

Submission on the Draft General Comment No. 26 of the Committee on the Rights of the Child on children's rights and the environment with a special focus on climate change

This submission is made on behalf of the Child Rights International Network - CRIN (www.crin.org), February 2022.

1. This submission particularly focuses on issues regarding children's access to justice for violations of children's rights related to the environment and climate change, including examples of how mechanisms to ensure children can access justice in this context have been applied by States. CRIN would be willing to provide further information on any of the issues covered in this submission to assist the Committee on the Rights of the Child in its preparation of General Comment No. 26.

Access to justice

Scope of obligations

Extraterritorial obligations

2. The Committee on the Rights of the Child ("the Committee") has recognised that States parties have extraterritorial or transboundary obligations to address climate change under the Convention on the Rights of the Child ("the CRC" or "the Convention"). The Committee's decision in *Sacchi et al v. Argentina* provides clear guidance for these obligations that should be reflected in the General Comment, setting out three requirements for when extraterritorial jurisdiction is established in this context:¹

- There is a causal link between the acts and the omissions of the State and the negative impact on the rights of children located outside of the territory;
- The State exercises effective control over the sources of emissions;
- The harm suffered by the victims is reasonably foreseeable to the State at the time of its acts or omissions.

3. In this respect, the jurisprudence of the Committee in this area provides clear guidance for the extent of States' extraterritorial obligations with regards to violations of the CRC in the context of the environment and climate change. This position could be usefully set out in the General Comment to clarify its application beyond the specific facts of the complaints that have already been addressed by the Committee.

Intergenerational equity

4. The concept of intergenerational equity - in essence the requirement that rights and opportunities of future generations be equal to those living today - has become a key concept related to children's rights in the context of climate change and environmental harm, but it does not have a simple relationship to the CRC, nor is it purely a children's rights

¹ *Sacchi et al v. Argentina* [2021] Application No. 104/2019, CRC/C/88/D/104/2019, para. 10.7.

concept. We recommend that the Committee address the issue within the General Comment, but be careful to be clear about how the concept relates to the Convention.

5. There is no express reference to intergenerational equity within the CRC, but the principle can be seen to live within the Convention's rights. The right to non-discrimination is broad enough to take account of discrimination on the basis of age as well as across age cohorts. The right to the highest attainable standard of health explicitly recognises the need for progressive realisation with a clear intergenerational effect. The best interests principle requires States to consider the best interests of both individual children and children as a whole when taking actions concerning children.

6. On a more structural level, article 4 of the Convention requires States to take all legislative, administrative and other measures for the implementation of the rights recognised in the CRC. This provision requires the implementation of all of the rights within the Convention for all children, not just those alive at the time of ratification, and so forms a basis for the continuous realisation of all rights under the Convention across generations.

7. We recommend that the Committee address intergenerational equity as a principle that lives throughout the Convention, insofar as it achieves the realisation of children's rights now and in the future.

Access to legal mechanisms

Standing

8. The lack of independence and legal status that national legal systems commonly accord to children is a serious barrier to them accessing justice for any rights violation, but environmental issues create further hurdles. The victims of large-scale environmental damage are not only those directly affected today, but the community as a whole as well as people who are not yet alive. Requirements that individuals have a particular interest and a failure to allow collective or public interest complaints for all those affected can block effective challenges based on the full impact of environmental damage.

9. This is not a necessary or insurmountable barrier to children accessing justice. Some States parties to the CRC have explicitly and effectively empowered children to bring cases to assert their environmental rights including the Philippines,² as well as Colombia.³ Cases brought by children and young people are pending in Peru⁴ and South Korea.⁵ In Costa Rica, the *amparo* cause of action has been construed very broadly to allow any person (including

² See CRIN, *Children's Access to Justice for Environmental Rights; Philippines*, March 2022.

³ *Future Generations v. Ministry of the Environment and Others*, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/future-generation-v-ministry-environment-others/>. In this case, the children involved were represented by their parents.

⁴ *Álvarez et al v. Peru*, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/alvarez-et-al-v-peru>. In this case, the children involved were represented by their parents.

⁵ *Do-Hyun Kim et al. v. South Korea*, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/kim-yujin-et-al-v-south-korea/>.

children) to file a case regarding the protection of their constitutional rights, including environmental rights.⁶

10. Providing for standing for specialist non-governmental organisations, whether in the field of children's rights or environmental protection, to bring suits in their own name where they allege a violation of the rights of children that falls within the expertise of that organisation can also be a highly effective means of protecting the rights of children in this context. This is a measure that has been adopted by around half of States parties to the Convention.⁷

Burden and standard of proof

11. Among the many barriers that children may encounter in accessing an effective remedy in environmental matters, is the burden of proof placed on children, including the need to establish causation. The burden of proof usually lies with victims, not with governments or businesses that use, produce or release hazardous substances that eventually pollute and often harm children. In order to reduce the burden of proof on victims of hazardous substances and wastes, the Special Rapporteur on toxics and human rights recommends that States explore options to better balance the right of victims to justice and remedy.⁸ As recommended by the Special Rapporteur, a recalibration of the burden of proof toward those with greater access to information would help to avoid impunity and promote access to an effective remedy.⁹

12. In Brazil, the Superior Court of Justice held that the burden of proof is reversed in environmental cases where certain prerequisites are demonstrated.¹⁰ In Thailand, courts have started interpreting the law around burden of proof in a way that promotes environmental protection; the Supreme Court recently shifted the burden of proof to the defendant in a water pollution claim.¹¹

13. The challenges that arise from demonstrating harm caused by widespread or diffuse exposure of children to toxic substances through environmental pollution can also be addressed in part through precautionary measures. As noted by the Special Rapporteur on toxics and human rights, "[t]he inadequate emphasis on prevention and precaution, in favour of emphasis on risk management without adequate information on which to calculate the risks, has failed to protect human rights, including children's rights."¹² By adopting a precautionary approach to restricting the emission of, and exposure of children to, potentially toxic substances, harm can be reduced but also the challenges establishing causation and liability for harmful exposure can be avoided.

⁶ See CRIN, *Children's Access to Justice for Environmental Rights: Costa Rica*, forthcoming.

⁷ See CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016, p. 24.

⁸ Guidelines of Good practices, SR on Human Rights and Toxics, A/HRC/36/41(2017), para. 106.

⁹ Report of the Special Rapporteur on Human Rights and Toxics on the State's duty to prevent exposure to toxics, 1 Oct. 2019, A/74/Slot no. 48053, retrieved from: https://www.ohchr.org/Documents/Issues/ToxicWaste/AnnualReports/A_74_slot48053.docx.

¹⁰ See CRIN, *Children's Access to Justice for Environmental Rights: Brazil*, March 2022.

¹¹ See CRIN, *Children's Access to Justice for Environmental Rights: Thailand*, forthcoming.

¹² *Report of the Special Rapporteur on the implications of human rights of the environmentally sound management and disposal of hazardous substances and wastes*, A/HRC/33/41, 2 August 2016, para. 43.

Limitation periods

14. Strict time limits on when a case must be submitted can present a serious barrier to children accessing remedies, particularly for young children who may not be able to approach the courts until they have reached the age of majority.¹³

15. With regard to environmental litigation, gathering evidence that can incriminate a perpetrator or which establishes causation of a given illness may be more difficult after a substantial period of time has passed. The challenge is particularly obstructive in cases where adverse health effects of an environmental problem manifest many years after exposure, and more so when a health problem becomes hereditary. One of the considerations in setting limitation periods is the difficulty in gathering evidence to defend oneself years after the event. However, it is common for limitation periods to be explicitly relaxed in certain types of proceedings, particularly where delay in bringing a case is not the fault of the victim, where the harm is particularly severe or where it may take time for the harm suffered to become evident. For example, in Slovakia there is no statute of limitations on civil claims for harm to a person's health.¹⁴ In Brazil, the federal law does not provide for specific time bars regarding criminal or administrative liability in environmental claims and courts have recognised that there are no limitation periods regarding the civil remediation of environmental damage.¹⁵

Financial barriers

16. National provisions governing the costs of litigation can also act as a serious barrier to cases being brought to challenge violations of rights in the context of the environment and climate change. The costs of legal advice and representation and the potential to pay for the costs of an opponent in the event that a legal action is lost are particularly barriers for children who are unlikely to have the resources to pay for these costs themselves. There are a number of mechanisms that States can adopt to recognise and mitigate these financial barriers:

1. **Free legal aid, advice and representation for children.** Very few children are in a position to pay for legal advice and representation, yet it is essential if they are to be able to access and rely on justice systems to provide remedies for violations of their rights. The Committee has made clear recommendations with regards to legal assistance in the context of the criminal justice system,¹⁶ but we would urge the Committee to address the necessity of such assistance in addressing violations of children's rights in other contexts.

¹³ See CRIN, Rights, Remedies and Representation: A global report on access to justice for children, 2016. Available at: https://archive.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf.

¹⁴ Civil Code of the Slovak Republic, Article 106.

¹⁵ See CRIN, Children's Access to Justice for Environmental Rights: Brazil, March 2022.

¹⁶ See Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para. 51.

- 2. Protective cost orders.** Many States have introduced “protective cost orders” which limit the financial risk to a person who brings a case in the public interest.¹⁷

However, even where these measures exist, the potential costs of litigation can be prohibitive where the financial limit on costs is set too high. In 2017, the UK government doubled the limit on liability for individuals bringing cases related to Aarhus Convention claims¹⁸ (that is claims related to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) which would leave litigants bringing cases in the public interest related to the environment much more vulnerable to financial costs if they were to lose their case. The rise in the costs of litigation disproportionately impacts those with fewer resources, including children.

Accessible mechanisms

17. The complaint mechanisms and legal processes available to children can also substantially improve their access to justice. As the Committee has recognised:

“Complaint and reporting mechanisms should be free of charge, safe, confidential, responsive, child-friendly and available in accessible formats. States parties should also provide for collective complaints, including class action and public interest litigation, and for legal or other appropriate assistance, including through specialized services, to children whose rights have been violated”¹⁹

18. With regard to rights violations in the context of the environment, further regulatory complaint mechanisms may also be relevant and should be accessible to children. These mechanisms vary significantly from State to State, and may be connected to regulating pollutants, protection of the natural environments, sanitation or any number of aspects of environmental protection. However, where a regulatory body has a mandate that affects children it is essential that it has expertise in relation to children; where it has a complaint procedure, it is essential that it is accessible to children.

19. In this context, the existence of effective appeal and complaint procedures to protect and address rights violations related to climate activism by children and young people are also essential. These mechanisms are essential in relation to challenging unjustified restrictions on the right to peaceful assembly, to complain against the use of force in the policing of assemblies or to challenge arrest and detention as a result of the policing of assemblies where they result in violations of the rights of children campaigning for climate justice.

Information to enable children’s access

¹⁷ For an overview of Protective Costs Orders, see Public Interest Law Alliance, *The Costs Barrier and Protective Costs Orders*, 2010. Available at: https://www.pila.ie/assets/files/pdf/flac_pila_report_final.pdf.

¹⁸ Civil Procedure (Amendment) Rules 2017, Part 45.

¹⁹ UN Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, 2 March 2021, para. 44.

20. The Committee has already recognised the importance of child-friendly information to ensuring that children are able to access justice:

“States parties should provide children with child-sensitive and age-appropriate information in child-friendly language on their rights and on the reporting and complaint mechanisms, services and remedies available to them in cases where their rights... are violated or abused.”²⁰

21. In many respects, the provision of child-friendly information to enable children to exercise their rights and access justice mechanisms is the same as for other rights. However, in the context of climate change, where children and young people have been active campaigners and been at the forefront of climate justice movements, there is an increased need to ensure that children are educated about and informed as to how to exercise their rights to protest and to access complaints procedures if their rights are violated while they are protesting.

Remedies

22. The Committee has recognised the scope of remedies for violations of children’s rights in other contexts, including restitution, compensation, apology and recovery services,²¹ but specific remedies may be necessary and appropriate in the context of violations of children’s rights with regards to environmental harm and climate change.

23. For example, the remediation of contaminated sites may be a necessary remedy in cases related to pollution or the release of toxic substances, medical and psychological care may be necessary for individual child victims of environmental rights violations and national preventative policies and law reform may be necessary for large scale violations.²²

24. In practice, courts have imposed a variety of remedies in environmental cases: damages and injunctions to stop activities or provide remediation (Uganda),²³ fines and charges, conditional sentences in conjunction with community service, imprisonment (Sweden),²⁴ upholding or overruling permits (New Zealand),²⁵ cessation of business activities (Tunisia,²⁶ Slovenia²⁷), and declaratory judgments and orders to compel the State to reduce its emissions (The Netherlands)²⁸.

Children’s rights and businesses

²⁰ UN Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, 2 March 2021, para. 49.

²¹ See UN Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, 2 March 2021, para. 46.

²² See *Report of the Special Rapporteur on the implications of human rights of the environmentally sound management and disposal of hazardous substances and wastes*, A/HRC/33/41, 2 August 2016, para. 110(h).

²³ See CRIN, *Children’s Access to Justice for Environmental Rights: Uganda*, forthcoming.

²⁴ See CRIN, *Children’s Access to Justice for Environmental Rights: Sweden*, forthcoming.

²⁵ See CRIN, *Children’s Access to Justice for Environmental Rights: New Zealand*, forthcoming.

²⁶ See CRIN, *Children’s Access to Justice for Environmental Rights: Tunisia*, forthcoming.

²⁷ See CRIN, *Children’s Access to Justice for Environmental Rights: Slovenia*, forthcoming.

²⁸ See CRIN, *Children’s Access to Justice for Environmental Rights: The Netherlands*, forthcoming.

25. Children may face particular difficulties in obtaining remedies when their rights are violated by business enterprises in the context of environmental damage, in particular where there is cross-border or global impact. The Committee has recognised the obligation of States to provide effective remedies and reparations for violations of children's rights by third parties, including business enterprises.²⁹ The Committee has also recognised the role of regulatory agencies with relevant oversight powers in investigating and monitoring abuses as well as imposing administrative sanctions on businesses which infringe children's rights.³⁰ There is a clear application in the context of the present General Comment in recommending that States sufficiently empower agencies with regulatory or oversight functions to enforce children's rights obligations against third parties, including businesses. To effectively achieve this function, these agencies and bodies must also be accessible to children and include expertise relevant to children's rights.

26. The Committee has recognised these challenges with regards to businesses operating in the digital environment and has made recommendations that could usefully apply within the context of the current General Comment:

“States parties should consider measures to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.”³¹

27. In the same manner that the Committee has recognised extra-territorial and transboundary harm with regards to State obligations, we urge the Committee to apply this same reasoning to ensuring that States apply measures to prevent businesses from causing transboundary extraterritorial harm that violates children's rights and secure accountability and remedies where such harm is caused.

28. In practice, this may take a range of forms. Singapore's Transboundary Haze Pollution Act, for example, imposes liability on those companies which are domiciled or operate overseas, but which cause or contribute to haze pollution in Singapore.³²

²⁹ UN Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 30.

³⁰ Ibid.

³¹ UN Committee on the Rights of the Child, General Comment No. 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25, 2 March 2021, para. 48.

³² See commentary here:

<https://www.business-humanrights.org/de/neuste-meldungen/commentary-singapores-law-to-hold-companies-liaable-for-transboundary-environmental-health-impacts-of-haze-pollution/>.