

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

This submission represents the contribution of Child Rights International Network (CRIN) (www.crin.org) to the report of the Special Rapporteur on the subject of regulation of water and sanitation services in the context of realisation of human rights. 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.

This submission focuses on the issue of contamination of water by toxics and its impacts on children's rights. However, as we are a global organisation, focusing on policy and advocacy work, we are not in a position to provide information for each of the questions of the questionnaire. We are therefore only providing answers where we are able to contribute.

Water is a major source of exposure to toxic chemicals and pollutants, in poor and wealthy countries.¹ Childhood exposure to contaminated water implicates numerous rights violations, including the right to life, survival and development, the right to health, the right to an adequate standard of living and a healthy environment. Securing the right of children to safe drinking water is a challenge that regulatory framework must take and in case their rights are violated, they must provide children with the means of getting redress.

Question 2: How can a regulatory framework (e.g., legislative, institutional, policy) and bodies contribute to the realisation of the human rights to water and sanitation? Please provide examples.

The Convention of the Rights of the Child (CRC) explicitly requires States to provide "adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution" (article 24). In its General comment No. 15, recalling that safe and clean drinking water and sanitation are essential for the full enjoyment of life and all other human rights, the Committee urges government departments and local authorities responsible for water and sanitation to recognise their obligation to help realise children's right to health, and actively consider child indicators on malnutrition, diarrhoea and other water-related diseases (...) when planning and carrying out infrastructure expansion and the maintenance of water services.²

The Special Rapporteur on human rights and toxics states in his report that "Many factors contribute to children being exposed around the world. Policies that prioritise businesses' instead of children's best interests, gaps in legislation, outrageous failures to enforce existing laws, the lack of capacity for monitoring and oversight, corporate misinformation campaigns, fragmented governance and disengaged health and labour ministries are but a few of the

¹ Sustainable Development Goal No. 6.

² Committee on the Rights of the Child, General Comment No. 15 (2013), para. 48.

problems that leave children in both the wealthiest and the poorest countries bearing the brunt of an assault from toxic chemicals and pollution.”³

In order to combat these causes and take into account the special vulnerability of children to toxics, regulatory frameworks should 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. The Special rapporteur on toxics highlights in this regard that “regulators assess the likelihood of harm from toxics on the basis of the exposure of an average adult to a single substance, not on the bases of real-life conditions, as children are exposed to multiple substances during sensitive periods of childhood development”.⁴

With such regulations in place, perpetrators would not be able to evade accountability.

Question 4: Please provide examples of situations where the lack of regulation, or inadequate regulation, in the water and sanitation sector could potentially lead to, or has actually led to, violations of the human rights to water and sanitation.

Toxic chemicals leave devastating impacts on people around the world, with children often the worst affected as a result of their unique vulnerabilities. Children are born around the world “pre-polluted”, as exposure to toxics before birth can severely affect children’s health.⁵ The World Health Organisation reveals that every 90 seconds a child dies from a water-related diseases. One hundred and sixty million children suffer from stunting and chronic malnutrition linked to water and sanitation.⁶ WHO also estimates that over 1.7 million children under the age of 5 died in 2012 from modifiable environmental factors, such as air pollution and water contamination.⁷

The Flint case in Michigan in the United States, where lead poisoning had impaired the health of thousands of people, particularly children, illustrates the failure of regulation to recognise that water is a human right and to ensure that essential services are provided in a safe and non-discriminatory manner.⁸

Question 5: What are the main challenges or obstacles encountered when trying to incorporate contents and principles of the human rights to water and sanitation into regulatory frameworks?

³ *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. 8.

⁴ *Ibid*, para. 7 and 11

⁵ *Ibid*, para. 5

⁶ WHO, *Progress on sanitation and drinking water, 2015 update and MDG assessment* (2015).

⁷ WHO, *Preventing Disease through Healthy Environments* (2016).

⁸ The week in Children’s rights, CRINmail 1462 available at:

<https://www.crin.org/en/home/what-we-do/crinmail/week-childrens-rights-crinmail-1462>; see also the statement of Special Rapporteurs on extreme poverty, water and sanitation and housing: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19917&LangID=E>

Right to information

People, and especially children, are unaware of their levels of exposure to hazardous substances. In addition, children often have no opportunity to participate in decisions about which hazardous substances enter their bodies. Implementing the right to information about hazardous substances in drinking water is one challenge that has to be transcended when incorporating human rights in regulatory framework. Information is crucial to preventing human rights violations resulting from exposure to hazardous substances and wastes; this information is, however, frequently unavailable and inaccessible.⁹

According to the Convention on the rights of the child, children must receive appropriate information on all aspects of health. The Convention includes a general obligation to ensure that the child has access to information and material from diverse sources, especially those aimed at promoting well-being and physical and mental health. States must take appropriate measures to ensure that children are informed about their health and various specific health issues.¹⁰ Furthermore, this information should be 'physically accessible, understandable, and appropriate to children's age and educational level.'¹¹ This international framework on the right to information is relevant to the implementation of the human right to water and sanitation and has to be reflected in any regulatory framework aiming at respecting the human rights to water and sanitation. For instance, the Special Rapporteur on human rights and toxics recommended States to promote education on toxic chemicals and pollution in primary schools' curricula.¹²

Question 7: Non-State actors have the responsibility to respect the human rights to water and sanitation and to exercise human rights due diligence in their operations. How should a regulatory framework reflect this responsibility? Please provide examples.

Business' responsibility

The Committee on the Rights of the Child, in its General Comment 16 on state obligations regarding the impact of the business sector on children's rights, stresses that "Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children's rights, such as exposure to (...) unsafe products or environmental hazards may have lifelong, irreversible and even transgenerational consequences". It specifically highlights the impact of activities and operations of business enterprises on the realisation of the right to survival and development (CRC, art. 6), and stresses that environmental

⁹ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances on the right to information throughout the life cycle of hazardous substances and wastes, A/HRC/30/40 (2015)

¹⁰ UN Convention on the rights of the child, articles 17 and 24(2) (e)

¹¹ Committee on the Rights of the Child, General Comment No. 15 (2013), para. 58

¹² 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. 110 (c)

degradation and contamination arising from business activities can compromise children's rights to health, food security and access to safe drinking water and sanitation.¹³

General comment 15 also recommends that States should regulate and monitor the environmental impact of business activities that may compromise children's right to health, food security and access to safe drinking water and to sanitation.¹⁴

Businesses have a responsibility to respect the rights of the child. As part of their human rights due diligence, businesses should identify, prevent and mitigate exposure of children to toxics through their activities, products or business relationships. The example of multinational milk companies promoting baby milk formula while discouraging breastfeeding in developing countries where access to safe water was not available illustrates the lack of due diligence that businesses show when considering the profits/human rights balance.¹⁵

Privatisation of services

It is increasingly common for States to deliver services through, or in partnership with, the private sector, but the manner of delivery of rights does not alter their content or decrease the obligations of the State. The Committee on the Rights of the Child has explicitly recognised that: "States are not relieved of their obligations under the Convention... when their functions are outsourced to a private business or non-profit organisation. A State will thereby be in breach of its obligations under the Convention where it fails to respect, protect and fulfil children's rights in relation to business activities and operations that impact on children."¹⁶ States are permitted to give effect to the right to water and sanitation through private services, but only if the provision fully realises these rights. In other words, "involving non-State actors requires, inter alia, clearly defining the scope of functions delegated to them, overseeing their activities through setting regulatory standards and monitoring compliance."¹⁷

Question 9: What mechanisms should be in place to ensure that the voice of persons and communities in vulnerable situations is heard and their needs are taken into consideration in the regulation of water and sanitation services? Please provide positive and negative examples.

Access to justice is key to ensuring that the needs of persons and communities in vulnerable situations are taken into account. Guaranteeing access to justice for children applies similarly across a range of rights violations, whether the prohibition of torture or access to

¹³ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 19.

¹⁴ Committee on the Rights of the Child, General Comment No. 15 (2013), para. 49.

¹⁵

<https://www.theguardian.com/sustainable-business/nestle-baby-milk-scandal-food-industry-standards>; see also the Bulletin of the World Health Organisation: *Formula-feeding is not a sustainable solution*, available at: <http://www.who.int/bulletin/volumes/87/8/09-069476/en/>

¹⁶ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 25.

¹⁷ Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, A/HRC/15/31, 20 June 2010.

water and sanitation. 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 focus on issues particularly raised under this question and of particular relevance to children in this context.¹⁸

Children's right to be heard

The right to be heard itself is a fundamental requirement for children to access justice and for their needs to be taken into consideration.¹⁹ This principle, one of the general principles of the Convention on the Rights of the Child,²⁰ is relevant to the implementation of all rights, including to water and sanitation. This right applies in the formulation of regulations that affect children in the context of water and sanitation as well as in addressing violations of their rights in this context.

Complaint mechanisms

The right to access remedies and redress for violations of the rights to water and sanitation are a key function of the regulation of these services. Effective complaint mechanisms, including those tailored to the needs of vulnerable groups such as children, are vital in this regard. There are a number of ways of protecting water and sanitation rights through complaints mechanisms, but perhaps the strongest is through enforceable constitutional protections. Colombia's Constitutional Court, for example, has been willing to issue writs based on constitutional rights protections ensuring access to water services that had been suspended by a utility companies where the water was needed for human consumption and where the lack of water would have a negative impact on living conditions.²¹ Litigation has also been common on ancestral water rights of indigenous communities preceding more recent regulations.²² Where regulatory regimes are in place, independent complaint bodies may also be effective and avoid the potential cost involved in petitioning the courts.

Intergenerational justice

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 justice between generations and that the rights of different generations should be equal over time.²³ The concept has been underdeveloped in national law, but has played an important

¹⁸ 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.

¹⁹ For discussion, see *Report of the United Nations High Commissioner for Human Rights: Access to justice for children*, A/HRC/25/35, 16 December 2013, paras. 46 to 51.

²⁰ Committee on the Rights of the Child, General Comment No. 5 (2003), CRC/GC/2003/5, 27 November 2003, para. 12.

²¹ See *Juan Carlos Puentes Soto v. Empresa de Servicios Publicos del Municipio de La Argentina, Huila* [2014] Sentencia T-163/14. Summary and link to full judgment available at: www.crin.org/node/42857.

²² See, for example, *Aqua Mineral Chusmiza v. Comunidad Indigena de Chusmiza Usmagama* [2009] Supreme Court of Chile. Summary and full judgment available at: www.crin.org/node/42859.

²³ 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-rightsneed_scapacities_2009.pdf.

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 generations.²⁴ The principle takes on particular importance in the context of issues related to natural resources, such as water, to mitigate against short termist policy that will affect the realisation of the rights of future generations.

Effective remedies

The Special Rapporteur on toxic wastes has drawn attention to the inadequacy of remedies for the harm caused by toxic chemicals, including through their impact on water sources, noting the lifelong “elevated risks of cancer, diabetes, respiratory problems, behavioural disorders, hormonal dysfunctions and other health impacts linked to the hundreds of toxic chemicals children are exposed to”.²⁵ In light of the inadequacy of possible remedies, the Special Rapporteur has emphasised prevention of the harm, including the effective regulation of the release of chemicals into the environment, as vital to ensuring the full realisation of these rights.

²⁴ *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.

²⁵ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management of disposal of hazardous substances and wastes, A/HRC/33/41, 2 August 2016, para. 41.