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| The Committee on the Rights of the Child  Via Jonas Schubert at Terre des Hommes | Our reference: reference:ranse: | 2022/49 |
| [ohchr-crc@un.org](mailto:ohchr-crc@un.org) | Date: | 28.02.2023 |
| Publication no.: | NIM-H-2023-012-EN |

Submission to the Committee on the Rights of the Child on its Draft General Comment no. 26

1. Introduction

The Norwegian National Human Rights Institution (NIM) is grateful for the opportunity to provide input on the Draft General Comment no. 26 on Children’s Rights and the Environment with a Special Focus on Climate Change (GC). We refer to the extension kindly granted by Chanmi Kim at the UN via e-mail 15.02.2023, and our previous submission to the Committee on the Rights of the Child (CRCt).[[1]](#footnote-1)

NIM is an independent public body established by the Norwegian Parliament to strengthen the implementation of human rights in Norway.[[2]](#footnote-2) We have a legislative mandate to, *inter alia,* participate in international cooperation to promote and protect human rights. Climate change, one of the most pressing and serious threats to human rights, is highly prioritized by NIM. In 2020, NIM wrote a report on climate and human rights and intervened as *amicus curiae* in the Arctic Oil case before the Norwegian Supreme Court. Together with the European Network of National Human Rights Institutions (ENNHRI), NIM has also submitted several third-party interventions to the European Court of Human Rights in pending climate cases.[[3]](#footnote-3) Throughout our work, NIM has acquired special expertise in this area.

NIM welcomes the draft, and believes it provides important guidance to the interpretation of the UN Convention on the Rights of the Child (CRC). Our following comment will focus on the elements that, in our view, could be improved.

1. Interpretations and the legal weight of General Comments (paras 9-10)

Treaties like the CRC are interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT) Articles 31-33, where general comments are not explicitly mentioned. However, the International Court of Justice (ICJ) has held the “[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of” the UN Human Rights Committee, “it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[[4]](#footnote-4) More recently, the ICJ held that “the Court has carefully considered the position taken by the [Committee on the Elimination of Racial Discrimination]”, but came to another result by “applying, as it is required to do … the relevant customary rules on treaty interpretation”.[[5]](#footnote-5)

Similarly, under Norwegian law, statements in General Comments from the CRCt are generally afforded weight according to *how well they are anchored in the text of the convention* based on the interpretative methods as described in the VCLT.[[6]](#footnote-6) Another key point is whether the statement is *interpretive*, or whether it must be seen more as a *recommendation on optimal practice*.

To ensure that the GC provides *authoritative legal interpretations* that will be relied upon by courts*,* the method applied throughout the text should be more stringent and described further in the draft paras. 9-10. The CRCt should formulate the GC in a way that (i) makes it clear what statements are interpretative (e.g. “must”) and what are recommendations (e.g. “should”), and (ii) explicitly anchors its interpretations in the text of the CRC, in accordance with the method described in VCLT Articles 31-33.

1. The right to life and the right to the highest attainable standard of health (paras. 16, 28)

The draft para 16 reads that “States *should* take positive action to ensure that children are free from acts and omissions intended or expected to cause their premature or unnatural death” and “*should* adopt environmental standards that are protective of children’s right to life” (our emphasis). Similarly, para 28 reads that “States *should* adopt a comprehensive process for identifying and addressing environmental health concerns relevant to children within their national plan, policy or strategy. Legislative and institutional frameworks, including regulation dealing with the business sector, *should* effectively protect children’s environmental health in all relevant settings” (our emphasis).

However, in the draft para 76, reference is made to a legally binding due diligence obligation to “to take appropriate measures to protect children against reasonably foreseeable environmental harm and violations of their rights”.

In our view, the wording in paras 16 and 28 should be changed to “shall” or “must” to reflect that this is a legal obligation. When environmental issues like climate change threatens the right to life or health of children, States are legally obliged to take preventive measures to protect them from such risks. The CRCt itself has already held that “[d]ue to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, states have heightened obligations to protect children from foreseeable harm”. Moreover, apex courts in the Netherlands, Ireland, Norway, Germany, France, the US, Canada, Colombia, Nepal and Australia consider climate change a real and serious threat to human lives, in several cases *obliging* States to mitigate climate change to protect life or the right to life under different conventions.[[7]](#footnote-7)[[8]](#footnote-8)

In view of the relative elements of Article 24 (“highest attainable standard of health”), the *minimum legal obligation* that should be addressed is the obligation to refrain from retrogressive measures. The draft para 76 already mentions this element.

1. Best interest of the child (paras. 52-55, 87-89)

The draft para 52 reads that “Where a decision may have a major environmental impact on children, a more detailed procedure to consider their best interests is appropriate.” However, there is little guidance on how to decide what decisions have a “major” impact on children.

The CRCt could include an example in the climate change context, where decisions to permit fossil fuelsextraction will have a “major impact” on children as a group. For example, the Full Federal Court of Australia has accepted that the permitting coal extraction which will lead to 100 million tons of CO2 emissions constitutes a “reasonably foreseeable” risk of death or personal injury to Australian children alive today, since “even an infinitesimal increase in global average surface temperature” above 2°C could set off a catastrophic “tipping cascade” triggering a 4°C warmer “hothouse Earth”.[[9]](#footnote-9)

What is in “the best interest**”** of children must be “assessed and determined in light of the circumstances” of children in general, with full respect to all rights in the CRC.[[10]](#footnote-10) States are under an obligation “to clarify the best interests of all children” and ensure “a child rights impact assessment (CRIA) to predict the impact” the action will have on children.[[11]](#footnote-11) Currently, child rights impact assessments are discussed in paras. 87-89. The CRCt should consider keeping paras 52-55 and 87-89 together.

The CRCt has previously underlined that the flexibility of the concept “best interests” has been manipulated and abused by States to justify e.g. racist policies.[[12]](#footnote-12) The CRCt should thus provide more authoritative guidance on how to determine what is in the best interest of children in the environmental context. At a minimum, a long-term assessment of the environmental impact of the decision on the right to life for children and the key concepts in the draft part II (sustainable development, intergenerational equity, the best available science and the precautionary principle) should be obligatory.

1. Access to justice (paras. 62-70)

As the draft para 62 mentions, a barrier for children to access justice is the issue of legal standing. In political and economic terms, children have “less possibility than adults to make a strong case for their interests”[[13]](#footnote-13) within the “rapidly closing window of opportunity” remaining to secure “a livable future” for themselves.[[14]](#footnote-14) Hence, to safeguard their rights before the finite carbon budget is exhausted, children and youth are particularly reliant on rights enforcement in courts. For children, recourse to associations is one of the accessible means, sometimes the only means, for children to defend their interests in courts. The draft should thus reflect that environmental associations should have standing to represent the individual rights for children.

1. The right to a clean, healthy and sustainable environment (part IV)

NIM agrees that the right to a clean, healthy and sustainable environment is implicit in, and directly linked to, many rights under the CRC. However, the elements in the draft paras. 72-74 can also be said to flowing *directly* from other rights, under which they may also be addressed. This might give the important paragraphs on obligations a greater legal weight, as a *self-standing* right to a clean, healthy and sustainable environment might be perceived by some as not being directly anchored in the text of the CRC. Discussing the obligations under other rights in this context does not seem like a difference in the level of protection, but rather a difference in terminology or classification.

1. Climate change (part VI), paras. 98-103 (state obligations) and 108-113 (mitigation)

**The draft should underline highlight the obligation do mitigate climate change as the most fundamental.** This is because a) loss and damage from climate change will increase with increased emissions, b) adaption measures are not sufficient to contain the risks climate change poses to life over time and “widespread breaching of adaptation limits is expected” if the planet warms beyond 1.5°C or even 2°C,[[15]](#footnote-15) c) successful mitigation measures today may limit the need for drastic reduction measures extensively interfering with human rights tomorrow, which will likely be justified in the future if climate change remain largely unmitigated this decade.[[16]](#footnote-16)

**The 1,5°C, a planetary boundary, should be the point of reference for determining the appropriateness of States mitigation measures.** In Article 2.1a of the 2015 Paris Agreement, States Parties agreed to “pursue efforts to limit” the global temperature increase to 1.5°C, with a maximum increase to “well below 2°C”.

However, new insights in the IPCC 2018 report, confirmed in the IPCC 2021 and 2022 reports, establish that limiting the temperature increase to 1.5°C instead of 2°C would substantially reduce the risks for humans.[[17]](#footnote-17) Moreover, a recent study establishes that exceeding 1.5°C global warming could trigger multiple climate tipping points.[[18]](#footnote-18) These scientific insights are shifting the political and legal consensus.[[19]](#footnote-19) Hence, in the 2021 Glasgow Climate Pact, the Parties to the Paris Agreement resolved “to pursue efforts to limit the temperature increase to 1.5°C”.[[20]](#footnote-20) The 1.5°C target thus reflects updated scientific consensus to prevent “dangerous” climate change having “significant deleterious effects” on humankind.

Accordingly, the draft paras. 102, 110 and 111 should refer to the need to limit global warming to 1.5°C to appropriately protect the rights of children. The draft should read that States are required to adopt and implement an ambitious, realistic and specified reduction pathway to limit global warming to 1.5°C, with interim targets in accordance with the IPCC’s reduction rates, reaching carbon neutrality as soon as possible, and no later than 2050.

**The draft should explicitly address the need to protect children from the harmful effects of fossil fuels.** In paras 99 and 101, the draft refers to obligations concerning “acts or omissions in relation to the causes and effects of climate change”, and an obligation to refrain from adopting “measures that could worsen the cause and effect of climate change”. Although a phase-out of fossil fuels is briefly mentioned in para 73d), the following section on mitigation paras. 108–113 does not explicitly mention an obligation to protect children from the core cause of climate change, namely fossil fuel extraction.

This is problematic, as climate change is primarily caused by the extraction and ultimate combustion of fossil fuels, which account for 81-91% of the anthropogenic CO2 emissions,[[21]](#footnote-21) and mostly since 1990.[[22]](#footnote-22) These emissions may be traced back to specific decisions allowing exploration and extraction. Moreover, the IPCC warns that the 1.5°C and well below 2°C targets “could move out of reach” unless there are “dedicated efforts to early decommissioning”, “reduced utilization of existing fossil fuel infrastructures” and “cancellation of plans for new fossil fuel infrastructure”.[[23]](#footnote-23) This is because the estimated future emissions from existing fossil fuel infrastructure already exhaust the remaining carbon budget to limit warming to 1.5°C, with planned fossil fuel infrastructure set to exhaust the 2°C budget.[[24]](#footnote-24) A recent study also concludes that “[a]ccording to a large consensus across multiple modelled climate and energy pathways, developing any new oil and gas fields is incompatible with limiting warming to 1.5°C.”[[25]](#footnote-25)

The draft para. 111 should thus include a criterion on how to protect children from the harmful effects of fossil fuel extraction, in line with previous concluding observations to different states.[[26]](#footnote-26) One example could be an obligation to refrain from any new fossil fuel extraction incompatible with limiting warming to 1.5°C.

**The obligation to mitigate climate change extends to all emissions under effective control.** The CRCt held in the case *Sacchi et al. v. Germany* that

it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect over the enjoyment of rights by individuals both within as well as beyond the territory of the State party. *The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions*.[[27]](#footnote-27) (emphasis added)

The GC could echo this finding by explicitly spelling out that States have “effective control” over emissions originating from the production of oil and gas (so-called “scope 3” or combustion emissions) by controlling whether the reserves will be exploited or not. This would be consistent with the UN climate regime, subsequent state practice and judicial findings from domestic courts in Europe, the US and Australia.[[28]](#footnote-28)

**Emission reductions today cannot be substituted by reliance on technologies that are unproven at scale.** As of 2022, there are no “substitute[s] for deep emission reductions”.[[29]](#footnote-29) The precautionary principle, as noted by the Dutch Supreme Court and the German Constitutional Court, implies that States cannot rely on negative-emission technologies to remove CO2 from the atmosphere, many of which do not yet exist or are still at early stages of development.[[30]](#footnote-30) Reliance on these technologies “is a major risk in the ability to limit warming to 1.5°C”, and a “dangerous, high-risk approach”, as implementation of these technologies “currently faces technological, economic, institutional, ecological-environmental and sociocultural barriers”.[[31]](#footnote-31) In light of this,the language on negative emissions in para 111 e) should be enhanced, for example “cannot rely” and changing the order of the two sentences.

We would be very happy to elaborate further on any of the matters below via further correspondence with the Committee.

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| Best regards  Norwegian National Human Rights Institution | |
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| Jenny Sandvig  Policy director | Hannah C. Brænden  Legal advisor |

1. <https://www.nhri.no/wp-content/uploads/2022/03/NIM_Sumbission-to-CRC-General-Comment-no.-26-.pdf> [↑](#footnote-ref-1)
2. NIM has ‘A status’ accreditation with the Global Alliance of National Human Rights Institutions ([GANHRI](https://nhri.ohchr.org/EN/Pages/default.aspx)), which means we comply with the requirements of independence, impartiality and integrity under the [Paris Principles](https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx). [↑](#footnote-ref-2)
3. Available here: <https://ennhri.org/news-and-blog/ennhri-intervenes-before-the-grand-chamber-of-the-european-court-of-human-rights-in-three-historic-climate-cases/> and here: <https://ennhri.org/news-and-blog/third-party-intervention-potential-impact-climate-case-arctic-oil-exploration/> [↑](#footnote-ref-3)
4. *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Report 2010*, p. 369, para 66. [↑](#footnote-ref-4)
5. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates),* Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71, para 101. [↑](#footnote-ref-5)
6. Rt. 2015 s. 193 para 42; HR-2018-2096-A, para 14. [↑](#footnote-ref-6)
7. See references to several court cases in ENNHRI, [*Written observations in application no. 53600/20 Verein Klimaseniorinnen Schweiz et autres c. la Suisse*](https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-_Klimaseniorinnen-v.-Switzerland.pdf)*,* footnote 65. [↑](#footnote-ref-7)
8. UN Doc CRC/C/88/D/107/2019 para 9.13. [↑](#footnote-ref-8)
9. *Minister for the Environment v. Sharma et al.* [2022] FCAFC 35, paras. 293, 332, 403 and 423. While the majority of the Full Federal Court upheld the findings on foreseeability in *Sharma et al. v. Minister for the Environment* (Federal Court of Australia) FCA 774, 08.07.2021 paras. 84, 88, 247, 253, 257, it disagreed that tort law absent confirmation by the Supreme Court, establishes a novel duty of care for children. [↑](#footnote-ref-9)
10. CRCt, General comment No. 14, UN Doc. CRC/C/GC/14, 2013, para 32. [↑](#footnote-ref-10)
11. CRC/C/GC/14 para 35. [↑](#footnote-ref-11)
12. CRC/C/GC/14 para 34. [↑](#footnote-ref-12)
13. CRC/C/GC/14 para. 37 [↑](#footnote-ref-13)
14. IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability, 2022, p. SPM-35. [↑](#footnote-ref-14)
15. World Climate Research Programme et al. 10 New Insights in Climate Science, 10.11.2022, pp. 13–17; IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 23. See the dismissal of adaptation alone by the German Constitutional Court (*Neubauer*, para. 157) and the Dutch Supreme Court (*Urgenda*, para. 7.5.2.) [↑](#footnote-ref-15)
16. See *Neubauer and others v. Germany*, BvR 2656/18 (Federal Constitutional Court of Germany), 24.03.2021 para 157 (on adaptation) and 186, 192 ff. (on the need for a proportionate distribution of the reduction burden between generations as to prevent future fundamental losses of freedom). [↑](#footnote-ref-16)
17. IPCC, Climate change 2022: Mitigation of climate change, 04.04.2022, pp. 2-72, TS-26; IPCC, 1.5°C Report, 2018, pp. 177–181; IPCC, AR6 Climate Change 2021 The Physical Science Basis, 2021, pp. SPM-19 to SPM-24. [↑](#footnote-ref-17)
18. Mckay et al., “Exceeding 1.5°C global warming could trigger multiple climate tipping points,” Science 377, no. 6611 (2022); [↑](#footnote-ref-18)
19. Regulation (EU) 2021/1119, 09.07.2021 (European Climate Law), Preamble rec. 3; Climate Change Act (2020) [Denmark], art. 1.2; Prop. 182 L (2020–2021) [Norway], p. 3., Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937), art. 15; Shell, ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021 (appealed), paras. 2.3.3, 4.4.27; Urgenda, para. 4.3; Friends of the Irish Environment, para. 3.4. [↑](#footnote-ref-19)
20. Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), Draft decision -/CMA.3 Glasgow Climate Pact, 13.12.2021, paras. 20–22. [↑](#footnote-ref-20)
21. IPCC, AR6 Climate Change 2021 The Physical Science Basis, 09.08.2021, pp. 676, 687, 688. [↑](#footnote-ref-21)
22. Stainforth et al., “More than half of all CO2 emissions since 1751 emitted in the last 30 years”, Institute for European Environmental Policy, 29.04.2020 [↑](#footnote-ref-22)
23. IPCC, Climate change 2022: Mitigation of climate change, 04.04.2022, p. 2-72 [↑](#footnote-ref-23)
24. Ibid, p. TS-26 ("existing fossil fuel infrastructure alone are 660 (460-890) GtCO2 and from existing and currently planned infrastructure 850 (600-1100) GtCO2"). [↑](#footnote-ref-24)
25. The International Institute for Sustainable Development (IISD), Navigating Energy Transitions: Mapping the road to 1.5°C, 21.10.2022 p. 14 ff., referring inter alia to reports from the IPCC (see below) and IEA, World Energy Outlook 2021, 2021, p. 112; IEA, Net Zero by 2050, 2021, pp. 23, 99. [↑](#footnote-ref-25)
26. E.g. CRCt, *Concluding observations on the combined fifth and sixth periodic reports of Norway*, Report No. CRC/C/NOR/CO/5-6, 4 July 2018 para 11; CRCt, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, Report No. CRC/C/CAN/CO/5-6, 23 June 2022 para 16a). [↑](#footnote-ref-26)
27. UN Doc CRC/C/88/D/104-108/2019, the view concerning Germany referred to here (no. 107) para 9.7 and 9.9. [↑](#footnote-ref-27)
28. See more on this issue in ENNHRI, *Written observations in application no. 39371/20 Duarte Agostinho et autres c. Portugal et 32 autres,* paras 7–10, available here: <https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Duarte-v.-Portugal-others.pdf> [↑](#footnote-ref-28)
29. IPCC, Climate change 2022: Mitigation of climate change, p. SPM-37 (C.4.6), 6-118 and 12-38. [↑](#footnote-ref-29)
30. Neubauer, para. 33 and Urgenda, para. 7.2.5. [↑](#footnote-ref-30)
31. IPCC, Climate change 2022: Mitigation of climate change, p. SPM-37 (C.4.6), 6-118 and 12-38; IPCC, 1.5°C Report (2018) pp. 96, 121; IPCC, AR6 WGI (2021) FAQ 5.3, DNV, Energy Transition Outlook 2021 (ES p. 4). [↑](#footnote-ref-31)