A Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention was adopted at the Extraordinary Meeting of the Parties held in Kiev from 21 to 23 May 2003. Out of seven countries of Southeast Europe, Bosnia and Herzegovina and Montenegro signed the Protocol but have not ratified it yet. Another five countries are parties to the Protocol.[5] The application of the Protocol will not be discussed in this chapter.

Genetically modified organisms (GMOs) were one of the most controversial topics during the negotiations over the draft of the Aarhus Convention.[6] The provisions of the Convention that guarantee public participation in decision-making apply to decisions on whether to permit the deliberate release of GMOs into the environment only 'to the extent feasible and appropriate' (Article 6/11 of the Convention). At the second meeting of the Parties held in Almaty, Kazakhstan, from 25 to 27 May 2005, the Parties adopted the Amendment to the Aarhus Convention that introduced a new Article 6 bis and Annex I bis with the aim to strengthen public participation in decision-making on GMOs. The amendment will enter into force when it has been ratified by at least three-quarters of the Parties that were party to the Convention at the time the amendment was adopted (i.e. it must be ratified by 27 of the 35 Parties that were party to the Convention at the time the amendment was adopted). As of 30 June 2013, the amendment has been ratified by 27 Parties, 22 of which were party to the Convention at the time the amendment was adopted. This means a further five ratifications are required. Slovenia is the only country in Southeast Europe that has ratified the GMO amendment.[7] Albania and Macedonia are among the parties that were parties to the Convention at the time the amendment was adopted but are yet to ratify the amendment.

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[3] For a discussion on substantive and procedural environmental rights, see e.g. Pallemaerts (2004); UNEP. http://www.genevaenvironmentnetwork.org/?q=en/system/files/human_rights_env_report.pdf. Accessed 30 June 2013; Pedersen (2008), pp. 73–111. http://ssrn.com/abstract=1122289. Accessed 30 June 2013; May and Daly (2009); Widener Law School Legal Studies Research Paper No. 09–35. http://ssrn.com/abstract=1479849. Accessed 30 June 2013.

[4] UN Treaty Collection. Status of ratification. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en. Accessed 30 June 2013.

[5] UN Treaty Collection. Status of ratification. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13-a&chapter=27&lang=en. Accessed 30 June 2013.

[6] Wates (2011), p. 14.

[7] UN Treaty Collection. Status of ratification. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13-b&chapter=27&lang=en. Accessed 30 June 2013.

Public authorities might tend to discriminate against non-citizens or non-residents in determining whether they have a recognisable interest regarding the right to initiate administrative and/or judicial procedures on the basis of Article 9 of the Convention, and might also tend to omit non-citizens and non-residents in decision-making on environmental matters.[8] Prohibition of discrimination is one of the main principles of the Aarhus Convention. Within the scope of the relevant provisions of this Convention, the public will have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or effective centre of activities (Article 3(9)). This provision establishes that all persons, regardless of their citizenship, nationality or domicile, have the same rights under the Convention as citizens of the Party concerned.

Pursuant to Article 17 of the Convention that allows regional economic integration organisations constituted by sovereign UNECE Members States to become its parties, the European Community signed the Convention on 25 June 1998 in Aarhus. The Convention was concluded by the Council of the European Union on 17 February 2005.[9] Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States (Article 216(2) of the Treaty on the Functioning of the European Union). In addition, all EU Member States ratified the Aarhus Convention. Its provisions are, therefore, binding on them in two ways: firstly, as its direct Parties, and secondly as the Member States of the EU that are committed to respect obligations under the Treaties.

The European Union is also a Party to the Protocol on Pollutant and Transfer Registers and to the GMO Amendment to the Aarhus Convention.

## 2 Status of the Aarhus Convention Within the Domestic Legal System

In the countries of Southeast Europe, ratified international treaties form an integral part of the domestic legal order and have primacy over domestic law.[10] Therefore, the status of the Aarhus Convention is superior to all laws and other general legal acts. The only exception is Macedonia where international treaties have equal rank to domestic laws, but cannot be changed or derogated by law.[11]

[8] See similar: United Nations Economic Commission for Europe (2013a), p. 65.

[9] Council Decision 2005/370/EC, OJ 2005 L 124, p. 1.

[10] See Article 116(1) of the Albanian Constitution (Law No. 8417 as modified by Law No. 9675 and by Law No. 9904), decision U 5/09 of the Constitutional Court of Bosnia and Herzegovina, Article 141 of the Croatian Constitution (*Narodne novine* (NN) No. 85/10—consolidated text), Article 9 of the Montenegrin Constitution (*Službeni list CG* no. 1/07), Article 8 of the Slovenian Constitution (*Uradni list RS* no. 33/1991 (as am.)) and Article 194 of the Serbian Constitution (*Službeni glasnik RS* no. 98/06).

[11] Risteska and Miševa (2013).

Constitutional courts exist in all the countries of Southeast Europe. They have the competence to determine the conformity of domestic laws with international treaties to which the State is a party,[12] with the exception of the Macedonian Constitutional Court.[13] In principle this means that there is the possibility to initiate before constitutional courts a procedure of review on whether the provisions of domestic law are in concordance with the provisions of the Aarhus Convention.

In Croatia, Macedonia, Montenegro and Serbia any person has the right to submit an initiative for commencing a procedure of assessing the constitutionality of a law or the constitutionality and legality of other regulations.[14] The submission of an initiative in these countries is not conditioned by the existence of legal interest.

A very different situation exists in Albania and Bosnia and Herzegovina. In Albania, individuals do have the right to initiate proceeding before the Albanian Constitutional Court, but only for issues related to their interests. Since

> . . .every normative act is, technically speaking, abstract in nature and has general effects, [so] it would be quite hard to argue that an individual may have a personal interest in their compatibility with the Constitution or international treaties. If a law is incompatible with the Constitution, it would first have to be applied to the concerned individual, who in turn could file a lawsuit with a district court and claim such incompatibility. In such case, it would be the court to formally seize the Constitutional Court (incidental proceedings ex art. 145(2)[15]), not the individual.[16]

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[12] Article 131 of the Albanian Constitution, Article VI(3) of the Constitution of Bosnia and Herzegovina, Article 149 of the Montenegrin Constitution, Article 160 of the Slovenian Constitution and Article 167 of the Serbian Constitution. The Croatian Constitution does not explicitly empower the Constitutional Court to review the conformity of an act with international treaties; however, the Constitutional Court has accepted the competence of reviewing the conformity of domestic acts with international treaties which have been ratified in Croatia (see e.g. U-I-745/1999 (NN No. 112/00)).

[13] The Macedonian Constitutional Court is empowered to review the conformity of laws with the Constitution and the conformity of collective agreements and other regulations with the Constitution and laws (see Article 110 of the Macedonian Constitution). The Macedonian Constitution does not expressly empower the Constitutional Court to review the conformity of laws with international treaties. Nevertheless, the Constitutional Court has the authority to repeal the provisions of domestic laws that are contrary to the ratified international agreements. (Miševa K. Email correspondence with the author (1 July 2013). Many thanks to Kristina Miševa for her explanation of the competence of the Macedonian Constitutional Court.)

[14] See Article 38(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia (NN No. 49/02—consolidated text), Article 12 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia (*Службен весник на РМ* No. 70/1992), Article 150 (1) of the Montenegrin Constitution and Article 168(2) of the Serbian Constitution.

[15] Article 145(2) of the Albanian Constitution reads as follows: 'If judges believe that a law is unconstitutional, they do not apply it. In this case, they suspend the proceedings and send the question to the Constitutional Court. Decisions of the Constitutional Court are binding on all courts'.

[16] Sali S. Email correspondence with the author (26 June 2013). Many thanks to Semir Sali and Gentian Zyberi for their explanation of the right of individuals to submit an initiative before the Albanian Constitutional Court.

Something similar is prescribed by the Constitution of Bosnia and Herzegovina. The Constitutional Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, with the laws of Bosnia and Herzegovina, or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.[17] In conclusion, individuals do not have direct access to the Constitutional Court to challenge the compatibility of domestic laws with the Aarhus Convention, as they do in Croatia, Montenegro and Serbia.

In Slovenia, the right to submit a petition to initiate a procedure for the assessment of the constitutionality or legality of regulations or general acts is connected with the existence of the legal interest of the person who submits it.[18] Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position (Article 24(2) of the Constitutional Court Act). In instances in which regulations or general acts issued for the exercise of public authority have direct effects and interfere with the rights, legal interests, or legal position of the petitioner, a petition may be lodged within 1 year after such an act enters into force or within 1 year after the day the petitioner learns of the occurrence of harmful consequences (Article 24(3)).

The only case of repealing domestic laws due to their incompatibility with the Aarhus Convention can be found in Slovenia.

## *2.1 A Case of Review of Conformity of Domestic Law and Regulation with the Aarhus Convention in Slovenia*

The Society for the Liberation of Animals and their Rights (*Društvo za osvoboditev živali in njihove pravice*) lodged a petition for the initiation of a procedure for the review of the constitutionality and legality of the Regulation amending the Regulation on Protected Wild Animal Species and the Ordinance on the withdrawal of the brown bear. The Society based its legal interest on the fact that it operates in the public interest. However, the Constitutional Court did not consider that such a status was sufficient for the recognition of legal interest. The legal interest of the petitioner was rather established on the fact that, as a member of the public concerned, the Society was not able to participate in the drafting of legally binding rules that regulate the protection of the area in which it operates.[19]

[17] Article VI/3(c) of the Constitution of Bosnia and Herzegovina.

[18] See Article 24 of the Constitutional Court Act (*Uradni list RS* No. 64/07—consolidated text).

[19] Decision of the Slovenian Constitutional Court, U-I-386/06-32, paras 3 and 4.

The petitioner claimed that the procedure of adopting the contested Regulation and Ordinance was not carried out in accordance with Article 8 of the Aarhus Convention that addresses public participation in the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. The Constitutional Court agreed with this argument and went even further and repealed the Nature Protection Act. Although Articles 26(1) and 81(1) of the Nature Protection Act[20] provide legal foundations for passing implementing regulations in the material field of its application, this Act lacked provisions that guarantee public participation in the preparation of such regulations. Thus, the Nature Protection Act was not in conformity with Article 8 of the Aarhus Convention.[21]

The Constitutional Court found that the Act is unconstitutional for the very reason that it did not regulate public participation in the preparation of subordinate legislation governing the protection of flora and fauna (i.e. implementing regulations that are adopted by the executive branch of government). In view of the fact that Slovenia is obliged to implement the Aarhus Convention, the legislature had the obligation to prescribe in the Act procedural rules for effective public participation in the preparation of these regulations. Since the Nature Protection Act, whose provisions provide a basis for the adoption of implementing regulations in this area, does not regulate public participation in the process of their preparation, it is inconsistent with the Aarhus Convention, and thus in conflict with the Constitution.[22]

The Slovenian legislature (*Državni zbor*) was instructed by the Court to correct the omission of public participation provisions within 3 months of the date of publication of the decision of the Constitutional Court in the Official Journal of the Republic of Slovenia. The Constitutional Court considered the deadline of 3 months to be adequate for rectifying the unconstitutionality, since the Nature Protection Act could be amended with minor changes.[23]

The contested Regulation amending the Regulation on Protected Wild Animal Species and the Ordinance on the withdrawal of the brown bear were adopted on the basis of the Nature Protection Act that was determined to be inconsistent with the Constitution. Since the Regulation was passed in a procedure that was, unconstitutionally, not regulated by the Act, the Constitutional Court found that this implementing regulation was in conflict with the Constitution and repealed it. The Ordinance was also repealed, with the explanation that it was adopted under the provisions of the Regulation which had just been invalidated by the Constitutional Court.[24]

[20] *Uradni list RS* No. 56/99, 31/200—popr., 119/02, 41/04 in 96/04—ur. p. b.

[21] Decision of the Slovenian Constitutional Court, *supra* note 19, para 9.

[22] Article 153(2) of the Slovenian Constitution prescribes that ‘Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties’.

[23] Decision of the Slovenian Constitutional Court, *supra* note 19, para 11.

[24] Ibid, paras 12–14.

The importance of this decision of the Slovenian Constitutional Court for the region of Southeast Europe is twofold. Firstly, it demonstrates that, pursuant to the hierarchy of legal norms, all laws and subordinate legislation must be in conformity with the Aarhus Convention and, in the case of conflict, their provisions can be challenged before the Constitutional Court in a procedure of assessment of their constitutionality. The only dissimilarity between the countries refers to different regulation of the right to submit an initiative for reviewing the constitutionality before the Constitutional Court (as noted *supra*). Secondly, although Article 8 of the Aarhus Convention, instead of mandatory wording, requires that the Parties 'strive to promote effective public participation', the Constitutional Court interpreted this phrase as obliging Slovenia to take concrete measures to fulfil the objectives of the Convention. Since there were neither legislative guarantees nor efforts on the side of Slovenian legislature to promote effective public participation in the preparation of implementing regulations, the absence of such guarantees in the Nature Protect Act represented a violation of the Aarhus Convention.

## 3 Direct Application of the Aarhus Convention by the Courts

In Albania, Croatia, Macedonia, Montenegro, Serbia and Slovenia international treaties are directly applicable by the courts.[25] Recognition of the direct application of international agreements in Bosnia and Herzegovina arises from the interpretation of Articles 28 and 29 of the Law on the Procedure for the Conclusion and Execution of International Treaties.[26]

One of the main features of a monistic relationship between national and international law is the obligation of the national authorities of a Contracting State to interpret and apply domestic legislation in a manner that their decisions are not contrary to the international obligations their State has committed itself to by the ratification of a treaty.[27] In addition, ratified rules of international law become directly applicable before the national courts and other public authority bodies without the need for any additional regulatory activity of the parliament or the government.[28] However, Article 3(1) of the Aarhus Convention requires the Parties to establish and maintain a clear, transparent and consistent framework for its implementation. Moreover, certain provisions of the Convention often contain

[25] See Article 122(1) of the Albanian Constitution; Article 118(3) of the Croatian Constitution; Article 98(2) of the Macedonian Constitution; Article 9 of the Montenegrin Constitution; Article 16(2) of the Serbian Constitution; Article 8(2) of the Slovenian Constitution.

[26] See the chapter of Meškić and Samardžić in this book.

[27] Omejec (2009), pp. 7–8. http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)035-e. Accessed 30 June 2013.

[28] Ibid, p. 8.

the phrase ‘within the framework of its national legislation’. This suggests that the Parties have the duty to adopt detailed provisions in their legislation to allow the implementation of the Convention. Therefore, direct application of the Convention by the national authorities may not be enough to fulfil the obligations that the Parties have undertaken.[29]

This issue was addressed by the Aarhus Convention Compliance Committee in its Report to the second Meeting of the Parties.[30] It was noted that some Parties, with legal systems that allow for ratification of an international treaty without prior transposition of its requirements into the domestic system, sometimes make inadequate institutional arrangements for the implementation of the Convention, relying on its direct applicability.[31] Although the Convention in these cases becomes a part of the domestic legal system, in many of its provisions it represents only a framework without clear requirements. These can lead to findings of the Compliance Committee that the Party concerned failed to take sufficient measures to establish a proper framework to implement the provisions of the Convention, regardless of the fact that national courts have the obligation to directly apply international treaties.[32]

In principle, courts deny the possibility of the direct application of rules of international treaties that are formulated in such a vague way that they could not be considered as self-sufficient and directly applicable.[33] If a provision of an international treaty is formulated in such a way that it is necessary to adopt other legal norms to enable its implementation, due to the clear principle of separation of powers, judges cannot create a new norm, and, as a consequence, they cannot apply the provisions of the international treaty. Despite its vagueness, the norm of an international treaty is still binding upon a Party and creates obligations. Even in the event that individuals cannot invoke provisions that do not have a self-executing character before the national courts, the State can still be held responsible for non-compliance with the international treaty.

Are the provisions of the Aarhus Convention formed in a sufficiently clear way that enables the national courts to directly apply them in the case of a lack or deficiency of national norms? An explicitly affirmative answer in relation to all the provisions of the Convention certainly cannot be given. However, in my opinion the courts should be wary of declaring a lack of clarity of certain norms of the Convention and denying their direct application. Specifically, lack of clarity in

[29] For the interpretation of the term ‘within the framework of its national legislation’ see United Nations Economic Commission for Europe (2013a), pp. 32–34.

[30] ECE/MP.PP/2005/13, 11 March 2005. http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.13.e.pdf, paras 36–38. Accessed 30 June 2013.

[31] Ibid, para 36.

[32] Ibid.

[33] For the restrictive case law of the French State Council (*Conseil d’Etat*) in providing direct effect of the norms of international treaties, see Betaille (2009), pp. 63–73. For a similar restrictive case law of the Czech Supreme Administrative Court (Nejvyšší správní spoud), see Passer (2001), pp. 41–48.

the application of norms of international treaties is comparable to the situation of the interpretation of domestic legal norms. Certain ambiguities in legal norms do not necessarily mean that the norm automatically becomes inapplicable, since courts are bound to apply the law, including international treaties. National courts should interpret the relevant national norms in accordance with the requirements of the Aarhus Convention and in many cases this should be sufficient to fulfil its goals of providing access to information, public participation in decision-making and access to justice in environmental matters.[34]

How does a court deal with a case of conflict between national norms and the Aarhus Convention? Taking into consideration that the Aarhus Convention is part of the *acquis communautaire*, the answer to this question depends on whether the country concerned is an EU Member State or not. In EU Member States, if the provisions of domestic law are incompatible with or contrary to the Convention (for example, due to the incorrect implementation of the provisions in national legislation or the retaining of existing national norms that are contrary to the Convention), national authorities should, in line with the principles of direct effect and supremacy of EU law, directly apply the provision of the Aarhus Convention that is clear, precise and unconditional. If an issue is regulated by a provision of the Convention which is not sufficiently clear and precise to have direct effect and the relevant provisions of national law are incompatible with the Convention or there is no adequate provision of domestic law, the national authorities must, as far as possible, interpret domestic law in line with the objectives of the Convention. With respect to the Aarhus Convention, this obligation was established by the Court of Justice of the EU in judgment C-240/09 *Lesoochranárske zoskupenie VLK*. In this case of reference for a preliminary ruling by the Slovakian Supreme Court, the Grand Chamber of the CJEU ruled that:

> Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters ... does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the *Lesoochranárske zoskupenie*, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

The requirement to interpret national law in conformity with Union law is called the principle (doctrine) of consistent interpretation.[35]

In countries that are not EU Member States, if a court in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with ratified international treaties, it shall stop the proceedings and

[34] For the same opinion, see Černý (2009).

[35] For judicial application of the doctrines of direct effect and consistent interpretation in the field of EU environmental law, see Jans et al. (2013).

initiate a review of the constitutionality of the law before the Constitutional Court.[36]

In our search for cases of direct application of the Aarhus Convention by courts in Southeast Europe, we have not been able to find many examples.[37] There are many possible explanations for the rare application of the Convention. The European Union has adopted several legal instruments, binding on its Member States, that include rules on access to information, public participation in decision-making and access to justice in environmental matters (e.g. Directives 2003/4/EC, 85/337/EEC, 2001/42/EC, 2003/35/EC, 2004/35/EC). In the process of harmonisation with the *acquis*, EU candidate countries must align their legislation with the EU directives. In most of the countries of Southeast Europe, implementation of the Aarhus Convention was part of such a process of harmonisation with EU law. Therefore, in situations where the provisions of the Aarhus Convention are relevant to the merits of the case, the courts will apply the corresponding norms of domestic legislation rather than the provisions of an international treaty. There is another restrictive factor for the direct application of the Convention in environmental cases. The Convention does not contain any provisions that prescribe the level of the quality of the environment (e.g. levels of air or water quality) that should be protected, since it only covers procedural environmental rights (access to information, public participation and access to justice). Thus, in many environmental cases the provisions of the Convention will not be relevant for the adjudication of the dispute.[38] The failure of a State to ensure a certain standard of the right to a healthy environment will not constitute a breach of the Aarhus convention, provided that all the procedural rights guaranteed by the Convention have been respected.

[36] See Article 145(2) of the Albanian Constitution, Article VI.3(c) of the Constitution of Bosnia and Herzegovina, Article 44 of the Act on Constitutional Court of Montenegro (*Sl. list Crne Gore* No. 64/08) and Article 63 of the Serbian Act on the Constitutional Court (*Sl. glasnik RS* No. 109/2007, 99/2011 and 18/2013). To my knowledge, the Rules of Procedure of the Macedonian Constitutional Court do not contain similar provisions.

[37] To my knowledge, and also based on the information received from other authors of this book, no cases have been reported in Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. There have been very few cases in Slovenia and Croatia where the Aarhus Convention was mentioned in judgments but not directly applied (in Slovenia: Judgment of the Administrative Court, I U 2/2010; in Croatia: Judgment of the Administrative Court, Us-7555/2004-5, Judgment of the Misdemeanour Court in Zagreb, VI-G-2047-09).

[38] Examples where the court found that the Aarhus convention was not relevant for the merits of the case were found in Slovenia (Judgment of the Administrative Court, I U 2/2010), and Macedonia (*Citizens of Veles v. Republic of Macedonia*). The Slovenian case concerned the issuance of an environmental permit. In this case, the court determined that the '…Aarhus Convention invoked by the plaintiff does not contain provisions that can be directly taken into account in the procedure…'. In the case before the Macedonian courts, the basic court in Veles and the appellate court in Skopje applied the EC Directive 2004/35/EC and not the provisions of the Aarhus Convention.

### 3.1 A Case of the Direct Application of the Aarhus Convention in Croatia

Since the Aarhus Convention came into force in respect of Croatia, there has only been one judgment of the Administrative Court of Republic of Croatia in which the provisions of the Aarhus Convention were directly applied.[39]

The Croatian Society for Bird and Nature Protection submitted a request to make copies of the complete environmental impact assessment (EIA) study for the project 'Control works on the River Drava from 0 +000 to 56 +000 rkm'. The Ministry of Environmental Protection allowed access to the entire study. However, the request for making copies of the study was rejected because it might reasonably be expected this would endanger the intellectual property of the author of the study. The Society appealed without success. The Society then brought an action against the second-instance decision before the Administrative Court. The Administrative Court dismissed the lawsuit (Judgment of 23 October 2009, Us-5235/2009-5). In my opinion, the Administrative Court wrongly interpreted the relevant provisions of the Convention in several important points.

The first error was that the Administrative Court did not examine whether the study was really protected by copyright, but it held this to be indisputable. The Court only found that, pursuant to Art. 4(4), a request for environmental information may be refused if the disclosure would adversely affect, among other things, intellectual property rights. It did not give any reasons for the opinion that copying the EIA study was forbidden on the grounds of intellectual property law. It also did not explain why copying the study would adversely affect intellectual property rights. The plaintiff noted that he had never abused anyone's intellectual property rights. He never intended to become an authorised developer of environmental studies. Therefore, there was not even a theoretical risk of abuse of intellectual property rights.

There are also cases from EU Member States where administrations have refused public access to EIA studies with the argument that the studies are protected by copyright or intellectual property provisions.[40] The Aarhus Convention Compliance Committee in its report with regard to communication ACCC/C/2005/15 concerning compliance by Romania raised doubts that intellectual property rights could ever be applicable in connection with EIA documentation:

> Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule.[41]

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[39] This chapter contains parts of my article: Ofak (2012), pp. 16–17.

[40] Krämer (2011), p. 34.

[41] Report by the Compliance Committee, Addendum, Compliance by Romania with its obligations under the Convention, ECE/MP.PP/2008/5/Add.7, 16 April 2008, para 30.

The Administrative Court held that the right of the plaintiff had not been violated since he had been granted access to the complete study. He was only deprived of the right to copy it. However, the right to copy information is an integral part of the right of access to information.

Public authorities must make information available to the public, including, where requested, copies of the actual documentation containing or comprising such information (Art. 4(1)). A copy of the document, i.e. receiving information in the form requested, can be denied if it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form, or if the information is already publicly available in another form (Art. 4(1)). Since the Ministry of Environmental Protection published a summary of the study on an official website, the Administrative Court considered that Art. 4(1) was respected in this case. In my opinion, this is not a valid interpretation of Art. 4(1). The Society requested a copy of the entire study. Another form in which information is made available must constitute the functional equivalent of the form requested, not just the summary. The information should be available in its entirety.[42]

Although this is only one judgment in which the court directly applied the provisions of the Aarhus Convention, it is evident that it did not comply with the role of protector of the rights guaranteed by the Convention. It is not enough to read what the norm of the Convention prescribes, but to understand its true meaning.

In order to understand the provisions of the Convention which, especially in Article 9, use expressions that are subject to interpretation (e.g. effectiveness, timeliness, fairness, equitability, etc.), it is important to take into consideration the findings of the Aarhus Convention Compliance Committee (ACCC) in cases that were brought before it. Non-compliance or misapplication of the Convention in domestic practice can be avoided by being acquainted with the case law of the Compliance Committee. In addition, cases of non-compliance with the Convention of other Parties can be used in the formulation of proposals for amendments to the same or similar national legislation and/or practices that were determined to be contrary to the Convention. The impediment to broader knowledge of the case law of the Compliance Committee is that its Reports are not accessible in official/national languages. Moreover, judges do not have access to information on relevant ACCC case law through specific departments at the court or at the Ministry of Justice. On the other hand, States have responsibility to provide training for judges in cases which involve protection of rights guaranteed by international treaties. It seems that the Parties have recognised the importance of providing courses for judges on the topic of the Aarhus Convention.[43]

[42] United Nations Economic Commission for Europe (2013a), p. 75.

[43] Some examples are: 'In January 2013, the Judicial Training Institute organized a training seminar for judges on implementing the Access to Justice Pillar of Aarhus Convention. It is a part of a program Capacity Building to Put the Aarhus Convention into Action and Support Development of PRTR Systems in Serbia'. (Drenovak Ivanović and Lukić (2013)); in Macedonia, the Academy for Judges offers a course on criminal cases and misdemeanours against the

## 4 Aarhus Convention Compliance Committee Case Law Related to the Countries of Southeast Europe

Article 15 of the Aarhus Convention on review of compliance requires a Meeting of the Parties to establish optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. One of the particularities of the Aarhus Convention is that it has opened the way for the establishment of a control mechanism that will be available not only to Parties, but also to individuals. At the first meeting of the Parties to the Convention in October 2002, Decision I/7 on Review of Compliance[44] was adopted and the first members of the Compliance Committee were appointed. The compliance mechanism enables individuals to refer to the Committee cases of non-compliance, and the Committee in turn can provide expert assistance to Parties to the Convention for the harmonisation of their legislation and/or practice with the Convention.[45] Specifically, a review of compliance may be triggered in four ways:

(1) a Party may make a submission about compliance by another Party (so far, there has been only one case initiated by Romania about compliance by Ukraine (ACCC/S/2004/1));
(2) a Party may make a submission concerning its own compliance (no submissions yet);
(3) the secretariat may make a referral to the Committee (to date, no referrals have been made by the secretariat);
(4) members of the public may make communications concerning a Party's compliance with the convention (83 communications as of 30 June 2013).

In its Report submitted to the second Meeting of the Parties, the Committee noted that the compliance procedure is designed to improve compliance with the Convention and is not a redress procedure for violations of individual rights.[46] The competence of the Committee is limited by the fact that the Meeting of the Parties is the main decision-making body in respect of non-compliance. The Committee, as a rule, holds meetings four times a year, and Meetings of Parties are held every 3 years. Since 3 years is a relatively long period of time, the Committee may, for the

environment and nature that provides an introduction to the provisions of the Aarhus Convention (Risteska and Miševa 2013); in 2013 education for judges on the Aarhus Convention is also being provided in Bosnia and Herzegovina (Meškić and Samardžić 2013); in Croatia, the Judicial Academy, in cooperation with non-governmental organisations Green Istria and GONG, organised training for judges on the Aarhus Convention in September 2011.

[44] http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf. Accessed 30 June 2013.

[45] For ACCC case law and procedures, see, for instance: Jendrośka (2011), pp. 91–147; Andrusevych et al. (2011); Koester (2007), pp. 83–96.

[46] Report to the second Meeting of the Parties, *supra* note 30, para 13.

purpose of resolving cases without delay, take certain measures if it finds non-compliance with the Convention in the period between the Meetings of the Parties. These measures are subject to subsequent review by the Meeting of the Parties, and include:

a) providing advice and facilitating assistance to individual Parties regarding the implementation of the Convention;
b) making recommendations to the Party concerned;
c) requesting the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding achieving compliance with the Convention and reporting on the implementation of this strategy;
d) In cases of communications from the public, making recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.[47]

Measures under b) and d) may be taken only if the Party concerned gives consent. Koester Veit, former Chairperson of the Committee (2002–2011), noted that so far the Committee has managed to persuade the Parties to agree to the recommendations, pointing out to them that, in the event of their non-compliance, it would submit a decision to the Meeting of the Parties. However, if the Party agrees to the recommendations of the Committee, and if it shows some improvement in compliance, the Committee will not submit a separate decision on its non-compliance at the next Meeting of the Parties, but it will only mention the case in its report.[48]

In the case of non-compliance, the Committee may propose to the Meeting of the Parties that it undertake one or more of the following measures:

a) provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
b) make recommendations to the Party concerned;
c) request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
d) in cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by a member of the public;
e) issue declarations of non-compliance;
f) issue cautions;
g) suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

[47] See United Nations Economic Commission for Europe (2013b).
[48] Koester (2007), p. 87.

h) take such other non-confrontational, non-judicial and consultative measures as may be appropriate.[49]

Since the powers of the Committee have a consultative character, the Meeting of the Parties is not required to adopt its recommendations. However, so far, the Meeting of the Parties has confirmed all the findings of non-compliance and adopted most of the recommendations of the Committee.

Out of 83 communications, only four cases have been triggered by members of the public concerning compliance with the Convention with regard to the countries of Southeast Europe (two concerning Albania and two concerning Croatia).[50]

### 4.1 The Review of Compliance by Albania

The first case of review of compliance by Albania with its obligations under the Convention was initiated in response to a communication (ACCC/C/2005/12) from the Alliance for the Protection of the Vlora Gulf concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal electric power station in Vlora, Albania. The Alliance claimed that the public concerned was neither properly notified nor consulted in decision-making on the planning of an industrial park including oil and gas pipelines, storage of petroleum, thermal power plants and a refinery on a site of 560 ha inside a Protected National Park.

With respect to the proposed industrial and energy park, the Committee found that the decision by the Council of Territorial Adjustment of the Republic of Albania to allocate territory for the Industrial and Energy Park of Vlora fell within the scope of Article 7 (i.e. public participation during the preparation of plans and programmes relating to the environment). Albania failed to implement the requirements in the relevant decision-making process and thus was not in compliance with Article 7. With respect to the decision by the Council of Territorial Adjustment on the siting of the thermal electric power station near Vlora, the Committee found that, although some efforts were made to provide for public participation, these largely took place after the crucial decision on siting and were subject to some qualitative deficiencies. Thus, the Party concerned failed to comply fully with the requirements of the Aarhus Convention in question (Article 6, paragraphs 3, 4 and 8). By failing to establish a clear, transparent and consistent framework to implement the provisions of the

[49] United Nations Economic Commission for Europe (2013b), p. 7.

[50] Two of those procedures were stopped (dismissed). One case regarding Albania (ACCC/C/2008/25) was stopped due to lack of information and because the issues resembled those related to the Vlora Power Plant for which the Committee had reached its findings. The other case concerning Croatia (ACCC/C/2013/80) was also dismissed due to a lack of corroborating information.

Convention in Albanian legislation, the Committee also found that Albania was not in compliance with Article 3(1) of the Convention.[51]

On the third meeting held in Riga in June 2008, the Meeting of the Parties approved the findings of the Compliance Committee as regards Albania's failure to comply with the Convention.[52] Albania was requested to annually submit progress reports to the Compliance Committee with regard to the implementation of the Committee's recommendations. These recommendations referred to ensuring early and adequate opportunities for public participation in decision-making in environmental matters. In its Report from the meeting held in February 2011, the Committee noted with appreciation that Albania had seriously and actively engaged to follow the recommendations and that it was no longer in a state of non-compliance with the provisions of the Aarhus Convention.[53]

This case shows the positive outcome that can be reached by initiating the compliance mechanism. After the Meeting of the Parties decided in 2008 that it was in non-compliance, Albania had the obligation to regularly report what progress had been made regarding improvement of the existing legal framework. Finally, the Compliance Committee in 2011 decided that Albania had solved its compliance problems.

### *4.2 The Review of Compliance by Croatia*

On 24 January 2012, a Croatian Association for Nature, Environment and Sustainable Development 'Sunce' submitted a communication alleging non-compliance with the Convention by Croatia. They claimed that waste management plans were adopted in a number of towns in Croatia without inspection control and public participation, as provided under the Environmental Protection Act. This, according to the communication, constitutes non-compliance with Article 7 of the Aarhus Convention. A discussion before the Compliance Committee was held in December 2012. Draft findings and recommendations have not been adopted yet by the Committee. Hopefully, this case will clarify the obligation of the public authorities to provide public participation in the preparation of waste management plans.

[51] Report of the Compliance Committee on its sixteenth meeting. Addendum. Findings and recommendations with regards to compliance by Albania, ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para 92. http://www.unece.org/fileadmin/DAM/env/documents/2007/pp/ECE_MP.PP_C_1_2007_4_Add_1.pdf. Accessed 30 June 2013.

[52] Decision III/6a of the Meeting of the Parties on compliance by Albania with its obligations under the Convention, ECE/MP.PP/2008/2/Add.9, 26 September 2008. http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP3decisions/Albania/ece_mp_pp_2008_2_add_9_e_Albania%20ODS.pdf. Accessed 30 June 2013.

[53] Report of the Compliance Committee on its 31st meeting. Addendum. Compliance by Albania with its obligations under the Convention, ECE/MP.PP/C.1/2011/2/Add.1, April 2011, para. 22. http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-31/ece_mp.pp_c.1_2011_2_add.1_adv%20edited.pdf. Accessed 30 June 2013.

## 5 Other Complaint Mechanisms with Regard to Projects Which May Have a Significant Effect on the Environment

Since major projects that have a significant effect on the environment require substantial funds, in many cases their execution would not be possible without financial loans. One of the institutions that often provides such loans to the countries of Southeast Europe is the European Bank for Reconstruction and Development.

In 2012, the national electricity company (*Hrvatska elektroprivreda d.d.*—HEP) started to implement a plan to construct the Ombla underground hydropower plant based on an environmental impact assessment that was conducted in 1999. On the day of Croatia's accession to the EU, the location of Ombla was due to enter the ecological network Natura 2000. In 2008, the Croatian State Institute for Nature Protection declared the project 'unacceptable for nature'. In addition, many experts raised concerns, since this location had the highest biodiversity in Croatia and was one of the richest underground biodiversity sites in the world. Nevertheless, in 2011 the European Bank for Reconstruction and Development approved an EUR 123 million loan for the construction of HPP Ombla.

In order to protect Croatian biodiversity, Green Action—Friends of the Earth Croatia (a Croatian environmental association) filed formal complaints at the international level. The first set of complaints was addressed to the European Commission and the European Parliament.[54] The obstacle here was that Croatia was still not a member of the EU. Thus, any recommendations that the EU institutions gave to the Croatian institutions on this matter would not be legally binding. The second formal complaint was to the European Bank of Reconstruction and Development (EBRD). The complaint was based on the EBRD's Project Complaint Mechanism.[55] The Mechanism is open to individuals and groups directly located or having interest in the area of an EBRD-financed project, as well as to civil society organisations. The EBRD decided to suspend the loan disbursement until the launch of a new biodiversity study for Ombla. The study that came out in March 2013 showed that there would be damage to biodiversity. On 27 May 2013, HEP announced that they agreed with EBRD to cancel the loan.[56]

This case illustrates two main points. First, it was impossible for civil society organisations to challenge the EIA study of 1999, since it had become final 12 years

[54] CEE Bankwatch Network, Ombla hydropower project under fire in the European Parliament. http://bankwatch.org/bwmail/52/ombla-hydropower-project-under-fire-european-parliament. Accessed 30 June 2013.

[55] Zelena akcija/Friends of the Earth Croatia, Complaint to the EBRD's Project Complaint Mechanism regarding the Ombla hydropower project, Croatia. http://www.ebrd.com/downloads/integrity/Ombla_complaint_17.11.2011.pdf. Accessed 30 June 2013.

[56] EBRD's response to the civil society organisation letter. http://bankwatch.org/sites/default/files/response-EBRD-Ombla-04Jun2013.pdf. Accessed 30 June 2013.

previously and all the deadlines for submitting legal remedies had passed. Therefore, they did not have access to any adequate and effective remedies for initiating a review procedure of the legality of the construction of the Ombla hydropower plant. The only way of instituting some kind of control mechanism was at the international level. Second, the case demonstrates the positive impact of Croatian accession to the EU on decision-making in environmental matters. On the day of Croatia's EU accession, the location of Ombla entered into the Natura 2000 network. HEP has to prove that the final result of the project cannot be achieved by any other means without a harmful impact on nature. The conclusion is that such a new process means prolonging the procedure because of necessary changes to the project and obtaining new permits. This new procedure will have to be carried out in accordance with the relevant national and EU environmental legislation that was not applicable in 1999 when the first environmental impact assessment for this project was conducted.

A similar dispute regarding the construction of the *Boškov Most* hydropower plant in Macedonia was also initiated before the EBRD.[57] This project involves the construction of a 33 m high accumulation dam and hydropower plant with a total capacity of 68 MW. The total project cost is EUR 84 million, with the EBRD providing a loan of 65 million. The EBRD approved the project in November 2011 and signed the finance contract the same year.[58] One civil society organisation Eko-svest from Macedonia submitted a complaint to the Project Complaint Mechanism. The complaint stated that the Environmental and Social Impact Assessment study for the project was incomplete, and important biodiversity facts about the project area were unknown.[59] The complaint was found eligible and an eligibility report was published in May 2012. This and the Croatian case illustrate that civil society organisations are using all the available complaint mechanisms that could potentially lead to better decisions concerning projects that have a significant adverse effect on nature.

## 6 Conclusion

Members of the public in the countries of Southeast Europe have access to several mechanisms to ensure the effective and proper implementation of the Aarhus Convention. Indeed, the Convention prohibits discrimination, which means that members of the public from one country, as the public concerned, can exercise the

[57] Risteska and Miševa (2013).

[58] CEE Bankwatch Network, the Boskov Most hydropower plant (Macedonia) and the EBRD's Project Complaint Mechanism. http://bankwatch.org/sites/default/files/briefing-EBRD-BoskovMost-10May2013.pdf. Accessed 30 June 2013.

[59] Eko-svest, Complaint to the EBRD's Project Complaint Mechanism regarding the Boskov Most hydropower project, Macedonia. http://www.ebrd.com/downloads/integrity/Boskov_complaint_7.11.2011.pdf. Accessed 30 June 2013.

rights guaranteed by the Convention in another country that is also party to the Convention. Mechanisms that can be used include a review by the Constitutional Court on whether the provisions of domestic laws and regulations are in accordance with the Aarhus Convention. So far, there has been only one such case in Slovenia.

Civil society organisations sometimes use complaints mechanisms that are available at the international level (e.g. communications to the Aarhus Convention Compliance Committee and submission of complaints to the EBRD's Project Complaint Mechanism). Some examples from Albania, Croatia and Macedonia demonstrate that these mechanisms can lead to positive changes regarding public participation in decision-making in environmental matters.

Our survey showed that there have not been many examples of the direct application of the Aarhus Convention by the courts in SEE countries. In situations where the Aarhus Convention could be applied, the courts would rather apply the rules of domestic legislation that are relevant to the merits of the case, or the provisions of the EU directives that regulate access to information, public participation in decision-making and access to justice in environmental matters. In addition, in many environmental cases the Aarhus Convention will not be applicable, since it does not contain any substantive rules regarding the right to a healthy environment. However, this does not diminish its importance. The creators of the Aarhus Convention predicted the obstacles to access to justice in environmental cases at all stages of a procedure, and for each of these obstacles they tried to give an appropriate solution. Therefore, there is big task before the public concerned to take joint action to enhance the level of implementation of environmental law and the exercise of the right to a healthy environment. This requires greater professionalisation of environmental organisations and the use of advice of legal experts and attorneys who are sufficiently capable to represent in such cases before the courts. This also requires the introduction of high-quality environmental education of law students in legal studies, as well as of civil servants and judges in the framework of their professional training.

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