

# 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

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## Abstract

The parties to the Aarhus Convention recently established a new Rapid Response Mechanism for environmental defenders. This article analyses this mechanism and its guarantees for environmental defenders, with a specific focus on the protection of diverse forms of climate activism. The Convention's Compliance Committee has taken a broad approach towards the definition of 'environmental defenders' protected by Article 3(8) of the Convention. This definition includes persons who engage in demonstrations or rallies connected to environmental issues, even if there is no immediate link to the rights provided by the Aarhus Convention. In some cases, direct actions and acts of civil disobedience may fall under Article 3(8) of the Convention. Where environmental defenders suffer harmful acts such as penalization, harassment or persecution either by State authorities or private parties, the State concerned must produce evidence to show that these harmful acts were not a response to the civic engagement of the environmental defenders concerned. If environmental defenders are victims of harmful acts in the sense of Article 3(8) of the Aarhus Convention, they may address the Special Rapporteur who can swiftly issue protection measures. This could be especially relevant for detained persons, persons under police supervision or activists who undergo systematic harassment by the police or private security forces. In these cases, the Special Rapporteur may intervene and use their unique position on the international plane to ensure that environmental defenders do not suffer due to their engagement for the environment.

## 1 | INTRODUCTION

Although the urgency of the climate crisis is evident, States are still lagging behind when it comes to effectively tackling the issue. Courts increasingly declare State climate policies inadequate,<sup>1</sup> but

enforcement of these decisions remains problematic.<sup>2</sup> Climate protests and other public events organized by civil society are vital tools

<sup>1</sup>From the vast literature on this topic see for instance M Wewerinke-Singh and A McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' (2021) 30 *Review of European, Comparative and International Environmental Law* 275; J Setzer and D Winter de Carvalho, 'Climate

Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30 *Review of European, Comparative and International Environmental Law* 197; L Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 *Transnational Environmental Law* 17; F Sindico and MM Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer 2021).

<sup>2</sup>See for instance with regard to the Urgenda Judgement: D Baazil, 'After Climate Court Victories Comes the Problem of Enforcement' (Bloomberg, 18 August 2021) <<https://www.bloomberg.com/news/articles/2021-08-18/climate-litigation-victories-face-enforcement-problems>>.

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to make sure that politicians and relevant industries do not ‘forget’ the urgency of the matter and take the action needed.<sup>3</sup> In addition, climate activists who are unsatisfied with the pace of global and national efforts turn to tactics of non-violent civil disobedience<sup>4</sup> and direct action.<sup>5</sup>

Non-violent protests and demonstrations are protected by fundamental rights, such as the freedom of expression and association. In many countries of the world, State actions that limit the exercise of these rights—that is, by sanctioning protesters or prohibiting public assemblies—can be challenged in front of the courts.<sup>6</sup> In Europe, the European Court of Human Rights (ECtHR) can be resorted to as a final remedy. The United Nations Human Rights Council pointed out the importance of environmental protest and their connections to human rights in 2019.<sup>7</sup> According to the Council, these actions are an important contribution of civil society to sustainable development and a valuable part of the democratic process.<sup>8</sup>

Within the United Nations Economic Commission for Europe (UNECE), the Aarhus Convention (AC)<sup>9</sup> provides for other means of the public to engage in environmental matters, by establishing rights to information, participation and access to justice. In comparison to the more recent Escazú Agreement,<sup>10</sup> the issue of environmental defenders and their protection is dealt with less prominently in the AC: The rights enshrined in the Convention are complemented by Article 3(8) AC, 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. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.’<sup>11</sup>

As of yet, this provision resembles a sleeping beauty, because noncompliance with Article 3(8) AC has been alleged in only a handful of cases brought before the Aarhus Convention Compliance Committee (ACCC).<sup>12</sup> This small number of cases does not adequately reflect

the quantity and significance of the challenges faced by environmental defenders. Rather, these cases are only the tip of the iceberg. The parties to the Convention have recently decided to strengthen Article 3(8) AC by establishing a ‘Rapid Response Mechanism’ for the protection of environmental defenders.<sup>13</sup> The main feature of this mechanism is the instalment of a Special Rapporteur, with the power to take immediate action if needed.

Against this backdrop, the present article asks whether climate activists can profit from this additional protection mechanism—and if so, what does this protection entail? To answer these questions, the article analyses the guarantees laid down in Article 3(8) AC, taking into account the relevant case law of the ACCC. A short section will then present the ‘remedies’ available in cases of a violation of Article 3(8) AC, detailing the newly established ‘Rapid Response Mechanism’ for environmental defenders. Based on this, the article illustrates which forms of climate protests are protected by Article 3(8) AC and how they are protected.

## 2 | CLIMATE ACTIVISTS, ENVIRONMENTAL HUMAN RIGHTS DEFENDERS AND ENVIRONMENTAL DEFENDERS

This article draws on the example of climate activists and climate activism to illustrate current challenges faced by environmental defenders. Environmental activists in other fields may face similar challenges. As the relevant provision of the AC<sup>14</sup> is not limited to climate issues, the observations made in this contribution are applicable to environmental activism in areas other than the climate crisis as well.

Given recent developments, climate activism provides many examples that are useful to illustrate the wide range and diversity of potential strategies for civil society actions. Not only litigation but also lobbying and rallies are used as tools of the climate movement. It has been mentioned in the introduction that climate activists who are unsatisfied with the pace of global and national efforts increasingly turn to tactics of non-violent civil disobedience<sup>15</sup> and direct action,<sup>16</sup> a prominent example for this being Extinction Rebellion (XR).<sup>17</sup> According to its own description, this organization uses ‘non-violent direct action and civil disobedience to persuade governments to act justly on the Climate and Ecological Emergency’.<sup>18</sup> The endeavours of

<sup>3</sup>See B Schaefer Caniglia, RJ Brulle and A Szasz, ‘Civil Society, Social Movements, and Climate Change’ in RE Dunlap and RH Brulle (eds), *Climate Change and Society: Sociological Perspectives* (Oxford University Press 2015) 236.

<sup>4</sup>M Burkett, ‘Climate Disobedience’ (2016) 27 *Duke Environmental Law and Policy Forum* 1, 6 (for the climate movement in the United States).

<sup>5</sup>For a definition of direct action see ED Fritsvold, ‘Under the Law: Legal Consciousness and Radical Environmental Activism’ (2009) 34 *Law and Social Inquiry* 799, 801.

<sup>6</sup>See T Ginsburg, ‘The Global Spread of Constitutional Review’ in GA Caldeira (ed), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81, 81–88.

<sup>7</sup>United Nations Human Rights Council (HRC), ‘Recognizing the Contribution of Environmental Human Rights Defenders to the Enjoyment of Human Rights, Environmental Protection and Sustainable Development’ UN Doc A/HRC/RES/40/11 (21 March 2019).

<sup>8</sup>*Ibid.*

<sup>9</sup>Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

<sup>10</sup>Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) <[https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf)> (Escazú Agreement); see B Olmos Giupponi, ‘Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights’ (2019) 28 *Review of European, Comparative and International Environmental Law* 136. Article 9 of the Escazú Agreement deals explicitly and in-depth with the rights of ‘human rights defenders in environmental matters’.

<sup>11</sup>Aarhus Convention (n 9) art 3(8).

<sup>12</sup>The ACCC has been established by UNECE ‘Decision I/7 Review of Compliance’ UN Doc ECE/MP.PP/2/Add.8, 2 April 2004 pursuant to Aarhus Convention (n 9) art 15. On the establishment of the ACCC, see E Morgera, ‘An Update on the Aarhus Convention and its Continued Global Relevance’ (2005) 14 *Review of European Community and International Environmental Law* 138, 140.

<sup>13</sup>UNECE ‘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’ UN Doc ECE/MP.PP/2021/CRP.8 (18–20 October 2021) <[https://unece.org/sites/default/files/2021-11/ECE.MP\\_PP\\_2021\\_RRM\\_CRP.8\\_3.pdf](https://unece.org/sites/default/files/2021-11/ECE.MP_PP_2021_RRM_CRP.8_3.pdf)> (MOP Decision on the Rapid Response Mechanism).

<sup>14</sup>Aarhus Convention (n 9) art 3(8).

<sup>15</sup>Burkett (n 4) 6 (for the climate movement in the United States).

<sup>16</sup>For a definition of direct action, see Fritsvold (n 5) 801.

<sup>17</sup><<https://rebellion.global/>>. A scholarly perspective on the role of XR within climate governance is provided by N Gunningham, ‘Averting Climate Catastrophe: Environmental Activism, Extinction Rebellion and Coalitions of Influence’ (2019) 30 *King’s Law Journal*, 194, 197–199.

<sup>18</sup><<https://rebellion.global/about-us/>>.

XR activists have led to (criminal) proceedings in various jurisdictions, such as France<sup>19</sup> and the UK.<sup>20</sup>

These types of civil society action are not new,<sup>21</sup> and they are becoming more widespread. Hardly a week goes by without news about roadblocks or other forms of direct action to draw attention to the climate crisis.<sup>22</sup> Climate activism thus provides ample opportunity to reflect on the boundaries of the term ‘environmental defenders’ and the legal instruments established to protect them.

The terms ‘environmental defenders’ or ‘environmental human rights defenders’ have been used in various documents at UN level.<sup>23</sup> Notably, the UN Special Rapporteur on the situation of human rights defenders in a 2016 report defined ‘environmental human rights defenders’ as ‘individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna’.<sup>24</sup> It has been pointed out that the activities of human rights defenders sometimes cross the boundaries of peaceful means.<sup>25</sup> Insofar as these boundaries are crossed, their actions should not be qualified as those of human rights defenders. In principle, the same holds true for environmental defenders. The boundary of ‘peaceful means’ is definitely crossed when an action involves physical violence against the opponent.<sup>26</sup> It is harder to draw a clear boundary with regard to violence in the form of material destruction or damage against someone else's property. Whereas some theorists clearly classify this kind of behaviour as violent,<sup>27</sup> it may nevertheless qualify as a form of expression protected by fundamental rights in some instances.<sup>28</sup> Defacing a public building to

convey the seriousness of the climate crisis may be a criminal act, but nevertheless a form of expressing someone's views. States may criminalize this behaviour, but they have to do this in a proportionate fashion. These acts are protected by fundamental rights, even if they are not entirely non-violent, as they cause (financial) damage to somebody else's property. It might run counter to the concept of ‘environmental (human rights) defenders’ to categorically exclude these actions from the legitimate means available to environmental defenders.<sup>29</sup> Rather, a case-by-case approach is mandated, taking into account the severity of the damage and the urgency of the cause.

Although this interpretation may be seen as a stretch of the term ‘peaceful means’, it is in line with the definition used in the Meeting of the Parties (MOP) decision on the Rapid Response Mechanism,<sup>30</sup> according to which an environmental defender ‘is any person exercising his or her rights in conformity with the provisions of the Convention’.<sup>31</sup>

### 3 | THE SCOPE OF ARTICLE 3(8) AC

#### 3.1 | General remarks

Article 3 AC is titled ‘General Provisions’ and stipulates obligations relating to all areas covered by the AC, such as the obligation to establish and maintain a clear, transparent and consistent framework to implement the Convention in Article 3(1) AC. Article 3(8) AC lays down the prohibition of harassment, penalization or persecution of people exercising their rights under the Convention.

To give a broader context, a few comparative remarks are in place. First, the Escazú Agreement for Latin and America and the Caribbean uses the AC as inspiration in many regards<sup>32</sup> but puts more emphasis on the protection of environmental defenders.<sup>33</sup> In line with the evolution of the Escazú Agreement as a human rights treaty,<sup>34</sup> Article 9 is dedicated to ‘human rights defenders in

<sup>19</sup>Activists charged with obstruction of the movement of an aircraft after climbing the fence of Bordeaux airport and setting off a smoke flare at the runway. See <<http://climatecasechart.com/non-us-case/bordeaux-merignac-airport-v-climate-activists/>>. They were reportedly fined €500 each by the *Tribunal Correctionnel de Bordeaux* on 29 March 2021; D Bozec, ‘Bordeaux-Mérignac: amendes avec sursis pour l’irruption sur le tarmac de l’aéroport’ (sudouest, 29 March 2021).

<sup>20</sup>Activists charged with criminal damage after damaging Shell's headquarters in London in a protest against Shell; they were reportedly acquitted by the jury. See <<http://climatecasechart.com/non-us-case/r-v-bramwell-et-al-the-shell-six-case/>> and <<https://extinctionrebellion.uk/2021/04/23/breaking-the-xr-activists-who-took-on-oil-giant-shell-and-won/>>. Activist defaced a public building in Cambridge but was acquitted based on the necessity defense, High Court of Justice Queen's Bench Division Administrative Court, DPP v Ditchfield, 2021 WL 01759038 (12 January 2021). See <<http://climatecasechart.com/climate-change-litigation/non-us-case/trial-of-angela-ditchfield/>>.

<sup>21</sup>Similar tactics were already used, among others, by EarthFirst!, as described by Fritsvold (n 5) 801–803. Non-violent obstructions (such as roadblocks) are also one of the many methods of non-violent action elaborated on by G Sharp, *The Politics of Nonviolent Action, Part 2: The Methods of Nonviolent Action* (Porter Sargent Publishers 1973) 387.

<sup>22</sup>See recently T Turnbull, ‘Sydney Climate Protests: Activists Block Streets and Harbour Tunnel’ (BBC News, 27 June 2022); L Muniz, ‘Tour de France Disrupted by Climate Protesters’ (Politico, 12 July 2022); F Jordans, ‘Climate Activists Gluing Themselves to Berlin's Roads Say They Want to Cause “Peaceful Friction”’ (Euronews, 15 July 2022).

<sup>23</sup>‘Environmental human rights defenders’ qualify as a subtype of ‘human rights defenders’, whose rights and duties have been recognized by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (often abbreviated as ‘UN Declaration on Human Rights Defenders’), adopted by the UNGA, UN Doc A/RES/53/144 (8 March 1999).

<sup>24</sup>M Forst, ‘Report of the Special Rapporteur on the Situation of Human Rights Defenders’ UN Doc A/71/281 (3 August 2016) para 7.

<sup>25</sup>C Eaton, ‘Human Rights Defenders in the United Nations Framework’ (2016) 25 Human Rights Defender 5, 7 gives the example of an armed wing of the African National Congress.

<sup>26</sup>See MJ Stephan and E Chenoweth, ‘Why Civil Resistance Works. The Strategic Logic of Nonviolent Conflict’ (2008) 33 International Security 7, 10.

<sup>27</sup>G Sharp, *The Politics of Nonviolent Action, Part 1: Power & Struggle* (Porter Sargent Publishers 1973) 65–66.

<sup>28</sup>MJ Falcon y Tella, ‘Legal Justification for Civil Disobedience’ (2002) 13 Finnish Yearbook of International Law 19, 27. For concrete examples of civil disobedience in the case-law of the European Court of Human Rights (ECtHR), see K Nieminen, ‘Rebels without a Cause? Civil Disobedience, Conscientious Objection and the Art of Argumentation in the Case Law of the European Court of Human Rights’ (2015) 5 Oñati Socio-Legal Series 1291, 1300–1304.

<sup>29</sup>S Stec and J Jendroska, ‘The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings’ (2019) 31 Journal of Environmental Law 533, 540 point out that environmental defenders may hold values that may be hard to reconcile with the values of human rights defenders in general.

<sup>30</sup>MOP Decision on the Rapid Response Mechanism (n 13).

<sup>31</sup>See further Section 3.3.1.

<sup>32</sup>For more context on the Escazú Agreement and the protection of environmental defenders in Latin America, see A Pánovics, ‘The Escazú Agreement and the Protection of Environmental Human Rights Defenders’ (2021) Pécs Journal of International and European Law 23, 25ff; on the genesis of the Agreement, see Stec and Jendroska (n 29) 534–535.

<sup>33</sup>Probably due to the socio-political context, which has been qualified as high-risk region for environmental defenders; Olmos Giupponi (n 10) 140; Stec and Jendroska (n 29) 540. In addition to this, the Inter-American Human Rights System, and specifically the case law of the Inter-American Court of Human Rights provided the relevant background for the development of the Escazú Agreement; Olmos Giupponi (n 10) 139.

<sup>34</sup>See Escazú Agreement (n 10) arts 1 and 4(1); Stec and Jendroska (n 29) 537–538.

environmental matters'. Article 9 Escazú Agreement not only prohibits certain harmful acts towards these defenders (in paragraph 3) but also explicitly provides for positive obligations of States to guarantee a safe and enabling environment for their actions. In addition, the Escazú Agreement highlights the connection between environmental activism and human rights.<sup>35</sup> There is no such reference to human rights in Article 3(8) AC. Nevertheless, similar connections have been pointed out by the bodies of the Convention in various documents.<sup>36</sup> Given the focus of the Escazú Agreement on human rights, one can question whether the definition used by Article 9 covers every person advocating for the environment.<sup>37</sup>

Second, Article 3(8) AC also has some parallels to Article 14 of the European Convention on Human Rights (ECHR).<sup>38</sup> The latter demands that States ensure that the enjoyment of the rights set out in the ECHR can take place without any discrimination. Article 3(8) AC likewise prohibits harmful acts connected to the exercising of rights in conformity with the AC. Both provisions establish a conditional prohibition of certain acts: Discrimination (Article 14 ECHR) and harmful acts (Article 3(8) AC) are only prohibited insofar as they are connected to the enjoyment or exercise of certain rights. In the case law of the ECtHR, however, this connection is interpreted in a wide manner.<sup>39</sup> Whether the same is true for the existing case law of the ACCC with regard to Article 3(8) AC will be discussed in the following section.

### 3.2 | Article 3(8) AC in the case law of the ACCC

Although violations of Article 3(8) AC have not been frequently alleged in cases before the ACCC,<sup>40</sup> the few cases that exist have enabled the ACCC to provide some guidance on the meaning of the elements of this provision.

To date, there have been six cases in which the ACCC had to deal in depth with inter alia alleged violations of Article 3(8) AC. The cases

in question concerned Spain,<sup>41</sup> Lithuania<sup>42</sup> and two cases each in the UK<sup>43</sup> and Belarus.<sup>44</sup>

In the case related to Spain, the communicant (an environmental nongovernmental organization [NGO]) claimed that Spanish authorities violated provisions of the AC when dealing with requests for environmental information. Additionally, the communicant held that Article 3(8) AC had been violated, as their members were insulted publicly in mass media by the mayor of the city concerned.<sup>45</sup> Based on the evidence provided by the communicant, the ACCC found that there had been a violation of Article 3(8) AC in this specific instance,<sup>46</sup> but it did not elaborate on the broader meaning and content of Article 3(8) AC.

The two cases related to the UK both concerned issues of alleged penalization through prohibitively high costs. In ACCC/C/2008/27, an environmental NGO challenged a public authority's decision related to an airport. The NGO lost the case. They were ordered to pay the costs of the defendant—a public authority—in full, which amounted to £39,454. Although the ACCC qualified these costs as being prohibitively expensive and thus held that the UK violated Article 9(4) AC,<sup>47</sup> it did not find a breach of Article 3(8) AC. Nevertheless, the ACCC clearly stated that pursuing costs may amount to penalization under Article 3(8) AC.<sup>48</sup> However, the Committee did not provide any guidelines on when this might be the case. The other communication concerning the UK led to a similar outcome with regard to Article 3(8) AC. This case concerned costs emerging in a private nuisance suit, and again, the ACCC found certain aspects of the case to be in violation of Article 9(4) AC.<sup>49</sup> Given the specific circumstances of the case, the Committee did not conclude that the seeking of costs by the defendant (a public authority) amounted to a breach of Article 3(8) AC, without further discussing the content of this provision.<sup>50</sup>

In the first case concerning noncompliance by Belarus with Article 3(8) AC, the communicant argued that environmental activists were harassed by the dissemination of defamatory leaflets, detention, house searches and arrests.<sup>51</sup> The Committee refrained from making a

<sup>41</sup>ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2009/36 Concerning Compliance by Spain' UN Doc ECE/MP.PP/C.1/2010/4/Add.2 (18 June 2010) (ACCC/C/2009/36 Spain).

<sup>42</sup>ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2013/98 Concerning Compliance by Lithuania' UN Doc ECE/MP.PP/C.1/2013/15 (7 June 2013) (ACCC/C/2013/98 Lithuania).

<sup>43</sup>ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2008/27 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland' UN Doc ECE/MP.PP/C.1/2010/6/Add.2 (24 September 2010) (ACCC/C/2008/27 UK); ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2008/23 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland' UN Doc ECE/MP.PP/C.1/2010/6/Add.1 (24 September 2010).

<sup>44</sup>ACCC 'Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2009/44 Concerning Compliance by Belarus' UN Doc ECE/MP.PP/C.1/2011/6/Add.1 (28 June 2011) (ACCC/C/2009/44 Belarus); ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus' UN Doc ECE/MP.PP/C.1/2014/102 (18 June 2014) (ACCC/C/2014/102 Belarus).

<sup>45</sup>ACCC/C/2009/36 Spain (n 41) paras 29, 36.

<sup>46</sup>*ibid* para 64.

<sup>47</sup>ACCC/C/2008/27 UK (n 43) para 44.

<sup>48</sup>*ibid* para 47.

<sup>49</sup>*ibid* para 52.

<sup>50</sup>*ibid* para 53.

<sup>51</sup>ACCC/C/2009/44 Belarus (n 44) para 22.

<sup>35</sup>Escazú Agreement (n 10) art 9.

<sup>36</sup>For instance in MOP Decision on the Rapid Response Mechanism (n 13); UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations Publications 2014) 15.

<sup>37</sup>Stec and Jendroska (n 29) 540–542 highlight that a narrow reading of the provision might lead to the exclusion of land activists or NGOs acting to protect nature; the authors advocate for a broader, inclusive interpretation of Article 9 Escazú Agreement, taking into account the purpose of the Agreement and its provisions on indigenous rights.

<sup>38</sup>Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

<sup>39</sup>Specifically, it is not necessary for a ECHR right to be violated for Article 14 ECHR to apply; see *Carson and Others v United Kingdom* App No 42184/05 (ECtHR, 16 March 2010) para 63; Council of Europe and ECtHR, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (31 August 2021) 7; WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 562.

<sup>40</sup>Aside from the cases discussed below, some communications alleging non-compliance with Article 3(8) AC were deemed inadmissible, for example in ACCC/C/2019/169 concerning compliance by Hungary, where the communicant alleged that people participating in a public hearing concerning the Nuclear Power Plant Paks II were intimidated. All documents are available at <[https://unece.org/env/pp/cc/accc.c.2019.169\\_hungary](https://unece.org/env/pp/cc/accc.c.2019.169_hungary)>.

finding on these issues, as it was of the opinion that the evidence provided for these instances of potential harassment was not sufficiently strong.<sup>52</sup>

The second case regarding Belarus finally gave rise to a detailed discussion of Article 3(8) AC by the ACCC in its findings and recommendations. Like the first communication regarding Belarus, the issues arose around the planned Ostrovets Nuclear Power Plant.<sup>53</sup> Environmental activists were allegedly detained and searched by the police, arrested when trying to deliver petitions to the Russian Embassy and hindered from participating in a peaceful protest.<sup>54</sup>

Considering these accusations of noncompliance, the Committee established four cumulative conditions for establishing a breach of Article 3(8) AC<sup>55</sup>:

- *Members of the public have exercised their rights in conformity with the AC (environmental defenders).* The ACCC adopts a wide approach towards 'environmental defenders' under the AC. First, all situations covered by Articles 3 to 9 AC can be qualified as situations in which rights under the Convention are exercised.<sup>56</sup> Second, the ACCC points out that the application of Article 3(8) AC is not limited to cases in which the aforementioned provisions are applicable.<sup>57</sup> This opens up the application of Article 3(8) AC to environmental matters in general, as will be discussed in detail below.<sup>58</sup> In the various cases it had to deal with, the ACCC qualified these actions to fall under the scope of Article 3(8) AC: submitting a petition against a proposed activity falling under Article 6 AC<sup>59</sup>; organizing and participating in a public street action ('Chernobyl Way 2013'), even if it is not directly connected to a proposed activity<sup>60</sup>; and providing legal assistance to a person exercising their rights under the Convention.<sup>61</sup>
- *These members of the public have been penalized, persecuted or harassed (harmful act).* Taking into account the ordinary meaning of the wording of Article 3(8) AC as well as the Convention's objective and purpose, the Committee argues for a broad understanding of these terms in general but also points out the importance of a case-by-case assessment, allowing the concerned State to justify the measures taken in light of considerations of proportionality and non-discrimination.<sup>62</sup> Importantly, the Committee also

highlights that measures taken by private actors may amount to penalization, persecution or harassment, if the respective State did not take measures to prevent such actions from happening.<sup>63</sup>

- *Causation:* Article 3(8) AC is violated if members of the public are penalized, persecuted or harassed because they exercised rights in conformity with the AC. Citing case law of the ECtHR<sup>64</sup> related to Article 14 ECHR,<sup>65</sup> the Committee finds that the communicant only has to establish 'a prima facie case'<sup>66</sup> that a harmful act did take place, and the burden of proof to show that these actions are not linked to the exercise of rights lies with the State concerned.<sup>67</sup>
- *Lack of redress:* A violation of Article 3(8) AC can be prevented by the party concerned by providing full redress for the actions, for instance, by providing financial compensation.<sup>68</sup>

Based on the evidence provided to the Committee and in light of its interpretation of Article 3(8) AC, the ACCC found that certain actions taken by Belarus—such as the arrest of three environmental defenders in July 2012—amounted to noncompliance with the AC.<sup>69</sup> The Committee went on to issue recommendations to Belarus, including the delivery of appropriate training to members of law enforcement.<sup>70</sup> These recommendations have not been implemented by Belarus as of yet. To the contrary, the situation of environmental defenders in the country has deteriorated: Ecohome, the environmental NGO that initiated the cases against Belarus, has been liquidated by the Supreme Court of Belarus as of 31 August 2021.<sup>71</sup> In an unprecedented step, the ACCC issued a supplementary report in reaction to this, condemning these actions and finding them to be a grave violation of Article 3(8) AC.<sup>72</sup>

Lastly, a recent case regarding Article 3(8) AC concerns compliance by Lithuania.<sup>73</sup> Here, members of an environmental NGO that participated in consultations and hearings regarding the construction of an overhead power line in the border region of Poland and Lithuania were contacted by officers of the Lithuanian State Security Department via telephone and in person due to their opposition to the project.<sup>74</sup> In its findings, the Committee confirmed the approach taken in the case concerning Belarus<sup>75</sup> and held that even a single telephone call may constitute harassment.<sup>76</sup>

<sup>52</sup>ibid para 65.

<sup>53</sup>Ostrovets Nuclear Power Plant is situated in Belarus, close to the Lithuanian border. The planning and permitting process began in the 1990s, becoming more concrete around the early 2000s and drawing a lot of opposition by civil society. Construction of the plant was started in 2012, and the plant has been in operation since 2020. The opposition towards the plant also led to various international proceedings, for instance in front of the Espoo Convention Implementation Committee: see UNECE 'Decision VIII/4c, Compliance by Belarus with Its Obligations under the Convention in Respect of the Belarusian Nuclear Power Plant in Ostrovets' UN Doc ECE/MP.EIA/30/Add.2-ECE/MP.EIA/SEA/13/Add.2 (11 February 2021).

<sup>54</sup>ACCC/C/2014/102 Belarus (n 44) paras 21–57.

<sup>55</sup>ibid para 65.

<sup>56</sup>ibid para 66.

<sup>57</sup>ibid para 65.

<sup>58</sup>See Section 3.3.1.

<sup>59</sup>ACCC/C/2014/102 Belarus (n 44) para 80.

<sup>60</sup>ibid para 96.

<sup>61</sup>ibid para 80.

<sup>62</sup>ibid paras 67–69.

<sup>63</sup>ibid para 70.

<sup>64</sup>*Timishev v Russia* App Nos 55762/00 and 55954/00 (ECtHR, 13 December 2005) para 57. See Council of European and ECtHR (n 39) 21.

<sup>65</sup>As was discussed in Section 3.1, Article 14 ECHR prohibits discrimination related to the enjoyment of the rights of the Convention based on specific criteria such as race or gender.

<sup>66</sup>ACCC/C/2014/102 Belarus (n 44) para 73. For the case law on Article 14 ECtHR, see Schabas (n 39) 570–572.

<sup>67</sup>ACCC/C/2014/102 Belarus (n 44) para 73.

<sup>68</sup>ibid para 74.

<sup>69</sup>ibid para 112.

<sup>70</sup>ibid para 113.

<sup>71</sup>ACCC 'Supplementary Report of the Compliance Committee on Compliance by Belarus' UN Doc ECE/MP.PP/2021/61 (15 October 2021) (Belarus Supplementary Report) para 31.

<sup>72</sup>ibid paras 53 and 59.

<sup>73</sup>ACCC/C/2013/98 Lithuania (n 42).

<sup>74</sup>ibid paras 83–87.

<sup>75</sup>ibid para 157.

<sup>76</sup>ibid paras 154, 158.

### 3.3 | Conditions for the applicability of Article 3 (8) AC

In the light of the above case law, there are several conditions that have to be met for Article 3(8) AC to be applicable. These are the following:

1. Members of the public have exercised their rights in conformity with the AC (thus becoming ‘environmental defenders’).
2. A harmful act (penalization, persecution or harassment) has occurred.
3. There is a causal link between being an environmental defender and the harmful act.
4. The relevant State has not taken all necessary measures to redress the harm done.

Although the definition of ‘members of the public’ is provided for in Article 2(4) AC<sup>77</sup> and does not give rise to serious interpretation problems, the other conditions deserve closer inspection and discussion.

#### 3.3.1 | Exercising rights in conformity with the AC (becoming an ‘environmental defender’)

Both the texts of Article 3(8) AC and the ACCC use the wording of exercising rights ‘in conformity with’ the AC. This wording is very broad; specifically, it is not limited to the exercise of rights *granted by* the AC. The latter formulation would only include the rights that are enshrined in the AC itself, such as rights to access environmental information or the right to participate in decision-making procedures concerning projects with potential harmful effects to the environment.<sup>78</sup> Article 3(8) AC is not necessarily limited to these rights set forth by the AC (i.e. ‘Aarhus rights’).

Rather, any right granted in domestic law can trigger Article 3 (8) AC, as long as it is exercised in conformity with the AC. Rights that come to mind immediately are the right to freedom of assembly and freedom of expression, both of which are protected by the ECHR<sup>79</sup> and in many domestic constitutions. But what exactly is meant by exercising these rights in conformity with the provisions of the AC?

The AC does not lay down any specific rules governing the exercise of the freedom of assembly or freedom of expression. Therefore, there are no rules that could be violated by exercising these rights. However, this does not mean that the exercise of any right automatically falls under Article 3(8) AC. If Article 3(8) AC is to be understood in a fashion that includes rights beyond the Aarhus rights, ‘in conformity’ should not be interpreted to mean ‘in adherence to’ the

provisions of the AC, as the Convention simply does not regulate these issues. Rather, ‘in conformity’ here refers to the general objectives underlying the AC. These are enshrined in Article 1 of the Convention, which has to be read in conjunction with the preamble. From there, one can conclude that the general objective of the Convention is to contribute to sustainable development and to the enjoyment of each person’s right to a healthy environment.

Insofar as rights are exercised with the aim of furthering this objective, they qualify as having been exercised ‘in conformity’ with the provisions of the AC. Persons exercising rights in this manner can thus be qualified as ‘environmental defenders’. There is no explicit reference to the use of ‘peaceful’ or ‘non-violent’ means. ‘Environmental defenders’ under the AC may thus be a broader term than ‘environmental human rights defenders’.<sup>80</sup> Given that the enjoyment of the right to life is one of the central purposes of the Convention, physical violence against others should be excluded from the actions legitimately qualified as those of ‘environmental defenders’ under the AC. Other acts of violence—such as vandalism—should undergo a case-by-case evaluation, taking into account the severity of the act.

In effect, this means that Article 3(8) AC is applicable to a wide range of actions related to environmental protection.<sup>81</sup> In the findings concerning Lithuania, the ACCC explicitly pointed out that the protection of Article 3(8) AC does not end with the closing of formal public participation procedures.<sup>82</sup> People participating in these procedures are protected against any form of subsequent harassment related to their participation. Additionally, not only do the formal participation in decision-making procedures concerning projects fall under Article 6 AC, but also protests against such projects outside of formal procedures are protected via this provision. For instance, the communication against Belarus concerned demonstrations and rallies that were aimed at protesting against the construction of a new nuclear power plant.<sup>83</sup> The ACCC further specified that supporting activities—such as providing legal advice—are also covered by Article 3(8) AC. What is more, various forms of protest and other direct actions that are not related to a specific project but at environmental policy in general are also protected by Article 3(8) AC. This may become more relevant in the future, as climate activists become increasingly active and innovative in their forms of protest.

A critical issue in this regard are acts of civil disobedience. Civil disobedience is characterized by the wilful violation of laws to protest against injustices inherent in these laws and the political system.<sup>84</sup> Subsequent penalization is thus accepted by activists as a possible consequence of their actions. Consequently, one could argue that acts

<sup>80</sup>See Section 2.

<sup>81</sup>The definition is also open to people making use of ‘Aarhus rights’ to further other goals than environmental protection. If someone rightfully participates in an environmental impact assessment to make sure their land is not devalued, or to enable a competitor to proceed with a similar project, they might be exercising their rights under the Aarhus Convention. However, protection in this kind of cases is neither the purpose of the Rapid Response Mechanism discussed below, nor does it seem to have been a relevant issue in the past in the light of existing case law.

<sup>82</sup>ACCC/C/2013/98 Lithuania (n 42) para 152.

<sup>83</sup>ACCC/C/2014/102 Belarus (n 44).

<sup>84</sup>For a discussion of and further references to the philosophical underpinnings of (non-violent) civil disobedience, see J Lemons and DA Brown, ‘Global Climate Change and Non-violent Civil Disobedience’ (2011) 11 *Ethics in Science and Environmental Politics* 3, 8.

<sup>77</sup>Aarhus Convention (n 9) art 2(4) reads: ‘“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.’

<sup>78</sup>These rights are granted by the Aarhus Convention on the international level, but have to be implemented into domestic law. The precise effects of rights ‘granted’ by the Aarhus Convention depends inter alia on the relevance that domestic constitutional law accords to international law.

<sup>79</sup>ECHR (n 38) arts 10 (freedom of expression) and 11 (freedom of assembly).

of civil disobedience are not covered by Article 3(8) AC, as the possible penalization is inherent in the definition of civil disobedience and there usually is no explicit 'right' to civil disobedience.

There are many examples of climate activists using tactics of civil disobedience to garner attention for the climate crisis. Recent examples that have been classified as civil disobedience are the actions taken by activist of the 'Last Generation' in Germany, who glued themselves to highways to block access to airports and other infrastructure. With regard to these examples, it has been questioned whether the activists could rightfully be punished on the basis of German criminal law.<sup>85</sup> In the UK, for example, similar actions have been classified as being justified under the necessity defence. In 2007, climate activists climbed and tried to paint the smokestack of a coal-fired power plant in Kingsnorth in attempt to shut down the power plant.<sup>86</sup> They were charged with trespassing and damage to property. The activists argued that their actions were justified to prevent greater harm and produced expert testimony on the climate change effects of the power plant and the resulting damage.<sup>87</sup> Their strategy was successful, and they were acquitted.

In various other jurisdictions, courts were or are currently tasked with deciding on the legality of similar acts of civil disobedience aimed at protesting inaction in the field of climate change. The Sabin Center Climate Litigation Database currently<sup>88</sup> holds 56 entries for cases against protesters (40 in the United States and 16 in other countries). The vast majority of these cases depends upon the issue whether or not raising awareness for the climate crisis may justify otherwise criminal acts, such as trespassing or damage of property. Courts answer this question differently, depending on the applicable laws and the facts of the case.<sup>89</sup>

The borderline between illegal forms of civil disobedience and legal direct action is thus shifting and hard to pinpoint exactly—fundamental rights play an important role for demarking the borderline, and they are themselves dynamic. Based on the existing case law, it seems likely that the ACCC will take a broad, activist-friendly approach when faced with specific examples of civil disobedience and not exclude them from the scope of Article 3(8) AC. This broad interpretation is supported when looking at the purpose of Article 3(8) AC and the consequences it would have if civil disobedience (i.e. prima facie unlawful behaviour undertaken for the sake of the environment) would not be covered by Article 3(8) AC. From the perspective of the

AC, States would then have the power to outlaw any behaviour not to their liking and claim that it is 'unlawful' and thus not protected by the Convention. This would void Article 3(8) AC of any relevant meaning. Not immediately excluding civil disobedience from the guarantees provided by Article 3(8) AC is thus the interpretation mandated by the purpose of the AC. The balance between the legitimate interest of a State to prosecute behaviour contravening criminal law and the protection of environmental defenders can be found by applying the proportionality test inherent in the next criterion established by the ACCC—the occurrence of a harmful act.

### 3.3.2 | Harmful act (penalization, persecution or harassment)

Another condition for the applicability of Article 3(8) is the occurrence of a harmful act (penalization, persecution or harassment). Given the broad definition in Article 3(8) AC, harmful acts may come in many forms: arrest and detention, search and seizure, intimidating telephone calls, harassment through repeated or prolonged identity checks are only a few of the possible harmful acts. The United Nations Human Rights Council lists killings, violence, forced evictions and displacement as other examples of harm suffered by environmental defenders.<sup>90</sup>

Harmful acts will most often emanate from a State, by way of its police forces. One recent example of possible harassment was reported in Germany, where a female climate activist was detained by the police and asked to strip naked to identify the activist, who was unwilling to provide identification.<sup>91</sup> However, harmful acts by private persons are also covered by Article 3(8) AC. This is especially relevant for private security forces, for instance, when they are tasked with securing the site of a public hearing.

One of the communications addressed to the ACCC involved a Spanish mayor who issued defamatory statements directed against an environmental activist.<sup>92</sup> According to the ACCC, defamation can also amount to a relevant harmful act, as the consequences for the affected person may be severe.

Another category of potential harmful acts are SLAPP suits.<sup>93</sup> SLAPP stands for 'Strategic Litigation Against Public Participation'. The term is used to describe litigation efforts aimed at silencing activists or journalists. SLAPP suits often involve civil litigation and allegations of defamation; the litigants usually demand large sums as damages, thus threatening targeted activists and journalists with the potential financial burden. Additionally, defendants are immediately faced with the need of legal assistance, which can be expensive as well. The aim of SLAPP suits is thus to make critical journalism or environmental activism unattractive, by attaching personal financial

<sup>85</sup>FM Klein, 'Die Rechtfertigung von Straftaten angesichts der Klimakrise', (Verfassungsblog, 4 March 2022) <<https://verfassungsblog.de/die-rechtfertigung-von-straftaten-angesichts-der-klimakrise/>>.

<sup>86</sup><<http://climatecasechart.com/non-us-case/the-kingsnorth-six-trial/>>. See Lemons and Brown (n 84) 9; J Vidal, 'Not Guilty: The Greenpeace Activists Who Used Climate Change as a Legal Defence' (The Guardian, 11 September 2008).

<sup>87</sup>Lemons and Brown (n 84) 9.

<sup>88</sup>As of 17 July 2022.

<sup>89</sup>In Switzerland, for instance, activists staged a tennis match at a branch of Credit Suisse to urge tennis star Roger Federer to stop his sponsorship with the bank, which undertakes climate-damaging investments. They were charged with trespassing. Whilst a lower Swiss court accepted the climate-necessity defence of some of the defendants and acquitted them, this judgement was overturned on appeal. The case is currently pending before the apex court. See <<http://climatecasechart.com/climate-change-litigation/non-us-case/credit-suisse-protesters-trial/>>. For a perspective from the United States, see LN Long and T Hamilton, 'The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases' (2018) 38 Stanford Environmental Law Journal 57.

<sup>90</sup>HRC (n 7) 2.

<sup>91</sup>HP Schönherr, 'Klimaschutz-Aktivistin eingeschüchert: Nackt bis auf die Mund-Nasen-Maske' (TAZ, 25 January 2022) <<https://taz.de/Klimaschutz-Aktivistin-ingeschuechert!/5827846/>>.

<sup>92</sup>ACCC/C/2009/36 Spain (n 41).

<sup>93</sup>See P Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International' (2010) 19 Review of European Community and International Environmental Law 14, 15.

risks to it. Finally, lawsuits are also often a risk for the mental well-being of those involved.

It is worth highlighting that private corporations fearing for their reputation are not the only ones involved in potential SLAPP tactics: SLAPP suits or at least attempts at intimidation through threatened litigation could also be used by public authorities. One example for this can be found in Austria.<sup>94</sup> The city of Vienna is currently planning several high-profile road infrastructure projects. These projects are opposed by members of civil society, who claim that the building of new roads and highways will lead to more individual motorized traffic and is thus not in line with the goal of climate protection. The protests culminated in the occupation of parts of the construction sites. Activists involved in this occupation, but also scientists and other persons supporting the protest on social media, received a letter of an attorney-at-law working for the city of Vienna. In this letter, the recipients were asked to stop their protesting activities and threatened with further legal action concerning the costs arising from the delay of construction. These letters were followed by an outcry of civil society organizations, arguing that the city of Vienna was engaging in SLAPP tactics. In relation to these proceedings, Austrian Members of the European Parliament issued a parliamentary question to the European Commission, inquiring whether the Commission would qualify these actions as SLAPP.<sup>95</sup>

A last issue worth mentioning are criminal proceedings against people using means of civil disobedience to defend the environment. The example of climate protesters gluing themselves to highways was given above; other instances of civil disobedience include the painting of power plant chimneys or stealing the French president's portrait from public buildings to raise awareness for inaction of France with a view to climate change. All these actions can be qualified as acts of 'environmental defenders'. The subsequent question is whether the penalization of such actions, for example, in criminal proceedings, can be qualified as a violation of Article 3(8) AC.

These questions are delicate, as the borderline between criminal and legal behaviour is often less clear than is desirable under the rule of law. Recent examples of courts that had to decide on the lawfulness of environmental protest actions show that fundamental rights play an important part when it comes to the justification of acts of civil disobedience. In its findings and recommendations concerning Belarus, the ACCC established that whether a harmful act had occurred should be decided on a case-by-case basis. This case-by-case analysis includes a proportionality test.<sup>96</sup> For establishing whether or not Article 3(8) AC was violated, it will be relevant whether States properly weighed the interests and fundamental rights involved when deciding on the legality of a certain act and whether all aspects of the case—including scientific aspects of the environmental issue at the

root of the problem—were duly considered. It is also important to consider that harmful acts occurring after and because of a conviction may be prohibited by the AC. If, for instance, an activist is convicted of damaging property in the course of a climate protest, she might qualify as an 'environmental defender' under the AC. Her conviction could be the basis for further State action (e.g. police surveillance), which may amount to harassment or persecution under the AC if it does not pass a proportionality test.

### 3.3.3 | Causation between exercise of rights and harmful act

To fall under Article 3(8) AC, the harmful act that occurred has to be linked to the exercise of rights in conformity with the AC. In some cases, this may be evident, for instance, if an arrest occurs directly at an environmental protest. In other cases, this causal link might be harder to prove, for instance, if prolonged identity checks are allegedly used to keep an activist from joining a protest—as was the case in the Belarus communication. Here, internal strategic documents, decisions made within the police organization and the specific motivations of police officers would have to be investigated by those affected by it in order to prove the causal link. This evidence will often be hard to produce for those affected by the harmful act, especially when the harmful act (such as an arrest) is still ongoing.

The ACCC is obviously aware of the difficulties an affected person faces when trying to establish a causal link between a harmful act and the exercise of their rights. The burden of proof is thus shifted to the relevant State: If it can be established that a person exercised their rights in conformity with the Convention and suffered from a harmful act, the existence of a causal link between the two is assumed.<sup>97</sup> This assumption can be rebutted by the State, if it can provide evidence to the contrary. This rule of evidence also applies where harmful acts by private persons are at the heart of the matter.

### 3.3.4 | Lack of redress by the relevant State authorities

The last condition for establishing a violation of Article 3(8) AC is the lack of proper redress by the relevant State authorities. The ACCC does not detail which measures might qualify as such redress. Arguably, these measures should include both individual redress and systemic measures to prevent future violations of Article 3(8) AC.

Individual measures include immediate redress, such as the release of detainees, as well as financial compensation for the harm suffered. This compensation could include both payments for wrongful detention and emotional harm suffered. To address systemic roots of violation of Article 3(8) AC, legislative and regulatory change can be one important tool. Additionally, training and educational measures for security personnel could be used to raise awareness of the rights

<sup>94</sup>See D. Krutzler, 'Kritik an Anwaltsbriefen wegen Stadtstraßenbesetzung nimmt zu' (derStandard, 14 December 2021) <<https://www.derstandard.at/story/2000131909011/kritik-an-anwaltsbriefen-wegen-stadtstrassen-besetzung-nimmt-zu>>.

<sup>95</sup>Monika Vana (Verts/ALE), Sarah Wiener (Verts/ALE), Thomas Waitz (Verts/ALE), 'Question for Written Answer E-000470/2022 to the Commission' (3 February 2022) <[https://www.europarl.europa.eu/doceo/document/E-9-2022-000470\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2022-000470_EN.html)>.

<sup>96</sup>For an application of this proportionality test see for instance Belarus Supplementary Report (n 71) paras 47–52.

<sup>97</sup>ACCC/C/2014/102 Belarus (n 44) para 73.



of environmental defenders. Whether individual measures suffice as redress or systemic measures are needed can only be evaluated on a case-by-case basis. If violations take place repeatedly over a long period of time, this could be an indication for the need of systemic change.

#### 4 | THE REMEDIES: RAPID RESPONSE MECHANISM FOR ENVIRONMENTAL DEFENDERS

The findings and recommendations of the ACCC discussed above were made before the new Rapid Response Mechanism for environmental defenders was established. At the time of the harmful acts, there were no international mechanisms in place to address the potential violations.

The aim of the newly established mechanism is to provide for immediate relief in cases where environmental defenders are harassed, prosecuted or penalized. This mechanism thus provides an addition to the existing compliance mechanisms, such as the ACCC. To provide a 'rapid response' to alleged violations of Article 3(8) AC, a Special Rapporteur is introduced. Their mandate is detailed in an Annex to the MOP decision on the Rapid Response Mechanism.<sup>98</sup> According to the Annex, the task of the Special Rapporteur is to take measures to protect environmental defenders who suffer harmful acts or are under the imminent threat of such acts.<sup>99</sup> Complaints can be brought to the Special Rapporteur by members of the public on their own behalf or on the behalf of others, by parties to the Convention or by the Secretariat of the Convention.<sup>100</sup>

In a first step, the Special Rapporteur has to consider the admissibility of these complaints.<sup>101</sup> Grounds for inadmissibility include (i) anonymous complaints that cannot be verified; (ii) abusive complaints<sup>102</sup>; (iii) manifestly unreasonable or unfounded complaints; (iv) complaints in contradiction with the Rapid Response Mechanism or the AC; and (v) a *de minimis* exemption.<sup>103</sup> As the Rapid Response Mechanism was designed to address potential violations swiftly, there is no need to exhaust domestic remedies before bringing a complaint to the Special Rapporteur. This is the major advantage of this mechanism

when compared with other international mechanisms established to safeguard rights of environmental or human rights defenders.<sup>104</sup>

If a complaint is not considered inadmissible, the Special Rapporteur can gather information on the issue<sup>105</sup> and take a range of measures.<sup>106</sup> These include public statements and press releases, the use of diplomatic channels and the AC's institutions. Additionally, the Special Rapporteur may issue the so-called 'protection measures'. A protection measure is addressed to the party concerned<sup>107</sup> and directs this State to refrain from certain activities or take action to end harmful acts.<sup>108</sup> These actions should be named in the protection measure.<sup>109</sup> Protection measures may be 'immediate' or 'ongoing' protection measures. Immediate protection measures are designed to address urgent situations and may be issued by the Special Rapporteur even before the investigation on a complaint is completed.<sup>110</sup> Ongoing protection measures may be issued after the investigation is concluded if the Special Rapporteur comes to the conclusion that the party concerned has or may have violated Article 3(8) AC. This type of protection measure remains in force until lifted by either the Special Rapporteur or other AC bodies named in the Annex (i.e. the MOP or the ACCC).<sup>111</sup>

Alongside specifying the mandate of the Special Rapporteur, the Annex also includes provisions on the relationship between the Special Rapporteur and other bodies of the Convention, such as the ACCC<sup>112</sup> and the MOP.<sup>113</sup> According to these provisions, complaints to the Special Rapporteur do not in any way limit the possibility of bringing communications to the ACCC, and the Special Rapporteur may even make a referral to the ACCC. The Annex further details reporting obligation of the Special Rapporteur, who is obliged to report to the MOP.

In its last section, the Annex lays out the rules for the election of the Special Rapporteur. According to these rules, the Special Rapporteur has to be 'national of the Parties and signatories to the Convention and a person of high moral character and recognized competence in the field of the human rights defenders and shall preferably have relevant legal experience'.<sup>114</sup> On the basis of nominations by the Parties,<sup>115</sup> the Special Rapporteur shall be elected by the MOP.<sup>116</sup> The person is elected until the end of the next ordinary session. Re-election is possible, but the Special Rapporteur may not serve three consecutive terms (leaving open the possibility to be re-elected after a break of one term). In June 2022, the parties to the Convention elected Michel Forst as the first Special Rapporteur.<sup>117</sup>

<sup>98</sup>MOP Decision on the Rapid Response Mechanism (n 13) Annex.

<sup>99</sup>ibid Annex, para 1.

<sup>100</sup>ibid Annex, para 2.

<sup>101</sup>ibid Annex, para 3.

<sup>102</sup>This criterion relates to the abusiveness of the complaint itself. It does not allow for the Special Rapporteur to declare complaints as inadmissible because they qualify the actions of the complaining 'environmental defenders' as abusive (e.g. overstepping the boundaries mentioned in Sections 2 and 3.3.1 with regard to the use of violence). When in doubt whether someone may be rightfully be qualified as 'environmental defender', the Special Rapporteur should take a reasoned stance on the qualification as 'environmental defender' and process the complaint accordingly. An in-depth analysis of complicated cases involving fundamental rights will often not be possible without compromising the rapidness of the response mechanism. This deficit seems acceptable, given that the Special Rapporteur does not take final decisions on the legality of the alleged violations of the Aarhus Convention. These questions are better dealt with by the ACCC (with regard to the Aarhus Convention) or national and international human rights institutions and courts (with regard to fundamental rights).

<sup>103</sup>MOP Decision on the Rapid Response Mechanism (n 13) Annex, para 3(e) provides the Special Rapporteur with the opportunity to not consider any complaint that he/she considers to be 'de minimis'. The MOP decision does not further specify this exemption. Given the scope of the mechanism, complaints should not be qualified as 'de minimis' simply because they concern only one single individual.

<sup>104</sup>Such as, for instance, the ACCC or the ECtHR.

<sup>105</sup>MOP Decision on the Rapid Response Mechanism (n 13) Annex, para 6.

<sup>106</sup>ibid Annex, para 7.

<sup>107</sup>Any body of the executive branch or any other public authority within the definition of Aarhus Convention (n 9) art 2(2), MOP Decision on the Rapid Response Mechanism (n 13) Annex, para 12. Ibid para 12(a) mentions explicitly the relevant Ministers for Environment, Justice and Foreign Affairs.

<sup>108</sup>MOP Decision on the Rapid Response Mechanism (n 13) Annex, para 9.

<sup>109</sup>ibid Annex, para 11.

<sup>110</sup>ibid Annex, para 13.

<sup>111</sup>ibid Annex, para 14.

<sup>112</sup>ibid Annex, para 15.

<sup>113</sup>ibid Annex, para 16.

<sup>114</sup>ibid Annex, para 18.

<sup>115</sup>ibid Annex, para 20.

<sup>116</sup>ibid Annex, para 21.

<sup>117</sup>UNECE, 'World's First Special Rapporteur on Environmental Defenders Elected under the Aarhus Convention' (24 June 2022) <<https://unece.org/environment/press/worlds-first-special-rapporteur-environmental-defenders-elected-under-aarhus>>.

## 5 | FROM ENVIRONMENTAL DEFENDERS TO CLIMATE DEFENDERS?

The initial question of this contribution was whether climate protesters can benefit from the new Rapid Response Mechanism for environmental defenders under the AC. In principle, this can be answered in the affirmative. The ACCC has taken a broad approach towards the definition of 'environmental defenders' protected by Article 3(8) AC. As was shown above, this definition includes persons who engage in demonstrations or rallies connected to environmental issues, even if there is no immediate link to the rights provided by the AC. In some cases, direct actions and acts of civil disobedience may fall under Article 3(8) AC. Where environmental defenders suffer harmful acts such as penalization, harassment or persecution either by State authorities or private parties, the State concerned must produce evidence to show that these harmful acts were not a response to the civic engagement of the environmental defenders concerned.

If environmental defenders are victims of harmful acts in the sense of Article 3(8) AC, they may address the Special Rapporteur who can swiftly issue protection measures. This could be especially relevant for detained persons, persons under police supervision or activists who undergo systematic harassment by the police or private security forces. In these cases, the Special Rapporteur may intervene and use their unique position on the international plane to ensure that environmental defenders do not suffer due to their engagement for the environment.

It has to be pointed out, however, that the Special Rapporteur may only issue protection measures to public authorities in the sense of Article 2(2) AC.<sup>118</sup> In this definition, bodies or institutions acting in a judicial or legislative capacity are explicitly excluded. Although the Special Rapporteur may thus ask that an activist be released from detention, they may not issue protection measures with regard to ongoing court proceedings. It was pointed out above that the boundaries between civil disobedience and legal direct actions are blurred. This could lead to complicated constellations, in which the Special Rapporteur may be able to ask police authorities to release detainees, whilst not being competent to voice their opinion towards the judicial bodies tasked with deciding on the issue of whether a certain direct action was legal.

## 6 | CONCLUSION

The newly established Rapid Response Mechanism for environmental defenders under the AC umbrella fills an important gap by providing for the possibility of immediate protection for environmental defenders experiencing harmful acts, such as detention. Established as a non-confrontational, nonjudicial and consultative mechanism in the sense of Article 15 AC, the Special Rapporteur nevertheless is equipped with considerable means to provide immediate and effective relief to environmental activists. Given the nature of the Special

Rapporteur as a consultative mechanism on the international level, the meaningfulness of the instruments provided depends on the cooperation of national authorities. Recent developments in Belarus<sup>119</sup> indicate that this might prove problematic for the effectiveness of the mechanism, especially in countries where respect for the rule of law and human rights are not effectively guaranteed or on the decline.<sup>120</sup> Although it is to be hoped that the necessity to use this mechanism will not occur often, the intensification of debates around environmental issues and not least the climate crisis will likely provide ample opportunity to test the efficacy and limits of the Rapid Response Mechanism and the Special Rapporteur.

### DATA AVAILABILITY STATEMENT

Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

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<sup>119</sup>Belarus Supplementary Report (n 71). In July 2022, Belarus notified the Depositary about its withdrawal from the Aarhus Convention, which will take effect on 24 October 2022. Belarus' withdrawal has been denounced by a number of UN human rights experts, including the Special Rapporteur for Environmental Defenders. See UN Office of the High Commissioner on Human Rights, 'Belarus: UN Experts Denounce Withdrawal from Aarhus Convention' (10 August 2022) <<https://www.ohchr.org/en/press-releases/2022/08/belarus-un-experts-denounce-withdrawal-aarhus-convention>>.

<sup>120</sup>For a comparative global overview, see for instance <<https://worldjusticeproject.org/rule-of-law-index/country/2021/Fundamental%20Rights/>>. For a critical appraisal of this index and other indices with a focus on the rule-of-law crisis in Europe, see A Jakab and L Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal* 936, 944–947.

<sup>118</sup>MOP Decision on the Rapid Response Mechanism (n 13) Annex, para 12, see also n 107.