

Submission to the UN Committee on the Rights of the Child in advance of the 2016 Day of General Discussion on "Children's rights and the environment"

by Child Rights International Network (CRIN)
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Child Rights International Network (CRIN) is a rights-based organisation that advocates for the full realisation of all children's rights. Our submission aims to contribute information on the different aspects of children's access to justice in relation to rights violations resulting from environmental damage. The issue is fundamental in environmental debates, as the impact of contemporary environmental problems, such as climate change, pollution, environmental degradation and resource depletion will profoundly affect the quality of life of current and future generations of children. What's more, from a health perspective, children's bodies are particularly susceptible to adverse effects of environmental harm because exposure occurs during sensitive periods of development and their young age means they will have to live with any consequences for longer. Ensuring children's access to justice is not only crucial for violations of children's rights already incurred, but also for preventing their recurrence by ensuring future laws and policies are rights-respecting.

Obligations on children's right to access justice

State obligations relevant to ensuring children's access to justice for violations of their rights in the context of the environment are set out in a number of binding international treaties. Among others, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) are of particular relevance. All three instruments require States parties to bring their domestic legal framework in line with the rights and obligations enshrined therein, including through legislative and administrative measures, in order to implement (CRC art. 4) and give full effect to them (ICCPR art. 2.2; ICESCR art. 2.1), and therefore make them justiciable under domestic law. Moreover, article 2 of the ICCPR explicitly enshrines everyone's right to an effective remedy for the violation of their human rights.

While the CRC does not explicitly mention children's access to justice, the Committee on the Rights of the Child has affirmed that this is an implicit obligation of States parties.¹ The Committee explains further that,

States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including

¹ CRC General Comment n.5 on general measures of implementation, CRC/GC/2003/5, para 24.

compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.²

The CRC also sets out rights which ensure that children who seek justice are guaranteed fair access and treatment, including the right to information (art. 17), prompt access to legal assistance and to prompt decisions by the court (art. 37(d)), and to be heard (art. 12).

With regard to violations of children's rights resulting from the activities of private enterprises, States still have an obligation to provide effective remedies and reparations for violations of children's rights.³ States should not directly or indirectly facilitate, aid and abet any infringement of children's rights, and to this end, they have an obligation to ensure that all actors, including businesses, respect children's rights.⁴ Where a State has failed to undertake the necessary, appropriate and reasonable measures to prevent businesses from causing or contributing to abuses of children's rights or to provide remedies for these abuses it has breached its own obligations.⁵

Challenges of environmental litigation for children

Taking legal action to protect the environment brings up numerous challenges. Environmental campaigners, who are usually behind legal action either as petitioners or representatives, face high or increasing court costs,⁶ restrictions accessing critical funding, and the threat of criminal sanctions or being closed down based on trumped up charges related to their work, among others.⁷ With regard to children, despite the legal framework guaranteeing their rights, and due to children's special and dependent status, access to justice remains a challenge for children in any setting, including in the context of environmental litigation.⁸ There are several reasons for this situation.

Lack of information and legal status

Children are often unaware of their rights and the existence of services, so do not know where to seek advice and assistance or even that their rights have been violated in the first place.⁹ Furthermore in many countries children often have no legal status to act without their parents or

² Ibid.

³ Committee on the Rights of the Child (2013) General Comment n.16 on State obligations regarding the impact of business on children's rights, CRC/C/GC/16, para. 30.

⁴ Ibid. para. 26.

⁵ Ibid. para. 28.

⁶ *The Guardian*, "Legal battles to protect the environment 'easier to fight in China than the UK'", 11 November 2015. Available at:

<https://www.theguardian.com/environment/2015/nov/11/legal-battles-to-protect-the-environment-easier-to-fight-in-china-than-the-uk>

⁷ International Center for Not-for-Profit Law (2016), "Environmental advocacy: Challenges to environmental groups' rights to assemble, associate and express their opinions". Available at: <http://www.icnl.org/Global%20Trends%20Vol%207%20iss%201.pdf>

⁸ See UN High Commissioner for Human Rights (2013), "Access to justice for children", A/HRC/25/35.

⁹ Ibid. para. 14.

legal representatives.¹⁰ For these reasons, children's access to justice is usually dependent on the support of adults in the form of representatives. However even they may not be aware of children's rights or know how to best support their children.¹¹

Standing

The lack of independence and legal status national legal systems commonly accord to children is a serious barrier to them accessing justice for any rights violation, but environmental issues create further hurdles. The victims of large scale environmental damage are not only those directly affected today, but the community as a whole as well as people who are not yet alive. Requirements that individuals have a particular interest and a failure to allow collective complaints for all those affected can block effective challenges based on the full impact of environmental damage.

Despite the fact that the impact of contemporary environmental problems will be felt most by future generations, some governments have challenged litigation on behalf of future generations. For example, in 2015 the government of the **Netherlands** challenged the admissibility of a complaint filed by an NGO on behalf of 900 plaintiffs, including children, which sought to speed up state measures to reduce greenhouse gas emissions, arguing that it did not have the authority to litigate on behalf of future generations.¹² While the Hague District Court dismissed the government's argument, and the complainants won the case, the government's position demonstrates how the principle of 'intergenerational justice' - which requires that the rights and opportunities of future generations be equal to those of the generation governing today - is not always recognised.

There have also been few rulings by courts around the world recognising intergenerational justice. A landmark child-led case comes from the **Philippines**, where the country's Supreme Court ruled in favour of a group of children in 1993 who brought a lawsuit to stop the destruction of the fast disappearing rainforests in their country, arguing that the national Constitution recognises the right of people to a "balanced and healthful ecology" and the right to "self-preservation and self-perpetuation." Among other things, the Court recognised people's right to a clean environment and to exist from the land, and - perhaps more importantly - a justiciable intergenerational responsibility to maintain a clean environment, meaning that each generation has a responsibility to the next to preserve the environment.¹³

Financial burden

Court costs, in particular paying for legal representation, heavily affects children's ability to access justice, as they often lack the necessary means to pay for fees or to generate the funds. What's more, legal aid is practically non-existent for the kinds of civil or public interest

¹⁰ CRIN (2016), "Rights, Remedies and Representation: Global Report on Access to Justice for Children", pp. 16-19.

¹¹ UN High Commissioner for Human Rights (2013) "Access to justice for children", A/HRC/25/35, para. 16.

¹² See, for example, "The Urgenda climate case against the Dutch government." Available at: <http://www.urgenda.nl/en/climate-case/>

¹³ Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083). Available at: <https://www.escri-net.org/caselaw/2006/oposa-et-al-v-fulgencio-s-factoran-jr-et-al-gr-no-101083>

administrative cases that are likely to be used to bring environmental cases. From the onset, certain groups of children face this financial burden in particular, including Indigenous children¹⁴ and those living in poverty.¹⁵ In some cases, States have even been accused of attempting to deter organisations and individuals from bringing environmental suits by increasing the cost of litigation.¹⁶ Additionally, complainants who lose an environmental case deemed to be in the public interest can also incur considerable costs. For instance a government proposal in the **United Kingdom** seeks to double the costs which a party bringing a case may be liable to pay to the other side in environmental cases,¹⁷ currently capped at £5,000 for individuals and £10,000 for NGOs.¹⁸

Collective litigation

Collective litigation and public interest litigation are an effective way of challenging widespread or large scale violations - such as those resulting from environmental damage - while reducing the burden on any given child victim,¹⁹ yet less than half of States around the world allow collective litigation in some settings and only around 15 percent allow collective action across the board.²⁰ These measures represent an underdeveloped tool with the potential to greatly increase the protection of children's rights in the context of environmental damage, allowing for individuals, States and private enterprises to be sued.

The class action is perhaps the most well-known form of collective action and a more substantial means of addressing widespread abuses of children's rights. At its heart, a class action is a way of allowing a number of individuals to make a joint claim against a single defendant. The **United States** has one of the best established forms of class action and has acted as a model for other States, allowing hundreds of thousands of claimants to be represented in a single proceeding where there is a common question of law or fact, the representative of the class is appropriate and typical of all of the individuals and a class action is the most appropriate setting for the dispute.²¹

¹⁴ See the Study by the Expert Mechanism on the Rights of Indigenous Peoples (2013) on Access to justice in the promotion and protection of the rights of indigenous peoples, A/HRC/24/50, paras. 66-70.

¹⁵ See the Report of the Special Rapporteur on extreme poverty and human rights (2012), A/67/278, analysing the obstacles to access to justice for persons living in poverty.

¹⁶ *The Guardian*, "Legal battles to protect the environment 'easier to fight in China than the UK'", 11 November 2015. Available at: <https://www.theguardian.com/environment/2015/nov/11/legal-battles-to-protect-the-environment-easier-to-fight-in-china-than-the-uk>

¹⁷ The proposal is specifically for environmental cases. For an ordinary civil case (at least in the UK) there is theoretically no cap on how much a losing party would have to pay. If the other party spent millions of pounds on defence lawyers, the incurred costs for the plaintiff/s could be crippling.

¹⁸ *The Guardian*, "Legal battles to protect the environment 'easier to fight in China than the UK'", 11 November 2015. Available at: <https://www.theguardian.com/environment/2015/nov/11/legal-battles-to-protect-the-environment-easier-to-fight-in-china-than-the-uk>

¹⁹ See, for example, "Landmark US federal climate lawsuit," Our Children's Trust. Available at: <http://www.ourchildrenstrust.org/us/federal-lawsuit/>

²⁰ CRIN (2016), "Rights, Remedies and Representation: Global Report on Access to Justice for Children", p.10.

²¹ *Ibid.* pp. 23-24.

The following are a number of examples in which forms of collective litigation have been pursued over environmental issues affecting children. In 2016 **Pakistan's** Supreme Court decided to hear several pending environmental cases alongside one headed by a seven-year-old girl represented by her father, with the petition arguing that continued exploitation and promotion of fossil fuels by federal and provincial governments is a violation of the youngest generation's constitutional right to life and the public trust doctrine.²² 2015 saw **Mexico's** first lawsuit advocating for the collective rights of children over corporate interests in order to protect the environment. One hundred and thirteen child plaintiffs won the lawsuit to permanently suspend a development project in Cancun that would have seen the razing of dozens of hectares of mangrove forest.²³ Dozens of cases have been brought in the **United States**²⁴ relying on the legal doctrine of public trust, under which the State is responsible for safeguarding natural resources, such as the atmosphere and waterways, in the public interest. In one of the cases, the presiding judge held that the public trust doctrine is intrinsically linked to controlling carbon emissions which potentially affect those resources, and explicitly states that children have a right to a healthy environment.²⁵

A small number of countries have begun to develop forms of collective action that are specifically available in environmental cases. **Bolivia**, for example, allows "popular actions" to be filed by any individual or on behalf of a community when an authority is alleged to have violated, or threatened to violate, the collective rights and interests related to the homeland, public spaces, safety and public health, the environment or other rights of a similar nature as recognised by the Constitution.²⁶

Limitation periods

Strict time limits on when a case must be submitted can present a serious barrier to children accessing remedies, particularly for young children who may not be able to approach the courts until they have reached the age of majority. With regard to environmental litigation, gathering evidence that can incriminate a perpetrator or which establishes causation of a given illness may no longer be possible after any substantial amount of time has passed. Indeed this is near-impossible in cases where adverse health effects of an environmental problem manifest many years after exposure, and more so when a health problem becomes hereditary. One of the considerations in setting limitation periods is the difficulty in gathering evidence to defend oneself years after the event. Having said this, it is common for limitation periods to be explicitly

²² *The Express Tribune*, "Seven-year-old girl takes on federal, Sindh governments, 29 June 2016. Available at: <http://tribune.com.pk/story/1133023/seven-year-old-girl-takes-federal-sindh-governments/>

²³ *El Economista*, "Piden 113 menores revisión de fianza en Caso Tajamar," 12 November 2015. Available at: <http://eleconomista.com.mx/estados/2015/11/12/piden-113-menores-revision-fianza-caso-tajamar>

²⁴ See, for example, Our Children's Trust, "State legal actions". Available at: <http://www.ourchildrenstrust.org/state-legal-actions/>

²⁵ Our Children's Trust, "In advance of Paris climate talks, Washington court recognizes constitutional and public trust rights and announces agency's legal duty to protect atmosphere for present and future generations", 20 November 2015. Available at: <http://westernlaw.org/article/advance-paris-climate-talks-washington-court-recognizes-constitutional-and-public-trust-right>

²⁶ Constitution of Bolivia, arts. 135-136.

relaxed in certain types of proceedings, particularly where delay in bringing a case is not the fault of the victim, where the harm is particularly severe or where it may take time for the harm suffered to become evident. For example, in **Slovakia** there is no statute of limitations on civil claims for harm to a person's health.²⁷

Right to an effective remedy

An effective remedy has several components, including the right to equal and effective access to justice, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.²⁸

In the context of human rights violations related to environmental harm, full and effective reparations include adequate compensation, rehabilitation of those affected (including through access to medical and psychological care where relevant), guarantees of non-repetition (through the implementation of preventative and precautionary measures), remediation (of affected areas, where possible), and plaintiff satisfaction.²⁹ The latter should not be underestimated, as even where cases have successfully been brought to hold polluters responsible and deliver remedies to victims, results have not always been satisfactory. A case in point is the woefully inadequate compensation awarded to victims of **India's** Bhopal gas disaster.³⁰

Recommendations to the Committee

Enabling access to justice for children, including for violations of the right to a healthy environment, requires fully realising a range of rights. For more information and more detailed recommendations on this issue more broadly, see CRIN's access to justice for children project, available at: <https://www.crin.org/en/home/law/access>

We recommend the Committee urge States to:

- establish collective and public interest action mechanisms, including for environmental cases, that can provide remedies to all children affected by large scale environmental damage but do not require all affected children to be directly involved in proceedings;
- enshrine a justiciable right to a clean environment in domestic law;
- enshrine the principle of intergenerational equity in domestic law;

²⁷ Civil Code of the Slovak Republic, art. 106.

²⁸ UN General Assembly Resolution, A/RES/60/147 (2006), "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".

²⁹ Idib. paras. 18-23; Committee on the Rights of the Child (2013) General Comment n.16 on State obligations regarding the impact of business on children's rights, CRC/C/GC/16, para. 31.

³⁰ See, for example, "Campaigners dismiss Bhopal compensation as insufficient", BBC, 25 June 2010. Available at: <http://www.bbc.co.uk/news/10411047>

- ensure non-governmental organisations have standing to file and intervene in legal proceedings in the interests of children affected by violations of their environmental rights and on behalf of future generations;
- enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by private enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.³¹

About CRIN

Our goal

A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation

CRIN is a global research, policy and advocacy organisation. Our work is grounded in the UN Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

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³¹ Committee on the Rights of the Child (2013) General Comment n.16 on State obligations regarding the impact of business on children's rights, CRC/C/GC/16, para. 44.