

Submission for the Special Rapporteur's guide on good practices in relation to the human rights obligations related to the environmentally sound management and disposal of hazardous substances and wastes - May 2017

This submission represents the contribution of Child Rights International Network (CRIN) (www.crin.org) to the questionnaire of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes for the development of a guide on good practices. CRIN is a global research, policy and advocacy organisation and our work is grounded in the United Nations Convention on the Rights of the Child. Our goal is a world where children's rights are recognised, respected and enforced and where every rights violation has a remedy.

As this submission focuses on children's rights, we are not providing information for each of the questions of the questionnaire but only where we are able to contribute.

1. Please provide examples of, or views on, good practices to protect the right to life and health of consumers from toxic and otherwise hazardous substances in consumer products.

According to the Convention on the rights of the child (CRC), States must implement the right of the child to the enjoyment of the highest attainable standard of health, including by "taking into consideration the dangers and risks of environmental pollution" (article 24, c). The realisation of a healthy environment requires that States take effective measures to prevent childhood exposure to hazardous substances. However, over 1.7 million children under the age of 5 are still dying from modifiable environmental factors, such as air pollution and water contamination.¹

Good practices should include legal prescriptions for precautionary or preventive measures in children's best interests instead of prioritising businesses' profits by using industrial chemicals that have not been tested. In cases where preventive steps have not been taken, States should be held liable and victims of violations should be allowed to access complaint procedures.

The Committee on the Rights of the Child recognises that most mortality, morbidity and disabilities among children could be prevented if there were political commitment and sufficient allocation of resources directed towards the application of available knowledge and technologies for prevention, treatment and care.² This also apply to hazardous substances and wastes and States should encourage innovative businesses dedicated to ensuring the safety of consumer products for children.³

¹ Figures for 2012: WHO, *Preventing Disease through Healthy Environments* (2016).

² Committee on the Rights of the Child, General Comment No. 15 (2013), para. 1

³ In China, a father has launched a [startup dedicated to ensuring the safety of products for children](https://www.crin.org/en/home/what-we-do/crinmail/week-childrens-rights-1503): <https://www.crin.org/en/home/what-we-do/crinmail/week-childrens-rights-1503>

2. Please provide examples of, or views on, good practices to protect the right to life and health of workers from toxic and otherwise hazardous substances and wastes in occupational settings.

The need to protect the right to life and health of workers from toxic and hazardous substances and wastes in occupational settings also applies to children.

Children are exposed to harmful substances when performing the worst forms of child labour, for instance in extractive industry (using mercury in gold mining sector), in agricultural work (spraying pesticides) or in domestic work. According to the ILO Convention No. 182, the worst forms of child labour include “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children” (article 3, d). ILO recommendation No. 190 further clarifies that it includes “work in an unhealthy environment which may expose children to hazardous substances, agents or processes”. According to this international framework such forms of child labour, which are exploitative and harmful to children’s physical and mental development, must be prohibited and eliminated by States parties for all persons below the age of 18.

But children should also be protected as any other worker when the harm is less obvious. CRIN believes that in cases where children have to - or want to - work, it should be safe, fairly paid and should not interfere with their other rights, especially their education and development (Article 32 of CRC). Instead of prohibiting children from working, governments should formalise and regulate their labour activities, establish safeguards to ensure their protection which include affording them the same rights as adults.⁴ These include the right to join trade unions. According to the Universal Declaration of Human Rights and the Convention on the rights of the child, children have such a right.⁵ A good practice would therefore be for child workers’ unions to be consulted in the process of ensuring health & safety at the workplace. Working children would then have the opportunity to express their views and opinions in relation to the use of hazardous substances at work.

3. Please provide examples of, or views on, good practices to protect the right to life and health of the public from toxic and otherwise hazardous substances and waste in air, water and soil.

We refer you to our recent submission to the Special Rapporteur on the human rights to safe drinking water and sanitation.⁶

⁴ Read more about children’s access to employment in CRIN, “Age is arbitrary: setting minimum ages” available at: <https://www.crin.org/en/home/what-we-do/policy/minimum-ages/right-work>

⁵ Convention on the Rights of the Child, art. 12 on Freedom of expression and article 15 on the right to association

⁶ Submission for the Special Rapporteur’s report on the subject of regulation of water and sanitation services in the context of realisation of human rights, April 2017, available at: <https://www.crin.org/en/library/publications/water-and-toxics-crin-submission-sr-water-and-sanitation>

5. For questions 1-4, please provide examples of, or views on, good practices to protect those at elevated risk of impacts on rights to life and health, such as children, women, indigenous peoples, low-income communities, racial and ethnic minorities and migrants.

See above under questions 1-4

8. Please provide examples of, or views on, good practices for cooperation and coordination between relevant governmental authorities at the (i) national level and (ii) regional and/or international level(s).

Violations of human and children's rights by hazardous substances and wastes is a global challenge which need cooperation and coordination at all levels of decision.

The UN, as the world's human rights normative and agenda setting institution, can help promote a more holistic approach to children's rights. Good practices would include that all UN human rights treaty bodies address rights implications of toxic chemicals and pollution in their review of States' obligations and draw attention to deficiencies. The Committee on the Rights of the Child has included concerns over the impact of environmental threats on the rights of the child since its concluding observations of 2000. It has recommended, for instance, that several countries prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children, and to strengthen procedures for inspection.⁷ Such practices have to be encouraged and replicated throughout all the UN entities to bring awareness to all stakeholders.

As NGOs, our role is also to ensure that children's rights violations are monitored, reported on and brought to the attention of UN human rights bodies and complaint mechanisms.

10. Please provide examples of good practices in ensuring access to justice, including access to remedy for victims of hazardous substances and wastes. Please include information on good practices for the remediation of contaminated sites, reducing costs of judicial remedy, addressing the challenge of establishing a causal link between exposure and impact and other evidentiary hurdles, such as access to information, as part of your consideration of access to justice.

The issue of accessing justice is fundamental in environmental debates, as the impact of contemporary environmental problems, such as pollution, environmental degradation and resource depletion will profoundly affect the quality of life of current and future generations of children.⁸

⁷ See for example, CRC Concluding Observations to Jordan, CRC/C/15/Add.125, 28 June 2000, para. 50; CRC Concluding observations to Guyana, CRC/C/GUY/CO/2-4, 18 June 2013, para. 22

⁸ Also see CRIN's submission to the UN Committee on the Rights of the Child in advance of its Day of General Discussion on "Children's rights and the environment", available at: <https://www.crin.org/en/library/publications/environment-crin-submission-crcs-day-general-discussion-childrens-rights-and>

Taking legal action for victims of hazardous substances and wastes brings up numerous challenges, especially for children, because of their special and dependent status. This submission will not address the issue in depth - requirements such as legal aid, legal assistance and standing before courts cut across all human rights - but will focus on different types of actions and practicalities that are of particular relevance to children in this context and which should be developed, as good practices, in order to allow child victims to obtain remedies but also for preventing violations' recurrence by ensuring future laws and policies respect rights.⁹

Collective action and public interest litigation:

Collective litigation and public interest litigation, which allow a number of claimants or victims to bring a case or a complaint together, 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.¹⁰ 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.¹¹ 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. For example, in Cancún, Mexico, a group of 113 children who filed a lawsuit for the protection of their constitutional right to a healthy environment have been granted their request to permanently suspend a development project that would have seen the razing of dozens of hectares of mangrove forest.¹² In the United Kingdom, a class action on behalf of 18 children was also brought to the High court which linked the birth defects the children experienced to toxic material.¹³

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.¹⁴

Concept of the intergenerational litigation

The concept of intergenerational justice is also key in ensuring the protection of vulnerable groups, particularly children. In essence, the principle states that there should be distributive

⁹ For further discussion of children's access to justice, see CRIN, Rights, Remedies and Representation: A global report on access to justice for children, 2016. Available at: www.crin.org/node/42383. See more relevant legal actions brought to defend children's right to a clean environment:

<https://www.crin.org/en/library/publications/environment-childrens-right-clean-environment>

¹⁰ See, for example, "Landmark US federal climate lawsuit," Our Children's Trust. Available at: <http://www.ourchildrenstrust.org/us/federallawsuit/>

¹¹ CRIN (2016), "Rights, Remedies and Representation: Global Report on Access to Justice for Children", p.10.

¹² *El Economista*, "Piden 113 menores revisión de fianza en Caso Tajamar," 12 November 2015. Available at: <http://eleconomista.com.mx/estados/2015/11/12/piden113menoresrevisiofianzacasotajamar>

¹³ <http://www.bailii.org/ew/cases/EWHC/TCC/2009/1944.html>

¹⁴ Constitution of Bolivia, arts. 135-136.

justice between generations and that the rights of different generations should be equal over time.¹⁵ The concept has been underdeveloped in national law, but has played an important role in litigation in several countries, including the Philippines, where it has been used to allow class actions for the enforcement of benefits to future generation. In 1994, the Supreme Court of the Philippines ruled in favour of a group of children who brought a case concerning the destruction of rainforests in the country, finding that the rights to a clean environment, to exist from the land, and to provide for future generations are fundamental; each generation has a responsibility to the next to preserve the environment, and children may sue to enforce that right on behalf of both their generation and future generations.¹⁶ The principle takes on particular importance in the context of issues related to natural resources contamination by hazardous substances, to mitigate against short termist policy that will affect the realisation of the rights of future generations.

The case for public interest cost protection

One of the most serious barriers to children accessing justice is the financial burden. Justice can be expensive but no one should be prevented from seeking justice because of an inability to finance their case. As legal aid is practically nonexistent for the kinds of civil or public interest administrative cases that are likely to be used to bring environmental cases,¹⁷ other mechanisms should exist to encourage such collective actions of public interest. The general principle is that a losing party to litigation should pay the winner's reasonable legal costs. To remove this burden, one of the mechanisms available to the Court to ensure access to justice in public interest cases is the grant of a protective costs order.¹⁸ Consisting of excluding or limiting the liability in expenses of public interest litigants, this mechanism is already available in some countries for environmental cases, including in the United Kingdom.¹⁹ We recommend that this practice be developed to facilitate access to justice to victims of hazardous substances and wastes.

Reducing the burden of proof

The burden of proof usually lies with victims, not with governments or businesses that use, produce or release hazardous substances that eventually pollute and often harm children. But the exposure can be difficult to prove in tort litigation as the victim will have to: 1) prove that the chemical at issue is capable of causing the disease or illness the plaintiff has; 2) prove that the chemical at issue did in fact cause the disease or illness this particular plaintiff

¹⁵ See Institute for Development Studies, *In focus policy briefing Issue 13: Children in a changing climate - lessons from research and practice*, November 2009. Available at: http://www.childreninachangingclimate.org/uploads/6/3/1/1/63116409/seballos-ids_infocus-rightsneedscapabilities_2009.pdf.

¹⁶ *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources* [1994] 33 ILM 173. Summary and full judgment available at: www.crin.org/node/6943.

¹⁷ It is very common to limit legal aid to very limited circumstances: see more in CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016. Available at: www.crin.org/node/42383.

¹⁸ *Protective Costs Orders in UK Environmental and Public Law Cases*, John Litton QC, 2015 available at: <http://www.middletemple.org.uk/download/file/fid/901>

¹⁹ *Protective Expenses Orders and public interest litigation*, Tom Mullen, *Edinburgh Law Review*, Volume 19 Issue 1, Page 36-65, available at: <http://www.eupublishing.com/doi/full/10.3366/elr.2015.0250>

has.²⁰ In order to reduce the burden of proof on victims of hazardous substances and wastes, States should put in place regulatory frameworks which monitor information about who manufactures, sells, uses, trades in, releases or disposes hazardous substances. Regulatory frameworks should also provide with “safe levels” of chemicals released in the environment as well as “safe levels” of exposure for children, taking into account their special vulnerability on the bases of real-life conditions, children being exposed to multiple substances during sensitive periods of childhood development”.²¹ With such regulations in place, it would be more difficult for perpetrators to evade accountability.

15. Please provide examples of, or views on, good practices by States to avoid the international transfer of polluting industries and hazardous supply or value chains through international cooperation.

Cases involving the disposal of hazardous substances and wastes can cross borders. To this end, extraterritorial jurisdiction is an essential tool to hold multinational corporations responsible for environmental damage they have caused. A company may cause damage in one country, but the responsible person or the corporation’s assets may be in another jurisdiction. There are well established mechanisms and legal practices and models that can be used to address this problem. The Alien Torts Statute in the United States, for example, can be used to file cases for abuses under international human rights law that took place in other countries.²² Dutch courts have also asserted their international jurisdiction over cases involving environmental damage caused by oil spills that occurred overseas.²³

Cases involving environmental damage have often been difficult to litigate in this field. For example, plaintiffs in Ecuador won a judgment before national courts against Chevron Corporation seeking reparation for severe environmental contamination in an area where the company had conducted oil operations. The plaintiffs struggled to enforce the judgment when the company pulled out of the country and have filed a long-running series of lawsuits in countries where the company continues to hold assets.²⁴

²⁰ *Establishing proof of exposure*, by J.C. Mcelveen, Jr., available at:

<http://www.jonesday.com/files/Publication/920104a6-7dfb-4f96-bb0b-6459c8aad166/Presentation/PublicationAttachment/d3f26ae4-3e93-4f38-bf19-4f904d36dec5/EstablishingProof.pdf>

²¹ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances on the rights of children, A/HRC/33/41 (2016), para. 7 and 11

²² See, for example, *John Doe and others v. Nestle USA and others* [2015] Case No. 10-56739. Summary and full judgment available at: www.crin.org/node/42727. Please note that the case itself addressed child slavery rather than in relation to environmental, but it is used here to demonstrate the potential for extraterritorial jurisdiction for human rights violations.

²³ For example, see *Eric Barizaa Dooh and others v. Royal Dutch Shell PLC* [2015]. Full judgment available in English and Dutch at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:3586>.

²⁴ See *Maria Aguinda Salazar y Otros v. Chevron Corporation* [2013] Judgment No. 174-2012. Full judgment, summary and discussion of follow-up legislation available at: www.crin.org/node/42860.