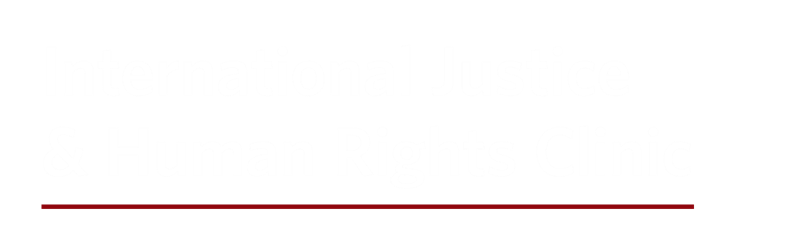
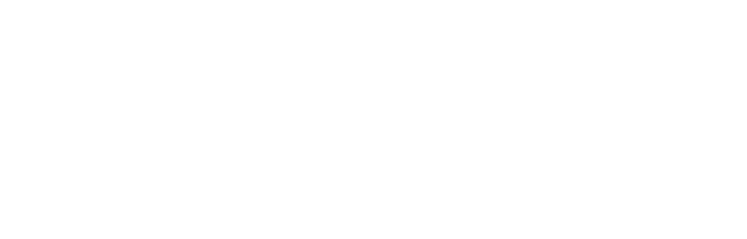
**Introduction**

Response to the Committee on the Rights of the Child’s Call for Comments on

Draft General Comment 26 on Children’s Rights and the Environment with a Special Focus on Climate Change

15 February 2023

Allard International Justice and Human Rights Clinic



The International Justice and Human Rights Clinic at the Peter A. Allard School of Law, University of British Columbia (Canada) welcomes the opportunity to comment on the Committee of the Rights of the Child’s Draft General Comment 26. Our submission recommends development of the Draft General Comment based on five legal obligations/principles:

1. State obligations to prevent transboundary environmental harm;
2. Due diligence obligations;
3. The precautionary principle;
4. The obligation for States to provide adequate remedies and;
5. The freestanding right to a healthy and sustainable environment.

Further discussion in General Comment 26 of these five areas would better protect children’s rights in a world threatened by climate change and other environmental crises.

* + - 1. **State Obligations Regarding Transboundary Harm**

Draft General Comment 26 refers to transboundary threats to children’s rights in several paragraphs, specifically with respect to children’s rights impact assessments (para. 87) and to the contribution of businesses to climate change (para. 116). It is unclear what the relationship is between this General Comment and a State’s customary law obligation to prevent transboundary harm to the territory of other States and areas beyond national jurisdiction.[[1]](#footnote-1) Regional human rights courts have further noted that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside of their territory.[[2]](#footnote-2) In light of these progressive developments in the relationship between international human rights law and environmental law, it is important to clarify how transboundary environmental harm interacts with State obligations under the Convention on the Rights of the Child (the Convention).

Several paragraphs of Draft General Comment 26 note that activities in one State may produce an impact on the enjoyment of children’s rights in a neighbouring State. However, the General Comment does not discuss the implications of situations where transboundary harm impairs another State’s ability to uphold its obligations under the Convention. While we acknowledge this Convention contains a jurisdictional clause that limits extraterritorial application, the General Comment should reconcile the Convention’s relationship with existing customary environmental law. In particular, the Committee should consider the customary environmental law that prohibits States from using their territory in ways that harm the environment of another, as such harm ultimately inhibits a State party’s ability to fulfil its obligations under the Convention through no fault of its own. Doing so would align General Comment 26 with the Rio Declaration and the Stockholm Declaration, which both include the obligation that States ensure that activities within their jurisdiction do not cause environmental damage beyond their borders.[[3]](#footnote-3)

We thus recommend General Comment 26 add a statement explicitly requiring States to refrain from activities that may impede the ability of another State to realize children’s rights within its jurisdiction. A similar statement to the one we suggest here was included in the Committee on Economic, Social and Cultural Rights’ General Comment No. 15.[[4]](#footnote-4) This paragraph states that “activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”

While paragraph 116 of the Draft General Comment sets out that States must prevent business enterprises from causing climate-related harm which may impact the rights of children, this statement should be broadened to also include a) harms resulting from sources other than transnational business organizations and b) environmental damage that is not climate-related.

* + - 1. **Due Diligence Obligations**

*Due Diligence and the State*

The due diligence obligation of States is mentioned several times in Section V without clarification as to what this duty entails. We recommend the General Comment articulate a threshold for due diligence, below which a State fails to uphold its obligations under the Convention. Elaboration of this standard in the specific context of children’s rights and the environment will provide a clear evidentiary standard to assist domestic claimants in identifying when a violation of children’s rights has taken place. Articulating a legal threshold for due diligence would create a stronger foundation for domestic complainants and establish clear rule for domestic and international courts, tribunals, and treaty bodies to follow.

The Committee on the Rights of the Child (“CRC” or “the Committee”) could draw, for example, from the definition of due diligence in the Draft Articles on the Prevention of Transboundary Harm, which defines the concept as “reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in a timely fashion, to address them”[[5]](#footnote-5) or “that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance”.[[6]](#footnote-6) Further, this General Comment should specify whether the due diligence obligation in the Convention imposes procedural obligations on States, such as the completion of an impact assessment when there is a risk that children’s rights will be significantly impaired.

Finally, there should be additional clarity on when the due diligence obligation to conduct a child's-rights impact assessment is triggered, and whether it shares any relationship with the obligation to conduct an environmental impact assessment. The obligation to conduct an environmental impact assessment is triggered when there is a “risk of significant transboundary harm”.[[7]](#footnote-7) This Comment should articulate an analogous threshold for when the duty to conduct a child’s rights assessment is triggered, or whether a child’s-rights impact assessment ought to accompany an environmental impact assessment.

*Due Diligence with Respect to Business Activities*

Paragraph 92 of the Draft General Comment provides that States should require businesses to undertake children’s rights due diligence but does not detail what an adequate child-rights due diligence process should entail. There is an opportunity to integrate existing human rights due diligence principles here, such the Ruggie Principles[[8]](#footnote-8) or UNICEF’s Children’s Rights and Business Principles.[[9]](#footnote-9) Including these explicit references would help with standard setting and increase the utility of existing human rights due diligence “soft law” by adapting it to new contexts.

* + - 1. **The Precautionary Principle**

We suggest paragraph 15 articulate a more robust version of the precautionary principle.[[10]](#footnote-10) The burden of proof should be expressly placed on the proponent of an activity to demonstrate the activity will not cause significant harm to children. If proponents cannot prove their proposed activities do not create the risk of significant harm to children, they should not be permitted to proceed.[[11]](#footnote-11) We also suggest adjusting the definition of the precautionary principle so that projects which present a risk of causing irreversible damage are expressly disallowed.[[12]](#footnote-12)

When articulating the precautionary principle in this General Comment, the importance of engaging with many stakeholders (including children) during risk assessment and management should be emphasized.[[13]](#footnote-13) Businesses should not be left to their own devices in assessing risk and uncertainty, given that they have an incentive to identify less risk and uncertainty to facilitate advancement of their project. The precautionary principle in this General Comment would therefore benefit from the inclusion of a consultation framework offering preliminary guidance on the appropriate forms of consultation during risk assessment and management.

We also suggest modifying the proportionality assessment by removing the phrase “assessing whether a harmful activity is necessary for achieving broader goals”, as this statement risks subordinating environmental and child health to perceived political, social or economic imperatives. Children often bear more of the risk arising from business projects than adults, as children are particularly vulnerable and also face potential consequences for a longer period than adults.[[14]](#footnote-14) The articulation of the precautionary principle in General Comment 26 should therefore account for the disproportionate risk children face from climate change and other environmental issues.

* + - 1. **Adequate Remedies**

General Comment 26 would benefit from elaboration of the different kinds of remedies available in the climate change context to guide complainants, courts and treaty bodies. In general, complainants may pursue individual remedies targeting particular past harms, or more systemic remedies which prevent future harms. Individual remedies include damages, declarations, and injunctions.[[15]](#footnote-15) Systemic remedies include structural injunctions (“targeted recommendations” in international law) and recommendations.[[16]](#footnote-16) The Comment should note that a combination of both individual and systemic remedies will generally be required to address children’s rights violations in the climate change context.

***Individual Remedies***

While damages claims in human rights-based climate litigation have not been common, such claims are increasingly sought at national levels.[[17]](#footnote-17) Money from damages claims could be deposited into loss and damage funds (discussed below), which would ensure damages awards are channelled towards constructive uses in the fight against climate change. General Comment 26 should also note the potential of declarations as a remedy. Given that the CRC did not make the requested declaration in *Sacchi*,[[18]](#footnote-18) discussing the importance of declarations in General Comment 26 would signal to future petitioners that the Committee is willing to make declarations.

***Systemic Remedies***

In paragraph 68 the General Comment notes that states should ensure regulatory agencies are available to monitor rights compliance and remedy breaches. However, it should also be highlighted that structural injunctions/targeted recommendations can be employed to create oversight bodies to ensure future rights compliance. Systemic remedies are particularly well suited to addressing complex climate-related harms, and thus General Comment 26 should articulate the importance of systemic remedies and provide guidance on how these remedies might be fashioned to protect the rights of children.

***Loss and Damage Funds***

Loss and damage funds that compensate those disproportionately impacted by climate change are another emergent strategy to remedy environmental harms. Children as a group are disproportionately impacted by climate change, and thus a reference to loss and damage funds could be mentioned in a remedies discussion. Loss and damage funds could support the creation and maintenance of oversight bodies and other regulatory agencies dedicated to addressing violations of children’s human rights arising from environmental harms.

***Exhaustion of Domestic Remedies***

The General Comment should explicitly waive the general principle requiring exhaustion of domestic remedies before turning to international fora in all cases presented to the CRC concerning climate change and other international environmental crises. In the context of climate change and other environmental crises, international courts and treaty bodies are better equipped to provide effective legal remedies. The international nature of rights violations resulting from climate change and other transboundary environmental problems renders remedies available to domestic courts and administrative bodies ineffective in many circumstances.

As stated at Article 7(e) of the Optional Protocol to the Convention, the exhaustion of domestic remedies is not required where a) those remedies are unlikely to bring effective relief or b) when the pursuit of domestic remedies would be unreasonably prolonged.[[19]](#footnote-19) Each of these conditions are met in the circumstances addressed in this general comment.

* + - * 1. *Domestic Remedies are Unlikely to Bring Relief*

International law generally considers a remedy sufficient when it is capable of redressing the specific harm alleged.[[20]](#footnote-20) In many instances, domestic remedies are unable to provide adequate redress for alleged harms. First, domestic remedies will be ineffective in isolation,[[21]](#footnote-21) as international cooperation is required to prevent further harm to human rights from climate change. Second, for many claimants, there is no reasonable prospect of success in domestic courts due to issues of non-justiciability that are pervasive in climate litigation cases.[[22]](#footnote-22) Third, domestic remedies are often ineffective by the time they are implemented, as the effectiveness of remedial state action is impeded by delays in implementation.[[23]](#footnote-23) The risk of irremediable rights violations is a highly foreseeable consequence if claimants are required to exhaust domestic remedies, given that the pursuit of domestic remedies is an unreasonably prolonged process in the climate change context (see below).

* 1. *The Pursuit of Domestic Remedies Would be Unreasonably Prolonged*

Petitioners seeking domestic remedies for environmental violations are likely to face undue delays for several reasons. First, the urgency of the alleged violations requires immediate state action. The requirement of exhausting domestic remedies poses a risk that the claimant’s rights will be prejudiced in the absence of immediate mitigative action by domestic governments.[[24]](#footnote-24) Jurisprudence from other international human rights mechanisms has recognized that urgency is a factor that warrants a waiver of the domestic remedies rule, specifically in the context of climate change.[[25]](#footnote-25) Second, domestic judicial systems operate at a pace that causes undue delay. Climate litigation takes approximately five years for domestic courts to resolve,[[26]](#footnote-26) which is unduly prolonged given the urgent context of climate change. Third, climate litigation faces additional procedural delays due to the novel legal arguments being presented before the courts.[[27]](#footnote-27)

Thus, we recommend including within the General Comment an explicit statement that exhausting domestic remedies is not required when addressing rights violations resulting from climate change or severe environmental damage.

1. **The Right to a Healthy and Sustainable Environment**

Paragraph 71 of the Draft General Comment acknowledges that children have a right to a clean, healthy, and sustainable environment. The inclusion of the right to a healthy environment in the General Comment is an important step in ensuring the protection of the rights set out in the Convention, but this discussion could be strengthened.

The General Comment can look to the Inter-American Court of Human Rights’ (IACtHR) interpretation of the right to a healthy environment for guidance as to how the right to a healthy environment can be interpreted in a way that ensures the interests of future generations are protected. The Draft General Comment sets out that the right to a healthy environment is implicit in, and directly linked to Article 6, Article 24, Article 27, and Article 29 of the Convention. In grounding the right to a healthy environment in other rights guaranteed under the Convention, the General Comment should emphasize that finding a violation of the right to a healthy environment does not require evidence that one of the aforementioned Convention rights is at risk. As the IACtHR did in *Advisory Opinion OC-23/17*, the General Comment should explicitly confirm that children’s right to a healthy environment, despite being derived from other Convention rights, operates autonomously.[[28]](#footnote-28) Emphasizing that the Convention grounds a right to a healthy environment that is enforceable without evidence that other Convention rights have been impacted would ensure that future generations of children benefit from the same right to a healthy natural environment that exists today.

The Draft General Comment could also specifically acknowledge the relationship between the right to a healthy environment and children’s right to enjoy their own culture guaranteed under Article 30 of the Convention. The General Comment should recognize the important role the environment can play in exercising cultural rights guaranteed by the Convention. The right to a healthy natural environment is particularly significant for many Indigenous cultures, as the Human Rights Committee has emphasized.[[29]](#footnote-29) Recognizing the link between culture and a healthy natural environment, General Comment 26 should list Article 30 as directly linked to the right to a healthy environment alongside Article 6, Article 24, Article 27, and Article 29.

Thank you for considering our comments.

1. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep 14 at para 101. [↑](#footnote-ref-1)
2. *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (2017), Advisory Opinion OC-23/17, Inter-Am Ct HR (Ser A) No 23 at paras 101-3 [*Advisory Opinion OC-23/17*]. [↑](#footnote-ref-2)
3. Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A /CONF.48/14/Rev.1, Principle 21; Rio Declaration on Environment and Development. United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 2. [↑](#footnote-ref-3)
4. Committee on Economic, Social and Cultural Rights, General Comment 15, at para 31. [↑](#footnote-ref-4)
5. See International Law Commission, *Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* 53rd Sess, UN Doc A/56/10, at 154. [↑](#footnote-ref-5)
6. *Ibid*. [↑](#footnote-ref-6)
7. Advisory Opinion OC-23/17, *supra* note 2 at para 195. [↑](#footnote-ref-7)
8. Report of the Special Rapporteur of the Secretary General on the Issue of Human Rights and Transnational Corporations and other business enterprises, March 2011, A/HR/17/31. (“Ruggie Principles”). Most notably, Principles 17 and 18 could substantiate the content of what an adequate child's-rights due diligence process looks like. [↑](#footnote-ref-8)
9. UNICEF, Save the Children and Global Compact, Children’s Rights and Business Principles (2011). [↑](#footnote-ref-9)
10. Earth Charter Commission, *Earth Charter,* Principle 6(a)–(b), online: <[earthcharter.org/read-the-earth-charter/ecological-integrity/](https://earthcharter.org/read-the-earth-charter/ecological-integrity/)> [*Earth Charter*]. The *Earth Charter* contains elements of the precautionary principle we discuss here. [↑](#footnote-ref-10)
11. Andri G Wibisana, “The Development of the Precautionary Principle in International and Indonesian Environmental Law” (2011) 14:1 Asia Pac J Envtl L 169 at 181 [Wibisana]. [↑](#footnote-ref-11)
12. See *The 1982 World Charter for Nature*, UNGA RES 37/7, para 11(a). [↑](#footnote-ref-12)
13. Wibisana, *supra* note 11, at 189. [↑](#footnote-ref-13)
14. Eva Lievens, “Growing Up with Digital Technologies: How the Precautionary Principle Might Contribute to Addressing Potential Serious Harm to Children’s Rights” (2021) 39:2 Nordic J Hum Rts 128 at 135. [↑](#footnote-ref-14)
15. Guidebook on Remedies in International Climate Change Litigation, Allard International

    Justice and Human Rights Clinic (Vancouver: Allard School of Law, May 2022) [*Remedies Guidebook*] at 8–15. [↑](#footnote-ref-15)
16. *Ibid*, at 15–18. [↑](#footnote-ref-16)
17. *Ibid* at 12. [↑](#footnote-ref-17)
18. *Sacchi v Argentina*, CRC/C/88/D/104/2019 at 10.15–10.21 [*Sacchi*]. [↑](#footnote-ref-18)
19. Optional Protocol to the Convention of the Rights of the Child on a communications procedure, adopted pursuant to General Assembly resolution A/RES/66/138 of 19 December 2011. [↑](#footnote-ref-19)
20. Lawless v. Ireland, European Court of Human Rights, Application No.332/57, in Yearbook, vol. 2, 1958-59. [↑](#footnote-ref-20)
21. Climate change is described as a super wicked problem by policy and planning scholars. See Lazarus (2008); K. Levin, B. Cashore, S. Bernstein, & G. Auld, “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change” (2012) 45:2 Policy Sciences 123. [↑](#footnote-ref-21)
22. Examples of judiciaries demonstrating inability or unwillingness to grant remedies in the climate change context: *Turp v. Minister of Justice and Attorney General of Canada*, 2012 FC 893; *Plan B and Others v. The Secretary of State for Business*, Energy and Industrial Strategy, [2018] EWHC 1892; *Juliana v. United States*, No. 18-36082 (9th Cir. Jan. 17, 2020); *Family Farmers and Greenpeace Germany v. Germany*, German Administrative Court, 00271/17/R/SP [Family Famers]. [↑](#footnote-ref-22)
23. Joint statement; CRC Concluding observations on Climate Change (Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Australia, Nov 2019, CRC/C/AUS/CO/5-6 at para 40; Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Belgium, Feb 2019, CRC/C/BEL/CO/5-6 at para 35; Committee on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of Japan, March 2019, CRC/C/JPN/CO/4-5 at para 37.) [↑](#footnote-ref-23)
24. *Ibid.* [↑](#footnote-ref-24)
25. Committee on the Elimination of Racial Discrimination, Guideline for the Early Warning and Urgent Action Procedures Annual Report, A/62/18 at para 12; Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure, 100th Sess., 1(100), INT/CERD/EWU/CAN/9026; 14 Minority Rights Groups, “Guidance: Exhausting domestic remedies under the African Charter on Human and Peoples’ Rights”, accessible at https://minorityrights.org/wp-content/uploads/2016/04/Domestic-remedies-guidance\_final.pdf, citing *Mohammed Abdullah Saleh Al-Asad v. Djibouti*, African Commission, Communication No. 383/110 at paras 123-124. [↑](#footnote-ref-25)
26. For example, the *Juliana* and *Urgenda* decisions took approximately five years to resolve. [↑](#footnote-ref-26)
27. For example, the defendant government in *Juliana*, *supra* note 23,often invoked motions to dismiss the case as non-justiciable to prevent or delay the case from proceeding. In New Zealand, the *Mataatua District Maori Council v. New Zealand* case, filed in 2017, remains pending despite the plaintiff having also filed an urgency application (*Mataatua District Maori Council v New Zealand* WAI 2607, 2017). [↑](#footnote-ref-27)
28. *Advisory Opinion OC-23/17*, *supra* note 2, at para 62. [↑](#footnote-ref-28)
29. See Human Rights Committee, General Comment 23, Rights of Minorities (Art. 27), at para 3. [↑](#footnote-ref-29)