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**Feedback on the draft general comment on children’s rights and the environment with a special focus on climate change**

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# **Introduction**

In general, we find the draft general comment to be comprehensive and elaborate, adequately covering most of the important topics. The following comments and suggestions are made with a view to further strengthening the draft general comment on children’s rights and the environment with a special focus on climate change.[[1]](#footnote-1) First, we provide some general observations on the sources and the structure of the draft general comment, suggesting the addition of a number of relevant sources and some structural changes. Then, we kindly suggest the addition of three important general principles regulating human activity in the context of the protection of the environment and climate change, namely prevention of harm, due diligence and non-regression and progression. Finally, we make specific drafting suggestions about various issues included in draft general comment 26.

# **General observations on the sources and the structure**

This section will provide some general observations on the use of sources and the structure. Based on the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), it is desirable even if not always possible, for general comments of the UN human rights treaty bodies (UNTBs), including those of the CRC Committee, to make reference to various relevant authoritative sources from other main UN human rights mechanisms and more broadly from relevant UN institutions and bodies and general public international law. Relevant sources include especially related general comments and individual cases by other UNTBs, reports by the Special Procedures of the Human Rights Council, and key UN documents concerning international human rights standards. This integrative approach seems to have been generally acknowledged by the CRC Committee in paragraph 10 of the current draft general comment.

## **On the sources**

While aware of the space limitation imposed by the overall word limit for general comments, we are suggesting a non-exhaustive list of relevant sources to be included through their official reference.

From other UNTBs, we suggest referring where relevant to the following sources:

* The 2019 statement by five UNTBs, including the CRC Committee, [HRI/2019/1](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/113/08/PDF/G2011308.pdf?OpenElement).
* Alongside the mentioned Human Rights Committee’s General Comment 36 on the right to life, also four recent cases, two relating to climate change, namely *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016) involving a family from Kiribati seeking asylum in New Zealand, and *Billy et al v. Australia* (CCPR/C/135/D/3624/2019) on the rights of indigenous peoples to private and family life and culture; and two relating to the protection of the environment, namely *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016) and *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015).
* The Committee on the Elimination of Discrimination against Women: General Recommendation No. 37 (2018) on Gender-related dimensions of disaster risk reduction in the context of climate change.
* The Committee on Economic, Social and Cultural Rights has addressed climate change in its General Comment No. 15 (2002) on the right to water (arts. 11 and 12 of the Covenant).

In terms of relevant work from the Special Procedures, we suggest referring where relevant to the following sources:

* Special Rapporteur on the promotion and protection of human rights in the context of climate change (A/77/226);
* Special Rapporteur on human rights and the environment (A/HRC/31/52, A/HRC/37/58, A/HRC/43/53, A/74/161, and A/HRC/40/55). The latter two are referenced in footnote 21 but could appear elsewhere as well;
* Special Rapporteur on extreme poverty and human rights (A/HRC/41/39);
* Special Rapporteur on the right to food (A/70/287 and A/70/287);
* Working Group on Business and Human Rights (A/73/163);
* Special Rapporteur on toxics and human rights (A/HRC/33/41and A/HRC/36/41).

More generally, in terms of relevant UN documents, we suggest referring where relevant to the following sources:

* More references to scientific reports are required, e.g. references to IPCC.
* Reference to UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

## **On the structure**

We have a few comments and suggestions on the structure of the draft general comment.

First, in Section III on “Specific rights of the Convention as they relate to the environment”, the general principles of the Convention, i.e. the right to non-discrimination (subsection III.G), the best interests of the child (subsection III.H) and the right of the child to be heard (subsection III.I) should be brought to the beginning of the section together with the right to life, survival and development (subsection III.A). In accordance with the Committee’s well-established and widely recognized practice, these should still be termed “general principles”.

Second, Section IV on “The right to a clean, healthy and sustainable environment” should be explicitly related to the recognition of this as a human right (A/RES/76/300) to make it clear why this section is included. Besides, a concrete list of recommended actions is included under that section. We wonder why this is not done also in other sections? In practice, such concrete recommended actions are useful as they may be included as necessary in the CRC Committee’s concluding observations to each State party to the CRC.

Third, given this general comment has a special focus on climate change, this issue needs to be addressed earlier instead as Section VI on “Climate change” at the very end starting on page 16, or otherwise be mainstreamed throughout the general comment. Additionally, under this section preferably mitigation needs to be addressed before adaptation.

Fourth, there is considerable overlap between subsections V.F and VI.D, which address issues concerning the business sector. These subsections could potentially be merged in a separate section addressing the business sector, or otherwise unnecessary overlap avoided.

Finally, and for the consideration of the CRC Committee, should sections IV (“The right to a clean, healthy and sustainable environment”) and VI (“Climate change”) be placed one after the other, and section V (“General obligations of States”) included as last, addressing obligations under both previous sections in an integrated manner?

# **Specific concepts to be included**

In Section II on “Key concepts”, several key concepts are included in the draft comment. Still, we are missing brief references to key concepts for regulating human activity relevant to both the protection of the environment and climate change, namely prevention of harm, due diligence and non-regression.

## **Prevention of harm**

The principle of prevention of harm is core to both environmental and human rights law.
This principle requires taking action to protect the environment and human rights at an early stage. Instead of repairing damage to the environment and human rights after it has occurred, the emphasis is placed on preventing such damage from occurring in the first place. The principle of prevention of harm is not as far-reaching as the precautionary principle, which deals with the need to act in the face of scientific uncertainty.

## **Due diligence**

The principle of due diligence in human rights law requires States to take the necessary measures to prevent harm from occurring which results from actions or omissions by the State or by non-State actors. This principle also requires business entities to proactively manage potential and actual adverse human rights impacts with which they are involved.[[2]](#footnote-2) The prevention of adverse impacts on people and on the planet is the main purpose of the principle of due diligence under human rights law.

## **Non-regression and progression**

The principle of *non-regression* in human rights law prohibits States from taking deliberately retrogressive measures. In human rights law, this means that, once norms and laws have been put in place to secure a certain right, the State has the duty to maintain the enjoyment of the right and cannot backslide from it. In climate law, this is complemented by the expectation of *progressive* enhancement of climate action: that States in regular intervals raise the level of their ambition beyond previous climate commitments, norms and laws, concerning both mitigation, adaptation and finance efforts.

# **Specific suggestions**

We have the following specific suggestions on language or key references for the consideration of the CRC Committee.

Paragraph 1: The statements in this paragraph need to be backed up with references to best available science, e.g. most recent assessment and/or special reports by the IPCC or IPBES.

Paragraph 12, relating to sustainable development: reference needs to be made to the Sustainable Development Goals and the Agenda 2030.

Paragraph 16: The reference to “environmental standards” should be complemented by “all other adequate and necessary environmental measures”. Even in the absence of “environmental standards”, States need to take effective measures; which may include the adoption of new standards or any other effective measure.

Paragraph 19, the first sentence should start with “The *absence* of effective environmental measures can jeopardize..”. Otherwise, the existing language suggests that environmental measures jeopardize children’s rights.

Section III: Children’s right to protection from all forms of violence, art. 19, is important because of the strain that climate change, biodiversity degradation etc. place on families, and should be included in this section. Children’s right to protection from various forms of exploitation, articles 32-35, could also be included.

Section III.K Access to justice and remedies: We consider this in general to be a good section, covering most of the relevant issues. However, we miss the mention of a crucial barrier for children to pursue remedies (para. 62): children’s lack of legal capacity and the need for them to be represented in court (and often before administrative authorities) by a guardian, normally their parents. In many/most countries, this is the case until the age of 18 years. In environmental cases, children and parents often have diverging views and parents may not want children to bring a case to court or a complaints mechanism, thus preventing them from doing so. If there is a conflict of interests in a legal sense, the child may be able to have a substitute guardian/guardian ad litem appointed. Yet, a disagreement between parents and children may not be defined as a conflict of interests and the threshold for having a guardian appointed in many countries is high. Implicitly, in demanding child-sensitive procedures (para. 64) and access of children to free legal aid and effective legal representation (para. 66), the general comment seems to assume that children may act themselves. We wish the Committee would comment on this. Suggested language:

Paragraph 62, third sentence: An initial barrieris *children’s lack of capacity and the need to be represented by their parents or other guardian. Another* barrier is legal standing, …(as before).

New paragraph 66, before current para. 66*: Children should have the right to act before a complaints mechanism (administrative or independent) without being represented by a guardian. In court, if their parents are not able or willing to represent them, the child should have the right to have a guardian ad litem appointed.*

Paragraph 71 should refer to UNGA res. 76/300, and UNHRC res. 48/13.

Paragraph 76 should also include the need to *prevent* harm and should read: “States have a due diligence obligation to take appropriate measures to protect children from reasonably foreseeable environmental harm and violations of their rights. Examples include *adopting all necessary and adequate measures at the level of best efforts to prevent harm*, assessing the environmental impacts of policies and projects and paying due regard to the precautionary approach, reducing unpreventable harm, and providing for timely and effective remedies for both foreseeable and actual harm.

Paragraph 94: The last sentence of this paragraph needs to be amended in order to reflect that both historical *and current* emissions are relevant and that this is aptly expressed in the concept of common but differentiated responsibilities and respective capabilities, in light of different national circumstances, as expressed in the Paris Agreement, Article 2(2). It is considered of utmost important to remain consistent with the approach to differentiated obligations as defined in the Agreement. The sentence should therefore read: “In the climate context, such obligations are tailored to take account of *differentiated responsibilities* ~~the historical emissions of greenhouse gas~~ and respective capabilities, *in the light of different national circumstances of States*,[[3]](#footnote-3) while requiring the provision of technical and financial assistance to developing States, consistent with article 4 of the Convention.”

Paragraph 100: In this paragraph, the extraterritorial dimension of human rights obligations is addressed. It would be desirable if this aspect were expanded, and reference made to *Sacchi et al*, where the CRC Committee made important statements in this regard.

Paragraph 106: The timeliness of adaptation action is an important aspect. The first sentence should read: “Adaptation measures should *be timely* and target both short- and long-term impacts, such as those aimed at sustaining livelihoods”. Also, reference should be made to *Billy et al. v. Australia* (CCPR/C/135/D/3624/2019) which addressed the issue of timeliness as part of States’ positive obligation.

Paragraph 108: Mitigation action is not a collective, but an individual obligation of each and every State party. The first sentence should therefore be: “The Committee calls for ~~collective~~ accelerated actions *by all Parties*…”

Paragraph 111(a): Transparency reports under the Paris Agreement are called: Biennial Transparency Reports (not update reports). The last sentence should be updated to correspond to the procedures established under the Paris Agreement, which replace those established under the UNFCCC and be changed to: “This obligation includes biennial *transparency* reports, and *Facilitative Multilateral Consideration of Progress, under Article 13 of the Paris Agreement*.[[4]](#footnote-4)

Paragraph 111(b): This paragraph refers to a concept of “fair share”. There is no definition of what that “fair share” should be. Instead, “Highest possible ambition” is included in the Paris Agreement (Article 4(3) and means “best efforts”/due diligence. The suggestion for the paragraph’s second sentence is: “Mitigation measures should reflect each State party’s ~~“fair share” of~~ highest possible ambition towards the global effort to mitigate climate change..”

Paragraph 117: Reference should be made to Article 2(1)(c) in the Paris Agreement and the goal of “making finance flows consistent with low greenhouse gas and climate resilient development”.

Paragraph 120: This paragraph reflects incorrectly the approach to cooperation and differentiation as expressed in the Paris Agreement. The principle of common but differentiated responsibilities is not a rule for cooperation (this rule exists already under international law), but indicates that the respective national circumstances need to be taken into account in the efforts to address climate change. Neither is this a “blank cheque” for providing finance to developing countries, but a balanced approach to providing and receiving support, depending on national capabilities. The first sentence should aim for consistency with the Paris Agreement and read: “The principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances, as expressed in Article 2.2 of the Paris Agreement indicates that *the respective national circumstances of each Party need to be taken into account in the efforts to address climate change.* Developed States should cooperate with developing States and provide *climate finance to assist in actions* to uphold *children’s* rights. Other states are encouraged to provide such support voluntarily.”

Paragraph 121: The sentence should be clear that climate finance is slanted towards mitigation, not the finance gap. Also, the gap in climate finance is currently the focus of negotiation of a new collective climate finance goal from 2025 onwards. This should be referenced here. The paragraph should read: “The current climate finance ~~gap~~ which is overly slanted towards mitigation at the cost of adaptation measures has discriminatory effects on children who live in settings where more adaptation measures are needed. *States should bridge the global climate finance gap when agreeing on a new collective global goal for mobilizing finance in 2025*, with a view to equal distribution. Moreover, the determination by States of the total global climate finance needed should be informed by the documented needs of affected communities, especially children and their rights.

# **Concluding remarks**

In concluding, we highly commend the CRC Committee for taking the initiative and for completing this important general comment addressing a major global challenge to ensuring human rights.

1. \* Professors at the Faculty of Law, University of Oslo, Norway. This feedback is provided in an individual capacity and does not represent the views of institutions with which the authors are affiliated. Sandberg is a former member of the CRC Committee (2011-2019), Zyberi is a former member of the Human Rights Committee (2019-2022), and Voigt is an internationally renowned expert on environmental law and chair of the IUCN World Commission on Environmental Law.

 See “Call for comments on the draft general comment on children’s rights and the environment with a special focus on climate change” at <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>. [↑](#footnote-ref-1)
2. See Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: “Corporate human rights due diligence emerging practices, challenges and ways forward”, A/73/163. [↑](#footnote-ref-2)
3. UNFCCC preamble, art. 3(1); Paris Agreement, Art 2(2); A/HRC/RES/26/27; A/HRC/RES/29/15. [↑](#footnote-ref-3)
4. Ibid., art. 14.4. [↑](#footnote-ref-4)