Venice/Bern, 6 February 2023

**Submission for the ‘Call for comments on the draft general comment on children’s rights and the environment with a special focus on climate change’[[1]](#footnote-1)**

**About para. 13, para. 76 and para. 88.**

Intergenerational equity is a fundamental principle while dealing with the concept of time and temporalities in international human rights law,[[2]](#footnote-2) and with the compelling issues emerging in international environmental and climate change law. The legal reasoning that underlies the Draft GC duly takes into account both present and future generations. Children are the future, both those that are already born and those that will be born in the years to come.

Concerning the protection of the environment for present and future generations, both natural major disasters and slow-onset emergencies, or, better – to transfer a non-legal concept to legal arguments – “slow violence”[[3]](#footnote-3) are relevant. The phenomena are different: major disasters erupt in a precise moment of time, and their effects are clearly immediate, medium and long-term, but the present dimension usually prevail in the adoption of policies aimed at responding to the emergency. Slow violence, on the contrary, might or might not lead to major environmental disasters. Several bodies have acknowledged this twofold dimension in the protection of the environment. For example, the Human Rights Committee, in *Daniel Billy et al. v. Australia* (views of 21 July 2022), confirmed the affirmation already included in *General Comment No. 36* that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”[[4]](#footnote-4)

The suggestion we make in these pages is to push for a inchoate principle: *in dubio pro futuris generationibus*, which draws from the principle *in dubio pro natura* and explains in operative terms the principle of intergenerational equity, entails a consideration of the interests of future generations in all actions undertaken by States.[[5]](#footnote-5) The perspective is eco-centric, because it appreciates the environment as a whole, composed of human and non-human beings, as well as natural objects, including present and future generations.[[6]](#footnote-6) What we suggest is that the environment does not need to be protected *in favour* of present and future generations, but the protection of the environment *in itself* contains the protection of the interests of both the present and the future generations. As a consequence, the *in dubio pro natura* brocardo can be read and interpreted as *in dubio pro futuris generationibus*, meaning that, when there is an uncertain situation or a conflict of interest, or the state of the art of science does not allow to solve the doubt of whether there might be irreparable effects for future generations, the doubt must be solved *in dubio pro futuris generationibus*. This formula, which is strongly inspired by the precautionary principle, can be used as interpretative tool or as “interstitial” norm, as prof. Lowe argued many years ago with regard to the precautionary principle.[[7]](#footnote-7)

This principle is also relevant for the part of the Draft General Comment that deals with the child rights impact assessment. In para. 88, the Committee writes:

Child rights impact assessments should have special regard for the differential impact of environmental and climate-related actions on children, especially the groups of children most at risk, necessarily including young children, as measured against all relevant rights under the Convention. This includes long-term impacts, interactive impacts and impacts on the different stages of childhood.

These long-term impacts are relevant for children that have already born and future generations. The effects of this principle, used as interpretative tool, is potentially enormous. For example, looking at the Inter American Court of Human Rights’ advisory opinion of November 2017, one could argue that the protection of the environment, irrespective of the benefits *pro* present “human” generation, should be granted as expression of the “right to a healthy environment” and *in dubio pro futuris generationibus*.

In terms of States’ obligations, the Draft GC refers to due diligence obligations, paying “due regard” to the precautionary approach. In our understanding, the *in dubio pro futuris generationibus* is also relevant for defining legal obligations States must abide by.

In this way, we can consider the new “temporality” of international law, which disrupts the traditional boundaries between past, present and future to contemplate audacious changes of theoretical and interpretative perspective. As corollary of the principle of intergenerational equity, and inspired by the brocardo *in dubio pro natura*, the brocardo *in dubio pro futuris generationibus* gradually emerges as a flexible instrument capable of guiding judges in the interpretation and national and international legislators in the adoption of policies that put at the center the interests of the environment, meant, as we said, in the holistic way Christopher Stone theorized 50 years ago, and magisterially revisited by the Special Rapporteur David Boyd.

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On the right to non-discrimination, the draft GC importantly acknowledges that “certain groups of children face heightened barriers to the enjoyment of their rights in relation to the environment due to multiple and intersecting forms of discrimination”. They include, among other groups, girls.[[8]](#footnote-8) In the aftermath of natural disasters, “risks and experiences of physical violence are particularly pronounced.”[[9]](#footnote-9) Violence can derive from both major disasters but also slow-onset environmental degradation force: loss of livelihoods, limited resources, water scarcity and droughts, slow but irreparable pollution are all cause of disproportionate risks of violence for girls. Another form of violence that the GC should take into account is forced marriage. According to *End Violence Against Children*, “research and evidence have established that climate change and other environmental crises are multiplying the drivers of child marriages – including poverty, displacement, conflict and loss of education.”[[10]](#footnote-10)

The recognition of the disproportionate effect of climate change on girls should be better emphasized in the Draft GC by including a specific analysis of the definition and purpose of the notion of vulnerability that is gaining momentum in the legal reasoning of all international human rights bodies. In particular, we recommend to explore how the notion of vulnerability is taken into account under the international human rights framework to move international protection to the centre stage of the problematization of climate change. This will allow to better clarify the relationship between vulnerability, human rights and climate change; second to identify how human rights obligations can be taken into account for defining the scope and content of climate change action; and finally to gain some insights from the interpretative practice of UN treaty to define the content of States’ obligations to ensure the highest standards of protection[[11]](#footnote-11). In this context, the temporal dimension plays a significant role when evaluating whether the alleged environmental harm will have an impact now, by causing vulnerabilities (time as imminence), or whether it will have an impact in the future by exacerbating pre-existing vulnerabilities (e.g. by accelerating the deterioration of health of elderly people or by affecting the rights of future generations) (time as duration and as length). From this perspective, the temporal dimension of vulnerability can be a device that captures real-life harms by recognizing the differently-manifested need for protection and giving meaning to human rights obligations triggered by climate change.

**About paras 62 ff.**

“Climate action is not only a matter of intergenerational solidarity, but is also a human rights duty and a matter of intergenerational justice.”[[12]](#footnote-12) Access to justice is pivotal in the protection of human rights. The draft GC clearly highlights that “effective remedies should be available to redress violations”, and that this “requires States to provide pathways for children to access justice.” In the protection of children’s rights as related to the environment, access to justice is complicated due to the transboundary nature of environmental harm, and usual lack of proximity between what caused the harm and whom is affected by its effects.[[13]](#footnote-13)

One possibility is to push for a consolidation of the argument made by the Inter-American Court of Human Rights in the advisory opinion of 7 February 2018 concerning the obligations of States Parties to the American Convention on Human Rights.[[14]](#footnote-14) The Court argued that jurisdiction of a State is established when it exercises control over the activities that caused the harm. This shift in the legal analysis is particularly relevant. In the words of the Inter-American Court of Human Rights:

The exercise of jurisdiction by a State of origin in relation to transboundary damage is based on the understanding that it is the State in whose territory or in whose jurisdiction these activities are undertaken, who has effective control over them and is in a position to prevent the causation of transboundary damage that may affect the enjoyment of human rights of individuals outside its territory. The potential victims of the negative consequences of these activities should be deemed to be within the jurisdiction of state of origin for the purposes of any potential state responsibilities for failure to prevent transboundary damage. In any case, not every injury activates this responsibility.[[15]](#footnote-15)

There is, however, an intrinsic procedural limit: the fact that such a legal argument is constrained within spacial boundaries, owing to the nature of the human rights treaty (in this case the American Convention on human rights) in which the interpretation operated. What about other legal systems where there is no access to a regional mechanism for the protection of human rights, or to an effective domestic remedy, or where the State has not accepted the competence of UN treaty bodies in receiving individual complaints?

It emerges here, especially with regard to environmental cases, and more especially when it comes to children, an inherent systemic discrimination which can hardly be solved without a serious commitment by States.

In that regard, the attempt is to offer an innovative view to the legal matter. The second possibility we envisage here is indeed that the CRC promote the establishment of a children’s tribunal, based on the model of women’s and peoples’ tribunals. The nature of such tribunals for children would be different than the experiences we have had in years. These tribunals can surely provide a voice to children, they can reveal the untold, as it was for all peoples’ tribunals, but they can also push forward legal interpretations that might be of inspiration for domestic and international tribunals alike. The non-binding nature of peoples’ tribunals should not be seen as a weakness, but, quite to the contrary, as an example of flexibility in international law. These tribunals can gather the stories of children living in small islands whose existence is at risk because of climate change, they can listen to stories which can never achieve a tribunal for the legal constraints the procedure has in terms of status of victims and admissibility, among others. The outcome of the decisions of these tribunals can be taken into account as *amici curiae* briefs. *Amici curiae* (friends of the court) are entities that are interested in a trial but not party to it, and they can submit a brief which can be both on a point of law or fact. It does not seem thus improbable, that international, regional, and domestic courts – if the participation of *amici curiae* is possible according to their rules of procedures – accept and even request *amici curiae* briefs from children’s tribunals, or, better, from the organizations that have promoted the establishment of the tribunals themselves. It is now necessary that, for the first time in history, an international tribunal or a domestic court clearly asks for the testimonies collected by one of the numerous peoples’ tribunals that have been established in the past years. One can only imagine the power (also in legal terms) of a children’s tribunal on the protection of the environment for present and future generations.

**About para. 100**

In terms of States’ obligations, a possible legal argument to face this challenge, using the provisions of the legal instruments in force, is to adopt the emerging doctrine of ‘common concern’ as the defining principle for developing a preventive-responsive framework.[[16]](#footnote-16) With the adoption of the Paris Agreement in 2015 it became clear that ‘change in the Earth’s climate and its adverse effects are a common concern of all humankind’ requiring collective and cooperative efforts. Common concerns function both as an ‘instrumental value’ and a ‘constraint’ that cannot be confined within domestic borders; these phenomena respect no frontiers. Common concern is a concept that guides states on cooperating to address problems of global interest. This raises new issues concerning the interplay between the internal and external dimensions of climate risk governance, which requires a departure from a State-centric approach to facilitate cooperation at the international level and effectively to maintain international peace and stability. The notions of prevention and cooperation are powerful in their practical meaning for dealing with common concerns, by acting unilaterally and concertedly upon commonly agreed rules. We suggest defining the contours of the obligation *to cooperate to prevent*, combining the duty to cooperate with the duty to prevent foreseeable harm and human rights violations.[[17]](#footnote-17) To clarify the scope of this obligation, we refer to the attempt of De Schutter to clarify how the duty to cooperate in human rights law[[18]](#footnote-18), in our case in the field of the rights of the child, could include in its definition a duty to seek to conclude agreements with other States to ensure a global implementation.[[19]](#footnote-19) This could be beneficial in translating human rights obligations into a cooperative duty to prevent harm for present and future generations by institutionalizing a cooperative framework that enables the full realization of their rights. Effective international cooperation for the realization of children’ rights could include seeking to adopt new multilateral and bilateral agreements including the adoption of new mechanisms (e.g. children tribunals) to prevent climate-related violations. [[20]](#footnote-20)

*This comment, despite being inspired by the debate in Bern, represents the ideas of the authors, specifically written to be submitted to the CRC.*

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1. This comment largely draws on the result of the expert meeting “Cooperative Duties, Human Rights and Climate Change” co-organized by Prof. Elisa Fornalè (World Trade Institute, University of Bern, Switzerland) and Prof. Sara De Vido (Ca’ Foscari University of Venice, Italy). It was held in Bern, at the WTI, on 8 December 2022 within the framework of the research project ‘Framing Environmental Degradation, Human Mobility and Human development as a matter of Common Concern’ ([www.climco2.org](http://www.climco2.org)) led by Fornalé and we acknowledge the support of the Swiss National Scientific Foundation (SNSF grant no. PP00P1163700). The participants included: Prof. Kathryn McNeilly, Queen’s University Belfast; Prof. Antonios Tzanakopoulos, Oxford University; Prof. Massimo Starita, University of Palermo; Dr. Federica Cristani Institute of International Relations, Prague; Dr. Mikiko Otani, Chair of the UN Child Committee; Dr. Cecilia Jimenez, Former UN Special Rapporteur on the Human Rights of Internally Displaced Persons; Dr. Laura-Maria Craciunean-Tatu, UN CESCR; Prof. Gentian Zyberi, member of the UN Human Rights Committee; Dr. Reem Alsalem, UN Special Rapporteur on Violence against Women; Dr. Hilary Gbedemah, CEDAW Committee; Dr. Mikel Mancisidor, UN CESCR. [↑](#footnote-ref-1)
2. K. McNeilly and B. Warwick (eds.), *Time and Temporalities in International Human Rights Law*, Bloomsbury, 2022. [↑](#footnote-ref-2)
3. R. Nixon, *Slow Violence and the Environmentalism of the Poor*, Harvard University Press, 2011. [↑](#footnote-ref-3)
4. HRC, General Comment No. 36 (2019) on Article 6, Right to life. HRC, *Daniel Billy et al. v. Australia*, view of 21 July 2022, Communication No. 3624/2019. [↑](#footnote-ref-4)
5. S. De Vido, *In dubio pro futuris generationibus: una risposta giuridica ecocentrica alla slow violence*, forthcoming in M. Frulli (ed.), *L'interesse delle future generazioni nel diritto internazionale e dell'Unione europea*, 2023. [↑](#footnote-ref-5)
6. See also CESCR, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3), and (4) of the International Covenant on Economic, Social and Cultural Rights, where the “unacceptable harm” to humans or the environment” is contemplated. Needless to say, the concept of environment as a whole refers to C. Stone, *Should Trees Have Standing*?, Oxford University Press, 3rd ed., 2010. [↑](#footnote-ref-6)
7. V. Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?,* in M. Byers (ed.), [*The Role of Law in International Politics: Essays in International Relations and International Law*](https://academic.oup.com/book/2181)*,* Oxford, 2001. [↑](#footnote-ref-7)
8. See in that respect, Special Rapporteur on Violence against Women and Girls, its Causes and Consequences, *Violence against Women and Girls in the Context of the Climate Crisis, including Environmental Degradation and Related Disaster Risk Mitigation and Response*, 11 July 2022, A//77/136. [↑](#footnote-ref-8)
9. Ibid, para. 24. [↑](#footnote-ref-9)
10. https://www.end-violence.org/articles/how-climate-change-driving-child-marriages. [↑](#footnote-ref-10)
11. E. Fornalé, “The Role of Vulnerability in Climate Change Litigation”, in A. Pomade (ed.), Vulnérabilité (s) environnementale (s): perspectives pluridisciplinaires (forthcoming 2023). [↑](#footnote-ref-11)
12. As well highlighted by the then Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jimenez-Damary, in the internal displacement in the context of the slow-onset adverse effects of climate change (2020). [↑](#footnote-ref-12)
13. E. Fornalé and T. Koehler, “Climate change inaction and children rights”, JURIST – Academic Commentary, February 2022. [↑](#footnote-ref-13)
14. Inter-American Court of Human Rights, Advisory Opinion No. 23/17 of 15 November 2017, *Medio ambiente y derechos humanos.*  [↑](#footnote-ref-14)
15. Ibid, para. 102. [↑](#footnote-ref-15)
16. E. Fornalé, ‘Collective Action, Common Concern and Climate-Induced Migration’, Behrman S. & Kent A. (Eds.) Climate Refugees, Cambridge University Press, 107-127. [↑](#footnote-ref-16)
17. O. De Schutter (2021), “A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish ‘An International Legal Order in Which Human Rights Can Be Fully Realized”, in Bhuta et al. (eds.), *The Struggle for Human Rights*, Oxford University Press. [↑](#footnote-ref-17)
18. CESCR, General Comment n.12, E/C.12995/, para 36 ‘consider the development of further international legal instruments to that end (to comply with the right to food). [↑](#footnote-ref-18)
19. CRC, General Comment No. 5, CCGC/2003/5, para. 5; See also the CESCR, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (to encourage the adoption of multilateral agreements to prevent risks from materializing or to mitigate the effects of climate change, loss of biodiversity, among others (para. 81). [↑](#footnote-ref-19)
20. International Law Commission (ILC), (2013). Sixth Report on the protection of persons in the event of disasters, (A/CN.4/662). [↑](#footnote-ref-20)