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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Marc Pallemmaerts

Preliminary report*

Summary

This report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste is submitted to the Human Rights Council in accordance with Council resolution 21/17.

Having been appointed by the Council recently in September 2012, the Special Rapporteur in his first report to the Council will provide a summary of the background, context and work of the mandate to date, and present a broad outline of the strategy that will inform his work for the remainder of his mandate.

In particular, he intends to hold a number of consultations as early as possible in order to start the process of developing a guide on good practices in the environmentally sound management of hazardous substances and wastes, including elaborating on the normative content of the human rights obligations therein, as well as developing appropriate criteria with which to identify such good practices.

* Late submission.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–6	3
II. Background, context and work of the mandate	7–16	4
A. Background and origin of the mandate	7–13	4
B. Current context and scope of the mandate	14–16	6
III. International and domestic normative framework in the field of the mandate, from the perspective of human rights law and of environmental, health and consumer protection law	17–52	7
A. Tentative overview of life-cycle stages and regulatory gaps in international and internal law as regards hazardous substances and wastes with a view to the identification of areas for future focus	31–39	11
B. International and domestic norms that apply to different phases of the life cycle of chemicals and activities that involve them.....	40–52	13
IV. Planning the programme of activities of the mandate	53–59	18

I. Introduction

1. In its resolution 21/17, the Human Rights Council appointed the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, with a mandate to provide insight on:

(a) The human rights issues raised by transnational corporations and other business enterprises in connection with the environmentally sound management and disposal of hazardous substances and wastes;

(b) The scope of national legislation relating to the human rights implications of the management and disposal of hazardous substances and wastes;

(c) The human rights implications of waste-recycling programmes and the transfer of polluting industries, industrial activities and technologies from one country to another and new trends therein, including e-waste and the dismantling of ships;

(d) Support and assistance to victims of human rights violations relating to the environmentally sound management and disposal of hazardous substances and wastes;

(e) The ambiguities in international instruments that allow the movement and dumping of hazardous substances and wastes, and any gaps in the effectiveness of international regulatory mechanisms;

(f) Human rights abuses and violations committed against human rights defenders owing to their activities relating to the environmentally sound management and disposal of hazardous substances and wastes.

2. Furthermore, the Council requested the Special Rapporteur to submit at its twenty-fourth session a progress report with specific proposals, recommendations and lasting solutions, on existing problems and gaps requiring immediate intervention, in the management of hazardous substances and wastes as they pertain to adverse effects on human rights. Additionally, the Council urged the Special Rapporteur to develop, in consultation with relevant stakeholders and with the support of the United Nations High Commissioner for Human Rights, a guide to best practices regarding the human rights obligations related to the environmentally sound management and disposal of hazardous substances and wastes, and to submit the guide together with his report to the Human Rights Council at its twenty-seventh session.

3. At its twenty-first session, the Council appointed Marc Pallemmaerts as Special Rapporteur for an initial period of three years, and he took up his mandate on 1 November 2012.

4. In accordance with the mandate, the Special Rapporteur has begun his work by holding informal meetings with stakeholders including government and industry experts and practitioners of environmental law, human rights, and chemicals management, to share ideas on how the mandate should approach the issue of best practices and how to proceed with a view to producing a set of guidelines before the end of the mandate which will constitute a meaningful contribution to the promotion and protection of human rights and safety from toxic risks. In addition, the Special Rapporteur has participated in meetings and seminars on the subject matter of his mandate in response to invitations extended to him, including the fifth World Forum on Human Rights in Nantes, France, in May 2013, and an academic conference on the subject of hazardous waste traffic in Cotonou, Benin, in September 2013. On these occasions he had the opportunity to engage with key actors and experts in the field of hazardous substances and wastes and the sound environmental

management thereof and to meet with non-governmental organizations (NGOs) involved in the work of the mandate to explore possibilities for collaboration.

5. The Special Rapporteur intends to hold a series of consultations during the term of his mandate in order to give an opportunity to all stakeholders, governmental and non-governmental, to submit any evidence they deem relevant to the task of developing an extensive guide on good practices in the environmentally sound management of hazardous substances and wastes, including elaborating on the normative content of the human rights obligations therein. These consultations should facilitate the consideration of specific proposals, recommendations and lasting solutions, for existing problems and gaps requiring immediate intervention, in the management of hazardous substances as they pertain to adverse effects on human rights. In this regard, the Special Rapporteur at this time chooses to focus on a scoping exercise consisting of a broad analysis of relevant environmental and public health legislation and regulation in force at the global, and regional, national and subnational level, with respect to the management of hazardous substances and wastes all along their life cycle. He has initiated, as will be reflected below, a preliminary mapping exercise to track the extent to which such activities are adequately regulated or are symptomatic of regulatory gaps.

6. The Special Rapporteur is of the view that there is a need to reflect on the human impact that hazardous substances have occasioned in terms of real data in order to be able to make specific recommendations on the immediate actions that should be taken to reduce the numbers of persons adversely affected, especially children. In this first scoping report to the Council, he will provide a summary of the background, context and work of the mandate to date, and present a broad outline of the strategy and methodology that will inform his work for the remainder of his mandate. The relevant human rights impacted have been extensively canvassed by his predecessors and, in order to avoid duplication of work, the present Special Rapporteur will not enter into any detail on this issue in the abstract, but rather wait for the results of invitations to submit evidence and field visits before reporting further in future reports to the Council.

II. Background, context and work of the mandate

A. Background and origin of the mandate

7. Exhibiting profound foresight, the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972 first acknowledged the existence of a link between human rights and the quality of the human environment in all its dimensions¹ and, specifically, declared in its Principle 6 that “the discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted”, while Principle 7 calls for prevention of “pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”. It should be noted that Principle 6 further declares that “the legitimate struggle against pollution shall be supported”. Finally, Principle 22 provides for a victim-oriented approach by stressing that “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

¹ See Report of the Independent Expert on human rights and the environment, John Knox (A/HRC/22/43).

8. The United Nations maintained focus on the matter of hazardous substances, and the United Nations Conference on Environment and Development (Earth Summit) in Rio in 1992 addressed this matter in Agenda 21 as well as in the Rio Declaration on Environment and Development, whose Principle 10 pronounced that “Environmental issues are best handled with participation of all concerned citizens, ... each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes” and “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. This very important provision of the Rio Declaration constitutes the basis on which United Nations Economic Commission for Europe (UNECE) member States grounded the 1998 Aarhus Convention and its 2003 Kiev Protocol (see below).

9. Principle 13 of the Rio Declaration imposes on States the responsibility to develop national law regarding liability and compensation for the victims of pollution and other environmental damage. Agenda 21 – the other main soft law instrument adopted by the Rio Conference – noted, in its Chapter 19, that “the widespread contamination by chemicals, with serious damage to health, genetic structures, reproduction and the environment, continues in recent years in some major industrial areas of the world.” Risks to human health and the environment associated with the production and growing number of substances and chemicals used, however, are not limited only to highly industrialized areas, as the problems encountered by developing countries, especially emerging economies, clearly show.

10. Additionally the 1993 Vienna Declaration and Programme of Action declared that “the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.” More specifically, the World Conference on Human Rights recognized in the Declaration “that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone”.

11. The issue of illicit traffic and dumping of hazardous substances and wastes had risen to the top of the international environmental policy agenda in the 1970s and 1980s as a result of media attention given to dramatic instances of severe violations of well-established and internationally protected human rights (such as the right to life, the right to health and the right to personal safety) which had resulted from such traffic and dumping, especially in developing countries, as a result of unregulated or effectively illicit exports of banned or severely restricted chemicals such as, in particular, pesticides, and consumer goods treated with banned or severely restricted hazardous substances such as flame retardants and, most dramatic of all, actual or planned instances of outright dumping of hazardous wastes in West Africa or the Caribbean, creating an acute hazard to human life and health. Both the United States Congress² and the European Parliament³ took action, starting in the late 1970s and early 1980s to demand government measures to prevent such shocking practices, which were fast developing and becoming increasingly widespread.⁴

² Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 833.

³ European Parliament resolution of 14 October 1983 on the export of various dangerous substances and preparations, O.J. No. C307, 14.11.1983, p. 109.

⁴ See David Weir and Mark Shapiro, *Circle of Poison* (Institute for Food and Development Policy, San Francisco, 1981); Marc Pallemarts, “Regulating Exports of Hazardous Chemicals: The EU’s External Chemical Safety Policy”, in: Jonathan Golub (ed.), *Global Competition and EU Environmental Policy*, Routledge, London/New York, 1998, pp. 60-84.

12. This scoping report is not the place to explore in any detail the ethical and legal dimension of the toxic dumping issue, but will only quote the most important policy documents of the United Nations, such as General Assembly resolutions and negotiated outcomes of major United Nations conferences and summits. The outcomes of the Stockholm and Rio Conferences have already been cited. The General Assembly adopted very important policy pronouncements on the issue of dumping of hazardous chemical products, starting with resolution 34/137 in December 1979. The waste trade issue emerged later and climaxed in the second half of the 1980s, when the summit meeting of the then Organization of African Unity (now the African Union) reacted in the strongest possible terms to one instance of planned waste dumping from Europe in Sierra Leone, and the European Parliament, for its part, took forceful political action in response to an attempt to dump European waste in Guinea Bissau. There was also strong NGO campaigning – especially by Greenpeace International – in the late 1980s and early 1990s, up to the Rio Conference in 1992. At first, the dumping of hazardous pesticides and wastes were dealt with in different policy forums and addressed by different intergovernmental organizations (IGOs). The intrinsic unity of the issue of the “toxification” of the global environment only came to be perceived by scientists, civil society activists and policymakers in the late 1990s and the first decade of the 21st century. By addressing both issues together from the outset, the United Nations human rights protection machinery made a crucial contribution to this shift in perceptions.

13. In 1995, the then United Nations Commission on Human Rights (now Human Rights Council) noted that the illicit dumping of toxic and dangerous wastes and products has an adverse effect on the enjoyment of several human rights, and decided to appoint a Special Rapporteur with a mandate to examine the human rights aspects of this issue. Commission resolution 1995/81 affirmed that the illicit traffic and the dumping of toxic and dangerous products and wastes constitutes a serious threat to the human rights to life and health. The Commission thereafter adopted follow-up resolutions annually on the issue.

B. Current context and scope of the mandate

14. The scope of the mandate of the Special Rapporteur was then reviewed in September 2011, during the eighteenth session of the Human Rights Council. The Council decided to strengthen the mandate so as to cover not only the movement and the dumping of hazardous substances and waste, but also the whole life cycle of hazardous products, from their manufacturing to their final disposal (cradle-to-grave approach). Accordingly, the title of the Special Rapporteur was changed to the “Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes” (Human Rights Council resolution 18/11). On the basis of this resolution, the Special Rapporteur was tasked to monitor the adverse effects that the generation, management, handling, distribution and final disposal of hazardous substances and wastes may have on the full enjoyment of human rights, including the right to food, adequate housing, health and water.

15. In view of the worryingly increasing trend of victimization, harassment, arbitrary detention and even killings of persons who advocate the environmentally sound management and disposal of these hazardous substances and wastes, the Council further expanded the scope of the mandate and in its resolution 21/17 of September 2012 included the issue of the protection of these environmental human rights defenders.

16. An appropriate focus is required in order for the mandate to respond to emerging issues as well as those that are still deserving of continued international attention. The added value of the mandate is its human rights-based approach. Its aim is to raise awareness of the threats that hazardous substances and wastes pose to the enjoyment of internationally

protected human rights, with a view to eliminating, or reducing to a minimum, such threats and to ensuring effective redress for victims of human rights violations. By focusing on the human rights of the victims of exposure to hazardous substances and wastes, the mandate complements, rather than duplicates, the protection afforded by the international legal framework adopted in the field of international environmental law. Below, the Special Rapporteur briefly highlights and analyzes some of the current scope and state of the law by applying a life-cycle approach in accordance with the explicit terms of Human Rights Council resolutions 18/11 and 21/17.

III. International and domestic normative framework in the field of the mandate, from the perspective of human rights law and of environmental, health and consumer protection law

Human rights law

17. Like all special procedures of the HRC, this mandate has always grounded its normative framework in a rights-based approach and to that extent based itself on recognized principles as set out in various instruments of international human rights law. The Universal Declaration of Human Rights affirms in article 3 the rights of everyone to life, liberty and security of person, while article 25 provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. Article 6 of the International Covenant on Civil and Political Rights also stresses the inherent right to life, while article 19 guarantees the right to freedom of expression.

18. Under article 7 of the International Covenant on Economic, Social and Cultural Rights, States recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular, a decent living for themselves and their families and safe and healthy working conditions. Article 11 further lays down the right of everyone to an adequate standard of living for himself and his family, while article 12 recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health including through the improvement of all aspects of environmental and industrial hygiene; and the prevention, treatment and control of epidemic, endemic, occupational and other diseases. Finally, article 15 of the Covenant states that members recognize the right of everyone to enjoy the benefits of scientific progress and its applications.

19. Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women states that all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to protection of health and to safety in working conditions. The latter right includes safeguarding the function of reproduction. Article 25 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families affords migrant workers treatment not less favorable than that which applies to nationals of the State of employment in respect of conditions of work including safety and health.

20. The rights of children are particularly relevant in the context of the present mandate, because of the well-recognized special vulnerability of their health to, inter alia, toxic risks. Under article 24 of the Convention on the Rights of the Child, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures '[t]o combat disease and malnutrition, . . . , through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.'

Environmental, health and consumer protection law

21. As far as the major environmental instruments are concerned, the mandate has relied heavily so far on the application of, inter alia, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted in March 1989 under the auspices of United Nations Environment Programme (UNEP). Article 4 requires that parties should ensure that the generation of hazardous wastes and other wastes is reduced to a minimum, ensure the availability of adequate disposal facilities, ensure that persons involved in the management of these substances and wastes prevent pollution, and ensure that the transboundary movement of hazardous wastes and other wastes is reduced to a minimum. Resonating with the founding ideals of this mandate, the Convention stipulates that “illegal traffic in hazardous wastes or other wastes is a criminal act”.⁵ In this context, it is worth stressing that, in addition to the universal Basel Convention, there are regional and subregional international instruments in various regions of the world which are more restrictive of the movement of wastes across national boundaries and more protective of human health and the environment. The African Union’s 1991 Bamako Convention, which entered into force on 22 April 1998 and currently binds 25 African Union member States, is an example.

22. There are very few rules of international treaty law relating to the prevention and management of toxic and other health risks related to the presence of hazardous substances and chemicals as or in products, as opposed to the management of these substances and/or products at the end of their life cycle, i.e. as or in wastes. Apart from a few International Labour Organization (ILO) Conventions on the protection of workers against chemical and other health hazards in the workplace – agreements under international labour law rather than the law of the environment, with few ratified⁶ – the only two global conventions on chemical safety currently in force are of recent origin and concern only a very limited number of substances and preparations. In general, it should be noted that in this respect, governments have preferred to have recourse to forms of international cooperation and voluntary non-legally binding instruments. The clearest evidence of this is the fact that, unlike in most other fields of international environmental law, there is no framework convention on the regulation of chemicals and wastes, but only a soft law instrument developed under the auspices of UNEP, the Strategic Approach to International Chemicals Management (SAICM). International toxics law effectively developed in a fragmented and haphazard way from 1986 to 2013, much like the environmental law of the sea in the period 1950-1992. It clearly displays many significant gaps and is in serious need of further elaboration and refinement, like the environmental law of the sea in the run-up to the adoption in 1982 of the United Nations Convention on the Law of the Sea, a global framework convention that is widely regarded as “the Constitution of the world’s oceans”. The main similarity between both fields of international environmental law is that there was no complete and comprehensive roadmap when the law started to develop and that awareness of the need for coherence, comprehensiveness and unity developed very gradually in parallel with the progressive development of the law. What effectively amounts to the framework convention for marine environmental protection, part XI of the

⁵ Report submitted by the Special Rapporteur on toxic waste on adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (E/CN.4/2001/55), para. 58.

⁶ For example, ILO Conventions No. 148 on the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration; No. 162 on Safety in the Use of Asbestos; No. 170 on Safety in the Use of Chemicals at Work, No. 174 on the Prevention of Major Industrial Accidents; No. 176 on Safety and Health in; and No. 169 on Indigenous and Tribal Peoples in Independent Countries.

United Nations Convention on the Law of the Sea (UNCLOS), only came into existence a decade after the Stockholm Conference in 1972.

23. Similarly, in international toxics law no attempt was made to formulate an overall roadmap or plan for the development of the necessary legislation at the global and regional level before States started negotiating the first universal convention, the Basel Convention, in 1986. The adoption of that Convention in 1989 was followed by the drafting of many regional and subregional treaties inspired by it and effectively covering the same field, starting with the African Union's Bamako Convention in 1991. The development of international law on waste trade was followed by the emergence of binding international norms on international trade in banned and severely restricted chemical products in the form of the 1998 Rotterdam Convention, which, in turn was followed by the negotiation, also under the auspices of UNEP, of the Stockholm Convention on Persistent Organic Pollutants (POPs), concluded three years later in 2001. But it was only after the adoption of the first generation of conventional international law in the field of chemicals control that the international community saw the need for a comprehensive approach, and initiated the negotiation process leading to the adoption of a non-legally binding framework instrument, SAICM. The SAICM process was mandated at Johannesburg by the 2002 Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation – JPoI), whose paragraph 23 (reproduced as an appendix to the Dubai outcome) sets out the skeleton of the emerging universal policy on chemicals, which styles itself as a renewal of the “commitments” made in chapter 19 of Agenda 21, 10 years earlier. However, chapter 19 is almost silent on the need for hard law at the international level to strengthen the normative framework of chemicals management. It did not directly call for the negotiation of a convention on prior informed consent; that decision was taken three years after Rio by the UNEP Governing Council (decision 18/12). Paragraph 23 of JPoI provides that States shall “aim[...] to achieve, by 2020, that chemicals are used and produced in ways that lead to the minimization of adverse effects on human health and the environment, using transparent science-based risk assessment procedures and science-based risk management procedures, taking into account the precautionary approach, as set out in Principle 15 of the Rio Declaration (...)”.

24. The Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, which came into force on 24 February 2004 and currently has 153 parties, establishes international regulations on the export, import, labelling and management of certain chemicals that have been banned or severely restricted in many countries to protect human health or the environment, some of which have been described as “extremely dangerous” owing to the serious effects they may have on human health or the environment under the conditions in which they are used in developing countries as pesticide formulations. The substances subject to the provisions of the Rotterdam Convention preparations are identified by an international evaluation procedure and listed in the appendices to the Convention. All contracting parties then receive detailed information on the products in question and are invited to contact the Secretariat of the Convention regarding their decision on the future import of these products. The Secretariat will inform all Parties of the decisions that have been transmitted pursuant to this procedure, and the Convention requires exporting Parties to take appropriate legislative or administrative measures to ensure that exporters within its jurisdiction comply with these decisions.

25. This is the essence of the process of “prior informed consent” (PIC) established by the Rotterdam Convention. Apart from complying with this procedure, the Convention requires parties to provide “export notification” to the importing Party when a chemical banned or severely restricted by an exporting Party is exported from its territory. Exporting parties must also take steps to ensure that hazardous chemicals are, when exported, subject to specific labelling rules to ensure the dissemination of information with regard to risks

and/or hazards to human health or the environment, taking into account relevant international standards, without prejudice to any rules imposed on the subject by the importing Party.

26. The second global convention on chemicals is the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs). A total of 178 States and the European Union are now bound by this Convention, in force since 17 May 2004. Its scope is limited to a limited number of substances, the products of synthetic organic chemistry, which possess toxic properties, resist degradation, bio-accumulate and are transported, by air, water and migratory species, across international boundaries and deposited far from their site of origin, where they accumulate in the environment. POPs covered by the Stockholm Convention are mostly organochlorine pesticides, but also include products for industrial use such as polychlorinated biphenyls (PCBs) and products released unintentionally from thermal processes involving organic matter and chlorine, such as dioxins and furans. Most POPs are also listed in the schedules of the Rotterdam Convention and therefore subject to the PIC procedure.

27. Parties to the Stockholm Convention undertake a series of measures to reduce or eliminate releases from intentional production, as well as those resulting from unintentional production of POPs. In some cases, it may be a total ban on production and use, as well as import and export of these substances, or limitation of these activities, or else technical measures to reduce the total volume of anthropogenic releases of POPs that are not intentionally produced, in order to reduce their volume, and, if possible, ultimate elimination. Specific temporary exemptions are granted for certain substances and uses for which the parties do not feel they have alternatives. Parties who wish to benefit from these exemptions must notify the Secretariat of the Convention.

28. From a human rights perspective some provisions of the POPs Convention deserve special attention. In article 6 of the Stockholm Convention on Persistent Organic Pollutants (POPs), the measures to be undertaken to reduce or eliminate releases from stockpiles and wastes are outlined, while in article 9 on information exchange it is stressed that information on health and safety of humans and the environment shall not be regarded as confidential. Crucially, its article 10 requires public information, awareness and education, especially for women, children and the least educated, on persistent organic pollutants, as well as on their health and environmental effects and on their alternatives. The Rotterdam Convention, also contains some rather weakly worded provisions on public access to information and accountability and transparency of governmental decision-making. Its rationale is to “promote shared responsibility and cooperative efforts among Parties” through “information exchange” between competent authorities of States rather than regulate the management of chemicals in the field at the level of individual States.

29. At the interface of international human rights law and international environmental law, the UNECE 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, to which the mandate has also referred, guarantees the rights of access to information, public participation in decision-making, and access to justice in environmental matters in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is to be disseminated immediately and without delay to members of the public who may be affected. It should be stressed that the Convention does not concern European States only, as the UNECE region includes the United States, Canada, Israel, Turkey, Tajikistan, Turkmenistan, Kazakhstan, Kyrgyzstan and Uzbekistan and the former Soviet republics of Central Asia.

30. As regards collaboration with stakeholders, resolution 21/17 echoes all other previous resolutions of the mandate in encouraging the mandate to cooperate closely with UNEP as well as other relevant United Nations agencies such as ILO and the World Health Organization (WHO) in the fulfilment of the mandate. The mandate has actively cooperated with UNEP with particular reference to SAICM, which has provided it with essential technical support. Mandate holders have also participated in some ICCM meetings. The Secretariats of the environmental conventions have also facilitated significant synergies between the mandate and the Conventions, and the mandate has participated in meetings of the Conferences of the Parties to the conventions. The Special Rapporteur intends to reinforce the existing collaboration with these partners and promote new synergies as well as strengthen the engagement with civil society organizations that have supported the mandate.

A. Tentative overview of life-cycle stages and regulatory gaps in international and internal law as regards hazardous substances and wastes with a view to the identification of areas for future focus

31. Health and environmental risks of hazardous substances used extensively are generally discovered in hindsight, when the substances have already become widespread in the environment in large quantities and are having adverse effects on the enjoyment of human rights or on the state of ecosystems. As a consequence, regulatory action in chemical risk management generally occurs after the production and marketing of the substances, and normally aims at limiting the exposure of humans and ecosystems, reduce emissions, and restricting or banning the most harmful uses. This explains the emergence of an ongoing controversy around the precautionary principle or, as a small number of governments insist on styling it, the precautionary approach, as reflected in Principle 15 of the Rio Declaration.

32. Regulation of hazardous substances and chemicals covers different stages of the life cycle of these substances and products and various activities throughout the cycle. The life-cycle (or cradle-to-grave) concept, to quote from HRC resolution 18/11) has only become widely used relatively late in the history of environmental policy and law, as a consequence of the development of environmental product policies. In international environmental policy and law, this notion only began to emerge as a side-effect of conflicts between environmental policy and trade policy leading to the first environment vs. trade litigation before the then GATT panels, now the World Trade Organization (WTO) Dispute Settlement Body (DSB). The universal recognition of the product life cycle as a policy concept and of life cycle analysis as a tool of product-oriented policies dates from the Johannesburg World Summit on Sustainable Development in August-September 2002.

33. The Johannesburg Programme of Implementation contains an important and fiercely negotiated chapter on sustainable modes of production and consumption, including product policies within the ambit of the global sustainable development toolbox and mandating the application of the life cycle and precautionary approaches in the area of what eventually – and not quite logically – became known as sustainable consumption and production (SCP), as though the consumption of a product or service could precede its production. As every producer knows, this conception of industrial activity is nonsensical. However, since the present report focuses on the human rights approach and dimension of product and waste management policies and not on the intricacies of environmental policy instrumentation, we will for the sake of readability use the acronym SCP, which has become widely used not only at the global level (CSD and UNEP) but also in the policy jargon of the European

Union, which launched an action plan on SCP six years after committing to do so in Johannesburg.⁷

34. This brings us to the concept of hazardous substances and wastes, as referred to in the definition of the mandate, which, it will be recalled, refers to “the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes”. The first and most basic distinction to be made is that between substances and wastes. This issue was hotly debated in the negotiations leading to the adoption of the Basel Convention in 1989, when the international community had to agree on a definition of the notion of wastes in general and hazardous wastes in particular. The universal debate within UNEP on the definition of wastes mirrored the earlier debates on the same fundamental question in those countries – mostly industrialized countries, members of OECD – which had pioneered the development of waste management legislation and regulation in the 1970s.

35. It should be noted from the outset that different conceptions of how to define waste clashed in this policy development process and that definitions agreed in such international forums as the then European Economic Community (EEC) – the legal predecessor of the European Union – and OECD, which pioneered intergovernmental negotiations on waste management policy and law, reflect attempts to reconcile these diverging views. The definitions laid down in the Basel Convention represent a tenuous compromise between competing visions both within EEC and OECD and between industrialized and developing countries. It should be stressed at this point that the Basel Convention applies not only to those wastes it defines as hazardous, but also to so-called “other wastes”, i.e. in effect waste generally defined in domestic environmental law as household waste⁸ and subject to fundamentally different rules at the national/domestic level from industrial waste, which is produced in the course of a professional economic activity. However, the notion of household waste as opposed to hazardous waste should not be taken to suggest that the former is by definition not hazardous. Household waste contains varying amounts of hazardous substances and materials which may become a hazard to human health or the environment if they are not managed in an environmentally sound way. This waste is labelled “other wastes” in the Basel Convention because EEC member States and other OECD member States had divergent definitions of household wastes and residues arising from the practice of their disposal or, later, recycling or re-use.

36. The term “hazardous” applied to substances or products can also have different meanings. The most general sense refers to substances or products having properties which constitute a significant risk to humans or the environment. In a more specific sense, the term “hazardous substance” refers to certain substances identified and classified according to technical criteria of danger to human health, safety and the environment. For the purposes of this mandate, the Special Rapporteur, like his predecessors, will use the term in its most general sense, rather than subscribing to any particular set of technical criteria, which vary from country to country, culture to culture, and person to person. The concept of hazard and the related concept of risk are highly contextual. So the mandate is not based exclusively on particular legal and political compromises made in particular contexts, countries and periods in the process of agreeing on technical criteria for the management of substances and wastes. As a result, “radioactive substances and wastes,” which are

⁷ Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, EU Doc. COM(2008) 397 final, 16 July 2008.

⁸ Basel Convention, art. 1(2) and annex II.

explicitly excluded from the scope of the Basel Convention's regulatory system,⁹ will be treated as any other hazardous substances and wastes for the purposes of the mandate.

37. Certain rules of environmental and/or consumer protection product regulation apply to a "single, individual substance," while others apply to "preparations" or "mixtures" of substances. Other rules also involve the use of chemicals as "components of goods or articles or consumer products" that are not simply chemical mixtures. The Special Rapporteur intends to encompass as well, in his working definition of hazardous substances, actual substances, mixtures of substances as well as the presence of substances

38. The Globally Harmonized System of Classification and Labelling of Chemicals (GHS) developed a decade ago by a committee of experts under the auspices of the United Nations (UNECE and the Economic and Social Council of the United Nations (ECOSOC)) distinguishes "four categories of hazards:" physical hazards, health hazards, hazards for the environment and other hazards. Among the hazards to human health, the system distinguishes acute toxicity properties as those that cause corrosion or skin irritation, severe eye irritation or injury, or respiratory or skin sensitization and mutagenicity, carcinogenicity, reproductive toxicity and systemic toxicity to target organs.

39. In some legislation relating to the "protection of the aquatic environment," both marine and freshwater, the notion of "hazardous substances" refers to substances of particular danger to the aquatic environment because of their toxic, persistent nature and/or tendency to bio-accumulate in living organisms.

B. International and domestic norms that apply to different phases of the life cycle of chemicals and activities that involve them

40. **Development and testing:** Many countries now have laws that require manufacturers and importers of chemicals to carry out certain toxicological and ecotoxicological tests before producing and/or marketing substances described as "new", and communicate the results of these tests to the authorities to enable them to determine the risks to health and the environment posed by these substances. This type of preventive regulation of chemical risk was introduced into the United States in 1976 by the Toxic Substances Control Act. In 1977, OECD recommended that its member States establish national procedures for the systematic evaluation of the effects of new chemicals before they are put on the market, in order to anticipate and limit the risks of these products. The then European Community adopted in 1979 a directive providing for prior notification and reporting of data to the competent national authorities in member States with a view to assessing their chemical properties and hazards to human health and the environment. Building on this long-established system of chemical regulation the European Union more recently adopted a comprehensive Regulation concerning the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) which further elaborates the obligations not only of manufacturers but also of downstream users of chemicals and requires mandatory notification of data to a specially created European Chemicals Agency (ECHA) based in Helsinki according to a tiered system of quantitative production thresholds.

41. **Import:** The import of chemicals is generally subject under national law to the same conditions as the placing on the market of products manufactured in the territory of the importing country. Under international law, only the import of substances or products within the scope of the Rotterdam or Stockholm Convention is subject to specific rules. The

⁹ Basel Convention, art. 1(3).

products subject to the PIC procedure under the Rotterdam Convention should be authorized by an explicit decision by the designated national authority of the importing Party, which has the obligation to take legislative or administrative measures appropriate to ensure timely decision-making on the importation of these products. As regulated by the Stockholm Convention, POPs may be imported by the Contracting Parties only when permitted for a purpose covered by exceptions recorded in the annexes to the Convention or for the purpose of environmentally sound disposal in accordance with the relevant provisions thereof.

42. **Production:** In environmental and international law, the production of substances or hazardous chemicals is rarely regulated as such. Legislative attention generally focuses on other phases of the life cycle than production. Recently, however, the development of environmental policy has led to a growing awareness of the need to eliminate some unacceptable risks at the source, by banning the production of substances whose environmental and health risks cannot effectively be controlled by other measures. The first example in the history of international environmental law that is that of ozone depleting substances of which both production and consumption were limited in 1987 by the Montreal Protocol on Substances that Deplete the Ozone Layer. The Montreal Protocol provides for the gradual elimination of production and consumption of 96 chemicals that deplete the ozone layer according to a schedule which runs from 1994 to 2040. The parties may, however, continue to produce limited quantities of most of these substances in order to meet their needs in the case of “essential” uses for which no alternative has yet been identified. The Stockholm Convention, in turn, provides for the elimination of any intentional production of POPs except for some specific exemptions temporarily authorized for certain parties and specific uses. For example, parties that so wish can continue to produce DDT solely for disease vector control in accordance with the WHO recommendations and guidelines.

43. **Emissions from industrial processes:** Pollutant emissions from industrial facilities are one of the oldest objects of environmental regulation. Some of the pollutants for which emission standards are prescribed by pollution control legislation applying to industrial sources are actually hazardous substances that are also regulated in other ways. Emission limit values based on the best available technology are applied in international, European Union and national law. In international law, the Stockholm Convention requires its contracting parties to reduce the total volume of anthropogenic releases of unintentionally produced POPs in certain industrial processes involving organic matter and chlorine in order to reduce their volume, and, if possible, eliminate them altogether by a set of technical measures specified in an annex to the agreement.

44. **Use in industrial processes:** The impact of hazardous substances on human health and the environment can be reduced by limiting or prohibiting the use of these substances in certain industrial processes, where adequate substitutes or alternative processes are available. Such restrictions first emerged in the interest of protecting the health of workers. Thus, in 1921, an ILO convention was adopted prohibiting the use of certain lead-based pigments in industrial painting work to prevent the exposure of painters to the risk of lead poisoning. In 1971, another agreement was adopted by the ILO to restrict the use of benzene or products containing benzene in certain industrial activities and requiring the replacement of this carcinogen by less harmful alternatives. More recently, this type of measure has also made its appearance for reasons of environmental protection, including in the Stockholm Convention, and intergovernmental decisions taken under regional conventions for the protection of the marine environment, aimed at prohibiting the use of elemental chlorine for industrial bleaching of paper pulp, in order to prevent the formation of dioxins and other toxic chlorinated organic compounds.

45. **Use in products or preparations:** Many hazardous substances are used as components of preparations or other products for mass consumption or certain professional uses. When using these products results, due to the presence of these substances, in a risk considered unacceptable for users or the environment, legislative measures are often taken to restrict or prohibit it. An example of a measure taken for the prevention of air pollution is the UNECE 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, which commits its parties to apply measures to change the composition of a range of products containing solvents, such as paints, varnishes and adhesives, by curbing the use of volatile organic compounds (VOCs) that are harmful in the air, and encouraging the use of products with a low or zero VOC content. A second Protocol to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP), that of 1998 on Heavy Metals, restricts the use of lead as a gasoline additive. Another reason to ban the use of hazardous substances as components of some products is the risk of dispersion of these substances into the environment at the end of the life cycle of these products when they become waste.

46. **Storage:** The storage of large quantities of hazardous chemicals still presents a risk of serious accidents endangering public health and the environment, which legislators intended to limit by appropriate precautionary measures. After the chemical accident in Seveso, Italy, in 1976, the then EEC adopted a directive requiring operators of industrial sites at which hazardous substances are present in quantities exceeding certain specified thresholds, to take steps to identify and reduce the risk of accidents in consultation and collaboration with public authorities. This directive, which has since been strengthened, has also inspired the development of similar measures in international law, such as the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents, which currently binds 40 European countries and the European Union and ILO Convention No. 174 (1993) on the Prevention of Major Industrial Accidents, which has unfortunately been ratified only by 17 ILO member States to date.

47. **Packaging and labelling:** Packaging and labelling of chemicals is one of the key aspects of chemical safety. These standards were among the first to be developed to reduce the risk from these products, primarily for the safety and health of users and subsequently for the environment. They are intended to ensure proper product identification and user information on the risks and precautions to be taken when handling them. The basis of these standards is the classification of products in different categories of risk. The harmonization of standards and classification systems at the international level was initiated to facilitate international trade and transport of chemicals in safe conditions. In 1953, ECOSOC created for this purpose a Committee of Experts on the Transport of Dangerous Goods, which drew up recommendations and a “Model Regulation” concerning the transport of dangerous goods, including the setting of standards for the classification, packaging and labelling of chemicals subject to international transport. The mandate of this committee was expanded and remodelled in 1999 to undertake the development of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS), which was adopted in December 2002 in Geneva. Its purpose is to classify “all chemical products” according to their inherent danger, and to propose an appropriate labelling system based on universally understood symbols to protect people against the risks associated with mismanagement of chemicals. However, it should be stressed that the GHS is a non-legally binding instrument. Binding provisions relating to the classification, packaging and labelling of dangerous substances were first introduced in the United States, Europe and other OECD member countries. The then EEC adopted Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, in June 1967, which remained in force until it was recently superseded by the new regulatory system known as REACH, which included replacing the 1967 directive with a new, directly applicable

European Union regulation on classification, labelling and packaging (CLP). In conventional international law, there are few specific rules on packaging and labelling of chemicals. However, the Rotterdam Convention (see above), which require parties to submit export products exported from its territory to labelling rules regarding the risks and dangers to human health and the environment, “taking into account relevant international standards in this area,” which can be interpreted as an implicit reference to the GHS (even though the latter did not exist in 1998 when the PIC Convention was adopted), and the relevant provisions of the International Code of Conduct on the Distribution and Use of Pesticides of FAO.

48. **Transport:** The international transport of hazardous substances and chemicals is the first activity to have been the subject of international regulation for safety reasons, but also in order to facilitate international trade. Recommendations on the Transport of Dangerous Goods have been developed since the mid-1950s by a committee of experts established for this purpose by the United Nations. These recommendations inspired the 1957 UNECE European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), and then similar instruments for transport by sea and air, respectively, developed within the forum of the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO).

49. **Placing on the market:** Under conventional international law, provisions relating to placement on the market are rare. International instruments usually regulate the use or production and marketing of chemicals to which they relate. The marketing of a product is located upstream of its use. It is nevertheless a logical point of intervention for public authorities wishing to avoid risks associated with its use, without trying to ban the production. The prohibition or restriction of the placing on the market of a chemical can take different forms and is often associated with a concomitant restriction or prohibition of its use. The Rotterdam Convention distinguishes between “banned” chemical products, for which all uses within one or more categories of use have been prohibited by final regulatory action to protect human health or the environment, and those that are “severely restricted,” i.e. products virtually all uses of which within one or more categories have been prohibited by final regulatory action to protect human health or the environment, but for which certain specific uses remain allowed. In the history of environmental law, the regulation of the marketing of chemicals is generally reached *a posteriori*, or downstream, after unacceptable adverse effects have been observed, but for certain categories of products *a priori*, or upstream, control systems through certification or approval procedures required prior to any placing on the market have been imposed. This is particularly the case in most countries for pesticides, which can normally be placed on the market only for well-defined purposes for which they have been approved by the competent authorities. Regarding pesticides, non-binding international standards set by FAO and WHO recommend the restriction of the marketing of certain particularly dangerous substances, including limiting their use to certain categories of professional users on the basis of an evaluation of the risks associated with the use of the product conditions prevailing in the country of use. According to the International Code of Conduct on the Distribution and Use of Pesticides of the FAO, it may be appropriate to prohibit the sale and purchase of highly toxic and dangerous products if other control measures or good marketing practices are insufficient to ensure there is no unacceptable risk to their users during handling.

50. **Export as a product or component of a product:** It is only recently that environmental and consumer protection law became interested in regulating the export of chemical substances and products. International trade in chemicals and chemical products has escaped regulation. The first example of regulation of the export of certain chemicals in international environmental law is in the 1987 Montreal Protocol, which prohibits export of such substances to the States that are not parties to the Protocol. From the 1980s some industrialized countries began to regulate the export of dangerous chemicals whose

placement on the market and use had been banned or severely restricted in their territory, to provide relevant information to importing countries through procedures for export notification. Awareness of global risks related to international trade of certain substances eventually led to the adoption in 1998 of the Rotterdam Convention, which makes PIC legally binding. Under this agreement, exporting Parties have the obligation to take appropriate legislative or administrative measures to ensure that exporters within their jurisdiction comply with decisions taken by Parties of import under the PIC procedure, as well as ensure that a chemical listed in Annex III of the Convention is not exported from its territory to any importing Party that has not communicated its decision. The Stockholm Convention, meanwhile, prohibits not only production, but also the export of most substances it regulates, except to the parties benefiting from a temporary derogation for the use of these substances for “acceptable purpose” and, under strict conditions, to non-parties to the convention.

51. **Emissions resulting from the diffuse or widespread use of products:** Among the various strategies for reducing the risks of dangerous substances should also be included the regulatory measures taken to limit emissions of these substances in the environment as a result of the use of the products containing them. If the legislature did not see fit to ban the production and marketing of a substance, or to prohibit or limit its use as a component of products placed on the market, it can still find it necessary to impose certain restrictions on users in order to minimize the possible effects of the dispersion of the substance in the environment. Thus, though the Stockholm Convention does not prohibit the production and use of DDT for vector control, parties wishing to avail themselves of this exemption must still take appropriate measures to ensure that any use for this purpose is controlled to ensure that the intentional release of this substance in the environment is reduced to a minimum. Many regional conventions for the “protection of the aquatic environment” require their contracting parties to take measures to reduce emissions of hazardous substances from the sources they describe as “diffuse” (widespread or ubiquitous sources as opposed to point sources such as industrial wastewater discharges) including the use of products. Often, these policies require the application of what they call “best environmental practices” (BEP). One example is the 1992 UNECE Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which commits its parties to develop and implement BEP¹⁰ to reduce the contribution of hazardous substances from diffuse sources, especially when the main source is agriculture.

52. **Disposal as waste or component of a waste and export for this purpose:** A hazardous substance or a product that is not likely to be used should generally be legally considered as waste – in most cases the same as hazardous waste – and should therefore be treated as such. In this context one should take due note, however, of the importance of a clear relationship between the legal regulations for hazardous substances and waste products in order to avoid any lacunae or gaps. The Stockholm Convention contains specific provisions to make the link between the two types of regulation. It stipulates that all stockpiles of chemicals regulated by the Convention or containing them, as well as wastes, including products and articles upon their becoming wastes, consisting of such substances containing or contaminated by them, must be managed by the parties in order to protect human health and the environment. Specifically, they must be eliminated in such a way as to make sure that their POP content is destroyed or irreversibly transformed and that they can under no circumstances be subjected to disposal operations that may lead to recovery, recycling, reclamation, or re-use of these substances. Such waste may be exported only for the purpose of environmentally sound disposal operations in the country of

¹⁰ The BEP concept was first included in a global treaty in the UNEP Minamata Convention on mercury 2013. Cf. art. 2(c).

destination, in accordance with the applicable provisions relating to the transboundary movements of hazardous waste.

IV. Planning the programme of activities of the mandate

53. In this section the Special Rapporteur outlines his plan for discharging the remainder of his mandate. Of course this planning is tentative and always subject to revision in response to unforeseen events, as well as in response to the debate within the Council on this report and successive further reports, including reports on future country visits.

54. The Special Rapporteur intends to pursue a dual approach to his work under the mandate: (a) thematic (horizontal: addressing a particular issue globally) and (b) national/regional (vertical: including field visits to countries and regional/subregional institutions involved in the management of chemicals). He will strive for a proper geographical/regional balance in the choice of destinations for country visits, in order to visit all regions of the world and all categories of countries during his tenure (developing and industrialized countries, countries in transition to a market economy, emerging economies, least developed countries, chemical-exporting countries, chemical-importing countries, landlocked States, port States, small island developing States, countries that are members of regional economic integration organizations and those that are not etc.). He will visit not only countries but also the headquarters and/or governing meetings of a number of supranational and/or intergovernmental, universal, regional and subregional organizations within or outside the United Nations system that are playing a key role in the regulation of chemicals, such as ILO, WHO, the Food and Agriculture Organization of the United Nations (FAO), IMO, ICAO, the International Atomic Energy Agency (IAEA), the United Nations Economic Commission for Europe (UNECE), the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Latin America and the Caribbean, (ECLAC) the European Union, ECHA, the African Union (AU), Commission for Environmental Cooperation (CEC), Mercado Común del Sur (Southern Common Market – MERCOSUR), Association of Southeast Asian Nations (ASEAN), etc., as called for in the mandate. Whenever visiting a particular city or country, in consultation with the host government or organization, the Special Rapporteur will strive to provide opportunities for all interested stakeholders to submit evidence that falls within the scope of the mandate and may be relevant to discharging either his investigative or normative function.

55. Available budgetary means in principle allow for two full-fledged country visits per year. The Special Rapporteur's first such visit will be made in response to an invitation extended to his predecessor which the latter was unable to take up. After the twenty-fourth session of the Council, at a time to be agreed with the host country, he will visit Kazakhstan. Immediately after the Kazakhstan visit the Special Rapporteur will travel on to Japan in order to attend the diplomatic conference and adoption of a historical new treaty on chemicals management, the Minamata Convention on Mercury, negotiated under the auspices of UNEP. He will approach the Japanese authorities in order to seek an invitation for a back-to-back country visit, including the organization of a public hearing open to all stakeholders in Tokyo. This hearing should enable stakeholders, including industry, to submit evidence to the Special Rapporteur on both aspects of his mandate: instances of alleged violations of human rights resulting from unsound management of chemicals or wastes, and recommendations for best practices, in accordance with paragraphs 2 and 5 of Human Rights Council resolution 21/17. With respect to hearings, the Special Rapporteur hopes to emulate the method applied with great success by the Brundtland Commission (World Commission on Environment and Development – WCED) in the mid-1980s when preparing its historical report which led to the popularization of the concept of sustainable

development and prepared the ground for the Rio Earth Summit, including for the negotiation of Agenda 21 and its chapter 19.

56. Whenever responding to an invitation for a country visit, the Special Rapporteur will seek to make the best possible use of limited available financial resources by seeking invitations from neighbouring countries or other countries in the vicinity of the inviting country, in order to be able to give the visit a subregional or regional dimension. Advantage will also be taken of country visits to visit the headquarters of relevant international organizations, whether governmental or non-governmental, intergovernmental or supranational. Thus, for example, the Special Rapporteur will strive to combine his visit to IAEA with a country visit to Austria and his visit to ECHA with a country visit to Finland.

57. The gathering of evidence and suggestions for the recommendations on best practices which the Special Rapporteur is expected to include in his final report to the Council will start in earnest, but the process of drafting these recommendations will only be initiated during the final year of the mandate, taking into account all the experience gained and evidence gathered during the course of work pursuant to the mandate. The Special Rapporteur will draw inspiration not only from existing global human rights instruments, environmental instruments or instruments in the field of worker and consumer protection, but also from relevant regional or subregional instruments and existing soft law instruments drafted by a range of environmental and human rights organizations and bodies. Full account will also be taken of the case law and practice of relevant human rights treaty courts or other supervisory bodies, such as the three regional human rights courts, the European Commission and the Court of Justice of the European Union, the Aarhus Convention Compliance Committee and the compliance committees of multilateral environmental agreements (MEAs), and of the work undertaken by other special rapporteurs and all the present Special Rapporteur's predecessors.

58. The Special Rapporteur looks forward to the responses of members of the Council to his plans as outlined in the previous section and in particular to any feedback they may wish to offer on methodological issues and the organization of field visits. Furthermore, he looks forward to receiving invitations for country visits from as wide as possible a range of countries in all regions of the world, and suggestions for field work from NGOs and other stakeholders.

59. The Special Rapporteur concludes this report by launching a first appeal to NGOs, industry and any other stakeholders to submit relevant evidence within the scope of the mandate at their earliest convenience.