

Statement of Baskut Tuncak
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**Aarhus Convention Task Force on Access to Information
Geneva, Palais des Nations, Salle XI, 8-10 December 2015**

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Madame Chairperson, Excellencies, distinguished delegates, ladies and gentlemen:

It is a great honor and a pleasure for me to address this meeting in my capacity as Special Rapporteur of the UN Human Rights Council on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.¹

The right to information is often regarded as an enabler of other rights. As a former Special Rapporteur on toxic waste stated, the right to information is an essential tool for the exercise of other rights, such as the right to an effective remedy, to meaningful public participation, the right to the highest attainable standard of health, the right to adequate housing, and others.² Many of the provisions of the Aarhus Convention echo the values and principles of human rights, especially articles 4 and 5 on access to environmental information, which is the focus of this Task Force.

This past September, I presented my annual thematic report to UN Human Rights Council (A/HRC/30/40),³ regarding the right to information on hazardous substances and wastes. Before I turn to some of the elements of my report on the right to information, I would like to describe a recent example of the on-going challenge of access to information that came to my attention after my report was completed through a mission to the Republic of Korea.

In the Republic of Korea, humidifiers are a very popular product. To keep humidifiers and the moist air they emit inside homes and offices clean, a chemical mixture was sold for many years in Korea as a disinfectant (humidifier disinfectant), to be added to the humidifier's water tank.

Beginning in 2004, mysterious cases of respiratory illnesses began to surface. It is now estimated that 140 people died and over 500 were injured after purchasing and using a humidifier disinfectant that contained one or more hazardous substances. Most of the victims were women and children and the elderly, who suffered from a range of illnesses.

My colleagues and I heard the painful story of a middle-aged man, on the verge of suicide from the guilt of purchasing the humidifier disinfectant for his home that he firmly believes killed his mother and the maddening skin irritation he suffers from. Regulators finally banned the product in 2011, a few months after Oxy Reckitt Benckiser finally withdrew it from the market.

¹ For more information, see <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>.

² See, A/HRC/7/21, p.2

³ Available at: <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/Righttoinformation.aspx>

It does not appear that Oxy Reckitt Benckiser conducted any investigation into the health risks of inhaling the chemicals dispersed by the humidifier despite what appears to be virtually no information about its hazards, in compliance with weak legal standards of protection at the time.

A second case from Korea involved workers in the electronics industry. Between 70 to over 200 former workers allege a range of illnesses to be due to the use of hazardous substances in workplace, sometimes 29 days a month for 12 hours per day. The illnesses include cancers such as lymphoma and leukemia, miscarriages, and other adverse health effects among a very disproportionate number of young women. One of the major impediments in their pursuit of justice and an effective remedy is the need to prove the cause of their illnesses, but unable to access information on the chemicals they used and were exposed to make the causal link due to claims of confidentiality and trade secrets. I mention these cases because I believe it helps to illuminate several points about the right to information.

People have a right to know whether they are being exposed to hazardous substances. Yet, whether in consumer products, food or other sources of exposure, information is not available or accessible around the world. While progress is being made through various national and regional laws and processes, including under the Aarhus Convention, the fact remains that there remain grave information gaps, either due to claims of confidentiality or from the reluctance to generate necessary information.

The right of victims to an effective remedy, the right to meaningful participation, the right not to be subject to experimentation without consent, the right to the highest attainable standard of health and several other human rights have all been frustrated by large information gaps throughout the life cycle of substances and wastes.

In my report, I presented a normative framework on the right to information about hazardous substances and wastes of four parts: availability, accessibility, functionality, and non-discrimination.

(1) Availability: Information is available when current reliable information has been generated and collected in a manner adequate to assess the magnitude of potential adverse impacts.

(2) Accessibility: Information is accessible when everyone can seek, obtain, receive and hold available information, unless there is an over-riding public interest justification for non-disclosure.

(3) Functionality: To be functional, information must work to prevent harm, to enable democratic decision-making, and to ensure accountability, access to justice and an effective remedy. This means that information should be scientifically accessible, imparting knowledge with a reasonable degree of effort on the part of the intended user. Technicalities must be translated into a language that is functional, to enable individuals and groups of individuals to make informed choices and decisions, whether consumers or regulators.

(4) Non-discrimination and equality: Disaggregated data and specialized information is required to understand and prevent disproportionate impacts of hazardous substances and wastes on individuals and specific population groups, such as gender, age, income, ethnicities, location, as well as minorities and indigenous peoples.

In other words, information must be available and accessible, in a form that functions to protect the rights of everyone.

A recurring challenge to realizing the right to information in the context of hazardous substances are exceptions for commercial secrets and claims of confidentiality. The refusal to disclose information

because it would adversely affect the value of intellectual property or the confidentiality of commercial business or industrial information is not legitimate if it may hamper public health or the overall public interest.

Although there are limitations to the right to information, there are limitations on what governments and businesses can claim as confidential:

- Certain types of information about hazardous substances cannot be legitimately claimed as confidential. In particular, it is not legitimate to claim health and safety information about hazardous substances as confidential. I would remind Parties to the Aarhus Convention that under other international treaties, such as the Stockholm Convention on Persistent Organic Pollutants (POPs), they have legally binding obligations to this end, and have acknowledged this for a broader suite of chemicals under a global policy framework for the sound chemicals management as well.
- Limitations must be provided by law; to protect national security or public health; and necessary and no more restrictive than is required.
- And there is an overriding public interest in the disclosure of information concerning serious violations of human rights, such as the right to work in healthy and safe conditions; and the right to a healthy environment.

In my report to the Council, I clarified what is expected of states and businesses. Under international human rights treaties, States have a duty to protect and realize human rights.

To protect human rights affected by hazardous substances, States are duty-bound to generate, collect, assess and update information; effectively communicate such information, particularly to those disproportionately at risk of adverse impacts; to ensure confidentiality claims are legitimate; and to engage in international cooperation to ensure that foreign Governments have the information necessary to protect the rights of people in their territory.

And as reflected in the UN Guiding Principles on Business and Human Rights, businesses have a responsibility to respect human rights, including the responsibility to conduct human rights due diligence. In the context of hazardous substances, this means that businesses are responsible for identifying and assessing the actual and potential impacts of hazardous substances and wastes, either through their own activities or as a result of their business relationships; and to communicate information to other businesses, governments and the public effectively.

As part of their human rights due diligence, business have a responsibility to minimize risks, which in my view is best done through the development and use of less-hazardous chemicals, materials and production processes. Safer alternatives can be developed—but information must be available, accessible, functional and non-discriminatory in order for businesses to do so. Information disclosure should not be viewed as inherently bad for innovation. Stricter information disclosure requirements about hazardous substances can drive innovation toward safer, cleaner and healthier alternatives.

I hope my report on the right to information provides added value to the Task Force's discussions on access to environmental information with an aim to protecting and promoting the right to information to the maximum extent possible.

Madame Chairperson, Excellencies, distinguished delegates, ladies and gentlemen,

I thank you for giving me the opportunity to share my perspective at this important meeting, and I look forward to continuing to work with you all in the coming years.

Thank you again.