‑

|  |  |  |  |
| --- | --- | --- | --- |
| |  | | --- | | **Reference No.:** | | **Case officer:** | | AJB-1113/2023 |

# **The Hungarian National Human Rights Institution’s Comment**

# **on the CRC’s Draft General Comment No. 26**

# (*Children’s rights and the environment with a special focus on climate change*)

The Office of the Commissioner for Fundamental Rights is the Hungarian National Human Rights Institution (HNHRI) accredited by the Global Alliance of National Human Rights Institutions in accordance with the Paris Principles defined by United Nations General Assembly. The work of the Commissioner for Fundamental Rights (“Commissioner”) is assisted by two Deputies, one responsible for the protection of the interest of Future Generations (Ombudsman for Future Generations, „FGO”), another for the interests of nationalities living in Hungary. The predecessor of the current HNHRI was established in 1995 as an independent parliamentary institution, with the rights of the child being one of its main focal points from the outset, while the institutional protection of future generations dates back to 2008. Whereas the mandate of the Commissioner encompasses a broad range of fundamental rights, the founding act stipulates four areas with special focus: the *Commissioner pays special attention to the protection of the rights of the child, and to the interests of future generations* besides the rights of most vulnerable social groups and the rights of nationalities living in Hungary[[1]](#footnote-1).

The HNHRI’s competencies in relation to protecting the rights of the child and the interests of future generations are multifold: whereas investigations are conducted both based on incoming complaints and ex officio, the HNHRI also functions as an advisory body, recommending specific measures for public bodies, commenting on legislative drafts and submitting specific legislative proposals with relevance for fundamental rights. In the international arena the HNHRI is an active member of various umbrella organisations (GANHRI and ENNHRI), responding to enquiries from UNCRC, ENOC, EUROCHILD, the Special Rapporteur for Human Rights and the Environment, and the Special Rapporteur for Climate Change. The HNHRI is also a member of the Network of Institutions for Future Generations via the FGO[[2]](#footnote-2).

Based on the Hungarian NHRI’s long experience in promoting and advocating both for the rights of children and inter-generational equity, we trust we can offer relevant insights for the Committee in the process of finalizing General Comment No. 26 (“GC”). *We strongly applaud that the Committee recognizes the principle of inter-generational equity and the interests of future generations and believe that building on essential linkages and synergies between protecting the rights of children and future generations can result in an even more holistic and future oriented approach when it comes to ensuring the best interests of children of the present and of the future*.

Our comment therefore provides suggestions on how the GC could further clarify the normative content of the inter-generational equity principle, drawing on the principle’s interpretation in international soft law documents and the case law of the Hungarian Constitutional Court. Specifically, our input will:

I. point out the specificities of protecting long-term interests of future generations that can inform the efficient advocacy for children’s rights in the context of environmental protection and climate change;

II. suggest additional text elaborating on the normative meaning of the inter-generational equity principle;

III. advocate for endorsing the non-retrogression principle as part of the inter-generational equity principle; and

IV. argue for adopting a language, which clearly commits to a strong interpretation of the precautionary principle.

## **Synergies and lessons to be learned from future generations advocacy for safeguarding the environmental rights of children in the future**

It is highly laudable that the principle of inter-generational equity is featured in the draft GC as a conceptual cornerstone of States’ long-term obligations to protect the rights of children in the context of environmental and climate risks or harm. Indeed, some of the core interests of posterity overlap with those of present-day children with respect to the quality and quantity of resources as well as flourishing ecosystems.

At the same time, it is also important to acknowledge that the yardstick of “the best interest of the child” is somewhat different from that of the “interests of future generations”, as the latter captures the vital needs of future individuals (children and adults alike). This means that while children’s rights tackle the special vulnerabilities of present-day children, the principle of inter-generational equity requires a more future-oriented approach. Protecting the rights and interests of children in the future therefore necessitates focusing on longer timescales. The experience of spokespersons of future generations can have important lessons for putting the inter-generational equity principle into practice in the context of promoting children’s rights in the future.

The more than a decade-long history of the HNHRI with promoting inter-generational equity suggests that protecting the needs of future generations (including children) necessitates a specific set of expertise, an interdisciplinary working method, and the utilization of specific principles. With regard to the specific expertise, a different background is needed for defining the best interest of the child and the interests of future generations, as the latter requires expertise in environmental and climate law. Furthermore, defining what lies in the environmental interests of future generations is often an interpretative exercise, requiring consulting scientific reports and experts concerning environmental risks to incorporate such expertise in the relevant advocacy. Similarly, the colleagues working in the field of protecting children’s rights often rely on expertise from public health professionals, psychologists and pedagogues. Both types of advocacy is deeply interdisciplinary in nature, and necessitates getting insights from other experts’ fields. In this vein institutions that seek to promote long-term environmental interests of children in the future are likely to have to forge alliance with scientists.

Such an interdisciplinary working method also requires building on specific rules and principles. The precautionary principle is an established and vital part of translating probabilistic scientific results into protective action in an effective way. In order to claim protection for the long-term viability of natural resources and ecosystems, advocates of inter-generational equity have to inject long-term planning and thinking into the necessarily myopic approach of present-day stakeholders. Democratically elected officials tend to focus on satisfying the short-term preferences of their constituencies by sacrificing long-term assets. Efficient future generations advocacy therefore necessitates legal doctrines that impose constraints on the freedom of the present generations to exhaust vital resources in order to spare them for generations to come.

For these reasons, we believe the *text of the GC could address the principle of inter-generational equity more in depth to highlight the specific legal tools that are necessary to implement the principle in protecting the rights of future children*. Our comments below propose some amendments with which the GC could clarify the normative implications of inter-generational equity.

## **The content of the inter-generational equity principle: binding constraints on States’ freedom to neglect long-term risks of harm**

The recent wave in climate change and environmental litigation suggests that inter-generational equity is increasingly deemed by domestic courts as imposing binding obligations on States. In accordance with this legal development, the GC could reinforce that the principle is more than a symbolic, aspirational clause, stressing that it should have a direct bearing on the law-making and administrative decision-making of public authorities. Although utilised mostly in future generations advocacy, giving more weight to the principle of inter-generational equity and thereby shaping decisions made in the present will certainly benefit children of all generations to come.

In a growing number of States worldwide, the interests of future generations are protected through normative constitutional safeguards. In Hungary, for instance the principle of inter-generational equity is embedded in Article P) of the Fundamental Law, which obliges the State and every individual to maintain, protect and preserve the natural and cultural heritage, including biodiversity, freshwater resources, arable land, and forests, for the benefit of future generations. This provision has been consistently interpreted by the Constitutional Court as imposing binding obligations on the State. The Court has also nullified acts, which were found to be in breach of these inter-generational obligations as defined by the Court.

Specifically, the Constitutional Court has ruled that the legislature is obliged to engage in long-term planning when it designs laws that affect biodiversity and the natural resources and hence it has to consider the impacts of its policies even beyond the government’s election cycles.[[3]](#footnote-3) Furthermore, laws must not incentivize the wasteful use of natural resources,[[4]](#footnote-4) and must not permit members of the current generation to exhaust such resources.[[5]](#footnote-5) In the same vein, the Court stressed that the State may only allow the exercise of property rights by current rights-holders to the extent that doing so does not jeopardize the long-term viability of the natural and cultural heritage.[[6]](#footnote-6) In sum, the principle of inter-generational equity compels the legislature to take into account the interests of future generations with equal weight, in a fair and equitable manner when it enacts laws governing the use of natural resources.[[7]](#footnote-7)

We believe therefore that the current landscape of domestic laws as well as international principles make it possible to provide a more detailed definition on the content of the principle of inter-generational equity. A key feature of the principle lies in limiting the unfettered discretion of the State to pursue policies that clearly prioritize immediate economic benefits at the expense of sacrificing long-term interests. We therefore recommend expanding on the principle’s content by amending the end of paragraph 13 with the following sentences:

***The inter-generational equity principle is understood as requiring the conservation of options, the conservation of quality, and the conservation of access to natural resources for future generations.[[8]](#footnote-8) Current generations ought to pass on the Earth’s resources to their children in no worse condition than they received them.[[9]](#footnote-9) These inter-generational obligations limit the unfettered discretion of the State, both the legislative and the executive branch, in adopting laws and policies that may have trans- and multigenerational adverse impact on the climate system, the ecosystem and natural resources, undermining the life opportunities and the quality of life of children in the future. Policies pursued in the present ought not put future generations on path-dependency. The principle of inter-generational equity also requires States to adopt a long-term planning horizon in designing environmental and climate measures.***

## **Endorsing the non-retrogression principle as a core obligation flowing from inter-generational equity**

As mentioned above, we believe it is important to highlight the obligation that “***current generations ought to pass on the Earth’s resources to their children in no worse condition than they received them”*** as a key component of the principle of inter-generational equity. Such an obligation was first proposed by international soft law documents[[10]](#footnote-10) and scholarly positions[[11]](#footnote-11) as part of the principle.

The Hungarian experience with a constitutionally mandated principle of inter-generational equity under Article P) suggests that it is feasible to compel the legislative and executive branches not to allow the deterioration of key natural resources in order to protect the vital needs of posterity. In the Constitutional Court’s interpretation, the principle of intergenerational equity imposes a two-fold obligation on the State. On the one hand, under the so-called non-retrogression principle,[[12]](#footnote-12) the State cannot withdraw, or step back from, the statutory protection afforded to the natural and cultural heritage of future generations. On the other hand, the State is also obliged to take positive steps, by passing the necessary statutory safeguards, [[13]](#footnote-13) to pass on the Earth’s resources to their descendants in at least the same condition as they were received.

## **IV. On the need for a strong interpretation of the precautionary principle**

We welcome that the precautionary principle is referenced as a key concept in the GC. However, the text should also make clear the normative content of the principle, as it is still subject to entrenched debates. In some jurisdictions, it is called as a mere “approach”, and even where it is treated as a normative principle, its strict implementation is often impeded by the reluctance of authorities to act upon uncertain, statistical evidence on a precautionary basis.

The precautionary principle is an established principle both under EU legislation and domestic environmental law. Nevertheless, during its more than a decade-long history, the HNHRI has witnessed certain legislative initiatives, which went against the precautionary principle by tolerating or even generating environmental risks for key natural resources, such as drinking water reservoirs, or biodiversity. The HNHRI, through the FGO, regularly spoke up against such a narrow reading of the principle. In 2017, the Parliament adopted a legislative amendment abolishing all permitting requirements for drilling new wells for household water withdrawal purposes, thereby endangering the quality and quantity of groundwater resources. The act was challenged before the Constitutional Court by the Head of State and the FGO successfully intervened in the proceedings through an amicus brief, arguing that the amendment ran against the precautionary principle as the legislature neglected several scientific reports substantiating the risk that wells drilled without public agencies’ oversight are likely to pollute the finite groundwater reservoirs and thereby harm the interests of future generations.

For all these reasons, we believe it is instrumental to preclude the narrow and weak interpretation of the principle and to ensure that the text of the GC clearly and unambiguously compels States to take protective action on the basis of uncertain, inconclusive scientific evidence suggesting grave risks concerning the long-term viability of key natural resources, assets, and ecosystems. For this reason, we think the GC should make the implications of the precautionary principle even more explicit, by adding the following sentence to the end of paragraph 76:

***The serious risk of such harm should be deemed sufficient basis for States to pass protective measures in harmony with the precautionary principle.***

**Conclusion**

It is in the best interest of both current children and of future generations to live in a society that is able to place effective constraints on the ability of current generation, including economic actors and governmental decision-makers, to exploit natural resources and generate excessive GHG emissions that drive dangerous levels of climate change. Having experience representing the interests of both vulnerable groups, we believe that strengthening the current wording of the GC with more emphasis on intergenerational equity, non-retrogression and precautionary principles can offer further reinforcement for the application of a child rights-based approach in the environmental context on a longer timescale.

Budapest, 14 February, 2023.

Yours faithfully,

Dr. Gyula Bándi Dr. Ákos Kozma

1. Act CXI of 2011on the Commissioner for Fundamental Rights, 1§.(2) [↑](#footnote-ref-1)
2. The Network of Institutions for Future Generations (NIFG) is an independent, non-formal network of national institutions mentioned in the UN Secretary General’s 2013 report “Intergenerational Solidarity and the Needs of Future Generations”. The FGO has also contributed to the separate NIFG position that was prepared to the General Comment No 26. [↑](#footnote-ref-2)
3. Hungarian Constitutional Court Decision No. 14/2020. (VI.7.) Reasoning [36], Hungarian Constitutional Court Decision No. 28/2017. (X.25.) Reasoning [34], Hungarian Constitutional Court Decision No. 17/2018. (X.10.) Reasoning [96], Hungarian Constitutional Court Decision No. 3223/2017. (IX.25.) Reasoning [28] [↑](#footnote-ref-3)
4. Hungarian Constitutional Court Decision No. 13/2018. (IX.4) Reasoning [13] [↑](#footnote-ref-4)
5. Hungarian Constitutional Court Decision No. 28/2017. (X.25.) Reasoning [43], Hungarian Constitutional Court Decision No. 17/2018. (X.10.) Reasoning [84]-[85] [↑](#footnote-ref-5)
6. Hungarian Constitutional Court Decision No. 14/2020. (VI.7.) AB, Reasoning. [22]. [↑](#footnote-ref-6)
7. Hungarian Constitutional Court Decision No. 14/2020.(VI. 7) AB, Reasoning [22]. [↑](#footnote-ref-7)
8. Edith Brown Weiss: In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, Transnational Publishers Inc., New York, 1988. [↑](#footnote-ref-8)
9. 1988 Goa Guidelines on Intergenerational Equity drafted by an advisory body for the project on International Law and Intergenerational Equity with the United Nations University. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. See no 8 above [↑](#footnote-ref-11)
12. Gyula [Bándi:](https://m2.mtmt.hu/gui2/?type=authors&mode=browse&sel=10004204) Harnessing the non-retrogression principle for setting environmental thresholds: Rivista Quadrimestrale Di Diritto Dell’Ambiente 2021 : 2 pp. 103-133. ,. (2022) [↑](#footnote-ref-12)
13. Hungarian Constitutional Court Decision 28/2017. (X. 25.) AB, Reasoning 44. [↑](#footnote-ref-13)