

Centre for Child Law
Comments on
Draft General Comment No.26 (202X)

Children's Rights and the Environment with a Special
Focus on Climate Change

CONTRIBUTORS

Karabo Ozah –	karabo.ozah@up.ac.za
Lebohang Dube –	lebohang.dube@up.ac.za
Amy Tuchten -	amytuchten@gmail.com



CENTRE FOR
CHILD LAW

FACULTY OF LAW, UNIVERSITY OF PRETORIA



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

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ABOUT THE CENTRE FOR CHILD LAW

1. The Centre for Child Law (“CCL/the Centre”) is a child rights strategic litigation organisation with the vision to establish child law and uphold the rights of children in South Africa, within an international and regional context, particularly insofar as these interests pertain to children’s legal position. The CCL’s mission is to work towards the development of child law and the realisation of children’s rights in South Africa, within a regional and international context. CCL utilises strategic litigation, extensive empirical research, and advocacy to advance children’s rights in accordance with this vision and mission.

THE CENTRE’S POSITION ON DRAFT GENERAL COMMENT No.26: CHILDREN’S RIGHTS AND THE ENVIRONMENT WITH A SPECIAL FOCUS ON CLIMATE CHANGE

2. CCL welcomes the timely Draft General Comment No.26 on Children’s Rights and the Environment with a Special Focus on Climate Change (Draft General Comment). We support its objectives to emphasise the urgent need to address the adverse effects of environmental harm and climate change on children, to promote a holistic understanding of children’s rights as they apply to environmental protection, and to clarify the obligations of State Parties. We further recognise and applaud the efforts of the United Nations Committee on the Rights of the Child (“CRC”/ the Committee”) to include meaningful, child-friendly and appropriate child and youth participation in the consultation process.
3. Environmental rights and the successful mitigation of, and adaptation to climate change will have a direct effect on children’s rights, such as the rights to life, survival and development, the right to the highest attainable standard of living and several other rights. Climate change has already caused catastrophic harm to intersecting rights and interests of the current generation and its effects will carry over exponentially into future generations.¹

¹ Colombian Supreme Court Judgement: ‘*Future Generations v Ministry of the Environment and Sustainable Development and Others*’. <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/#:~:text=On%20April%205%2C%202018%2C%20the,Amazon%20as%20a%20%E2%80%9Csubject%20of> Accessed on 26 May 2022.

4. Consequently, CCL advocates that children’s rights should be mainstreamed in all relevant fields of international environmental law and policy, as well as other international measures, mechanisms and frameworks in respect of climate change adaptation and mitigation.²
5. While CCL supports the contents of the Draft General Comment, we wish to further submit comments on particular aspects relating to specific rights in the Convention on the Rights of the Child³ (“Convention”) as they relate to the environment, the general obligations of States, and comments on climate finance.

THE CENTRE FOR CHILD LAW’S SUBMISSIONS

6. CCL’s submissions will address:
 - *Specific rights of the Convention as they relate to the environment:*
 - a) The right to a clean, healthy and sustainable environment
 - b) Right to be heard, freedom of expression, association and peaceful assembly: access to information and protection from disinformation
 - c) Rights of children with heightened barriers to the enjoyment of their environmental rights
 - d) Access to justice;
 - *General obligations of States; and*
 - *Climate Change*

Specific Rights of the Convention as they relate to the Environment

7. Right to a clean, healthy and sustainable environment

7.1 The urgent need to address environmental and climate change-related harm as an existential threat to humanity is echoed in the adoption by the United Nations General Assembly of Resolution A/76/L.75 which recognises the right to a safe, clean, healthy and sustainable environment as a human right.⁴ This is an important development which lays a vital foundation for protecting children’s environmental rights.

² UNICEF East Asia & Pacific (2020) ‘*Background Paper on: Environmental and Children’s Rights in International Law and National Jurisprudence*’ at para 64. <https://www.unicef.org/eap/reports/childrens-environmental-rights-national-and-international-law>. Accessed on 10 February 2023.

³ UN Commission on Human Rights, Convention on the Rights of the Child., 7 March 1990, E/CN.4/RES/1990/74.

⁴ United Nations General Assembly, Resolution A/76/L.75.

7.2 While the Draft General Comment recognises that the right to a clean, healthy and sustainable environment is implicit in, and directly linked to other rights in the Convention, such as the rights to life, survival and development, and to the highest attainable standard of health, we note with concern that the right to a clean, healthy and sustainable environment is not being elaborated upon as a stand-alone right. We recognise that human rights standards need to be clear, explicit and binding to prevent they're being overlooked as mere components of other State obligations.

7.3 We, therefore, recommend that the Committee addresses the possibility of proposing a resolution for the insertion of 'the right to a clean, healthy and sustainable environment' as an explicit right in the Convention on the Rights of the Child to mitigate the risk of oversight described above.

8. *Right to be heard, freedom of expression, association and peaceful assembly: Access to information and protection from disinformation*

8.1 The rights to access information and to be heard are linked to children's rights to freedom of expression, association and peaceful assembly. Access to reliable information is therefore a foundational right for child rights defenders in the context of environmental justice and is furthermore a gateway right that enables meaningful and informed child participation in decision-making processes regarding the environment.⁵

8.2 The Committee already recognises the need to protect children from "harmful and untrustworthy [digital] content"⁶ and further places an obligation on States to ensure that "relevant businesses and other providers of digital content develop and implement guidelines to enable children to safely access diverse content...in accordance with their rights and evolving capacities."⁷ This protection includes protection from misinformation, particularly disinformation- which is spread deliberately- on climate change and the latest scientific information on the subject.

⁵ Government of Canada Office of the Federal Ombudsperson for Victims of Crime 'Information as a gateway right: Examining complaints related to the Canadian Victims Bill of Rights' January 2021 <https://www.victimfirst.gc.ca/res/pub/IGR/-IGR/index.html> (accessed on 13 February 2023).

⁶ 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 2021, para 54.

⁷ CRC/C/GC/25,2 2021 n 6 above.

8.3 We recommend the incorporation of the need for States to protect children from disinformation as per UNCRC General Comment No.25 on Children's Rights in Relation to the Digital Environment in the broader context of the right.

9. Rights of children with heightened barriers to the enjoyment of their environmental rights

9.1 Article 2 of the Convention places an obligation on States to:

"...respect and ensure the rights outlined in the present Convention to each child within their jurisdiction without discrimination of any kind..." and *"take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."*

9.2 We note with appreciation the Committee's express recognition of intersecting and disproportionate challenges faced by children with heightened barriers to the enjoyment of their environmental rights due to discrimination including *"...girls, children with disabilities, indigenous children and children of minority groups, children of peasants, children in rural communities, children living or working in hazardous, contaminated, disaster-prone and/or climate-vulnerable environments, children living in poverty, children in street situations, children of nomadic groups, children in situations of conflict or humanitarian disaster, and refugee, migrant and internally displaced children."*⁸ The link between existing social, physical, psychological and special challenges faced by certain children and their abilities to respond to, for example, environmental disasters is appropriately drawn by the Committee, including the obligation placed on States to identify the differential impacts of environmental-related hardship on children.

9.3 We further note the use of inclusive and progressive language in identifying 'children in the street situations' as an important barrier-lifting and empowering tool.⁹ Despite this, we note with concern the omission of children of minority sexual orientation and gender identities ("SOGI"), who share barriers to the enjoyment of their rights in relation to the environment due to discrimination.

⁸ UN Committee on the Rights of the Child, Draft General Comment No.26 (2022) on Children's Rights and the Environment with a Special Focus on Climate Change, para 50.

⁹ Unpublished: FS Mongwai 'The protection and promotion of the rights of street children: A South African perspective' unpublished LLM mini-thesis, North West University.

9.4 We, therefore, recommend the explicit inclusion of children of minority sexual orientation and gender identities within the scope of this General Comment, with a specific acknowledgement of their rights to access necessary services in the context of environmental disasters.

10. Access to justice

10.1 Several barriers that are inherent in legal systems prevent access to and the realisation of justice for children seeking redress for environmental and climate-related harm. These include barriers to children's access to legal mechanisms in their respective legal jurisdictions, such as legal standing and prescription in matters involving environmental harm.

10.2 Standing has the effect of limiting participation in legal processes and can exclude children from accessing justice for environmental rights violations by the State or private parties. There is a need for the Committee to set guidelines that empower children and limit barriers in bringing matters before domestic courts or tribunals. This may further be done through the facilitation of the creation of regional and sub-regional standards that allow effective access to local and regional remedies for children, classes or groups involving children and interest groups aggrieved by environmental and climate-related harm. Recognising that the matter of *Sacchi et al v. Argentina* was ruled inadmissible by the CRC due to a failure to exhaust local remedies, it is an important next step for the Committee to provide some guidance on what these local and/or regional remedies should entail.¹⁰ This Draft General Comment is an ideal opportunity for this issue to be elaborated upon.

10.3 Redress for transboundary environmental and climate-related harm for children is a complex challenge.¹¹ We note with concern that the Draft General Comment does not recognise the link between colonialism and persisting environmental degradation. This is an issue that is of particular importance in the African context. However, the Committee

¹⁰ *Sacchi et al v. Argentina* [2021] Application No. 104/2019, CRC/C/88/D/104/2019, para 10.20.

¹¹ See *Anglo American South Africa Limited v Kabwe and 12 Others: In re: Kabwe and 12 Others v Anglo American South Africa Limited* (2020/32777) [2021] ZAGPJHC 892 (26 October 2021).

has already adjudicated this issue and recognised that States have transboundary obligations in this regard.

10.4 In the landmark decision in *Sacchi et al v. Argentina*,¹² the Committee provides guidelines for a State's extraterritorial obligations and sets a test for when extraterritorial jurisdiction is established, where:

- There is a causal link between the acts or omissions of a State and the negative impact on the rights of children located outside its borders or territory;
- The State has effective control over the sources of emissions (such as industries); and
- The harm suffered by the victims is reasonably foreseeable to the State at the time of its acts or omissions.¹³

10.5 We recommend that the Committee's decision as set out above should be incorporated into the Draft General Comment, including the scope of its application. Further recognition of this section's applicability in the context of providing redress to previously colonised nations should be explicitly acknowledged, noting the enduring harm that a lack of comprehensive redress has caused for the children of colonised peoples, and the environment they have to grow up in. States that are responsible for colonialism should be encouraged to direct resources toward the mitigation of climate-related loss and damage in affected States above and beyond the obligation placed on high-income States to assist developing countries under the theme of international cooperation.

10.6 The improvement of reporting, complaint and 'whistle-blower' mechanisms as part of legal processes to allow children affected by environmental and climate-related violations is necessary. We recommend that the Committee's recognition of the need for safe, accessible, confidential, responsive, child-friendly and accessible complaint and reporting mechanisms should be included in the Draft General Comment. Built into these mechanisms, there should be obligations to further set up specialised witness and whistle-

¹² *Sacchi et al v. Argentina* [2021] Application No. 104/2019, CRC/C/88/D/104/2019, para 10.

¹³ CRIN, *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*, February 2022.

<https://static1.squarespace.com/static/5afadb22e17ba3eddf90c02f/t/6227999bbc86fd10ad050d5b/1646762395552/CRIN+Submission+CRC+General+Comment+No.+26.pdf> (accessed on 13 February 2023).

blower protection programmes to facilitate children and environmental child rights defenders. In addition, effective appeal and review procedures that address environmental rights violations against children or groups including children should be provided for.

10.7 We further draw to the Committee's attention the need for universal recognition of the scope of available remedies for violations of children's environmental rights, including, but not limited to restitution, compensation, apologies, recovery of services and interdicts.

10.8 Noting children and child rights' vulnerability in the legal process, we recommend the recognition of the right to protection of privacy and identity during legal processes involving violations of children's rights in accordance with the aims and objectives of the Convention. In the South African Constitutional Court case *Centre for Child Law and others v Media 24 Ltd and Others*,¹⁴ the highest court found that the country's Criminal Procedure Act was unconstitutional to the extent that it did not protect the identities of child witnesses, including accused children, as well as child victims.

10.9 We draw the Committee's attention to the above judgment's strong endorsement of children as participants in the legal process, including as litigants in environmental and climate change-related action.

General Obligations of States

The obligation to respect, protect, and fulfil

11. We are pleased that the Draft General Comment explicitly iterates the obligation of States to 'refrain from actions limiting the right of children to express their views on climate protection.' It is a matter of concern that States tend to ignore their obligation to facilitate child participation in decision-making processes, rather than relying on civil society organisations to fulfil this obligation on their behalf. Donor-funded initiatives such as these do not have the benefit of long-term security which is a hindrance to effective child participation.

¹⁴ *Centre for Child Law and Others v Media 24 Ltd and Others* CC [2019] ZACC 46, 4 December 2019.

12. We, therefore, recommend that beyond this negative obligation, States should also be recommended to facilitate the direct involvement of children in decision-making processes that impact their environmental rights, such as through the establishment of a dedicated government budget for the establishment and running of Children's Parliaments.

Heightened obligations

13. Regarding the inclusion of the heightened obligation of States pertaining to children's environmental rights, we submit that this is an important point at which it should be stated within the Draft General Comment that the heightened duty of care children is entitled to receive should be context-sensitive, grounded in an intersectional understanding of the obstacles that children of varying identities face, and in a manner that respects children's evolving capacities.

Child rights impact assessment

14. We welcome the Committee's inclusion of a child-specific mechanism for assessing environmental impact, which is a growing sector. We do note with concern that no express stipulation is given regarding the facilitation of these impact assessments.

15. We thus recommend that it be included that assessments be undertaken transparently by an independent entity. Further obligations for the standardisation and regularised training of assessors should be provided for.

Children's rights and the business sector

16. Recognising the inclusion of child rights impact assessments for government processes in the previous section, we submit that the obligation is placed on States to also legislate for the addition of these assessments to processes taking place in the business sector as part of the 'stricter process of due diligence' being endorsed in the Draft General Comment.

17. We further note with concern that child labour in the context of climate change is not addressed in detail. A 2022 report by the International Labour Organisation states that 'climate change is

already having profound impacts on child labour.¹⁵ We recommend that the Draft General Comment should make mention of this in line with the standards previously laid out in this Committee's General Comment No. 16 (2013).

International cooperation

18. Citing Africa as a best practice, we recommend that States be encouraged to devise platforms for regional integration and collaboration as regards children's rights in the context of climate change. The African Committee of Experts on the Rights and Welfare of the Child is the only child-specific regional rights organ in the world and undertakes activities specific to children's rights in the context of climate change.¹⁶ We believe that this is a best practice which should be encouraged globally and would be a valuable addition to the Draft General Comment.

Climate Change

19. International cooperation on climate change adaptation and mitigation is, although gradual, reassuring. Climate financing, however, remains a concern, particularly in relation to an international just transition framework to minimise the social and economic impact of transitioning to a low-carbon, inclusive and greener future. The mainstreaming of children's rights to a clean, healthy and sustainable environment in all international instruments and engagements is, therefore, a necessary step toward achieving a just transition and climate justice.

20. Along with States, we recommend that the Committee should include that business must undertake to comply with all applications for children's rights and environmental laws, and articulate and implement policy commitments that mainstream environmental protection and climate justice. States should enforce child-rights-based, scientifically-backed climate change adaptation and mitigation measures.

21. Finally, such measures should include child rights impact assessment to identify, prevent, mitigate and account for their responsibility toward protecting children's rights to a clean, healthy and sustainable environment as an enforceable clause in the Convention.

¹⁵ International Labour Organisation *Vulnerabilities to Child Labour* (2022) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_845129.pdf (accessed on 15 February 2023).

¹⁶ See: <https://www.acerwc.africa/en/special-mechanisms/working-groups/working-group-children-and-climate-change> (accessed on 15 February 2022).

Conclusion

22. CCL notes with appreciation the measures by the Committee to create a transparent, inclusive and progressive process of engagement on the Draft General Comment. We are particularly pleased about the extensive inclusion of children's views and the efforts to facilitate direct engagements with children, child-led organisations as well as other relevant stakeholders and interest groups.

23. As highlighted above, the Draft General Comment is a welcome development and effort toward a meaningful international climate response as it provides a standardised approach to the implementation and enforcement of the Convention in relation to environmental and climate change. The intersectionality of children's rights as it relates to environmental and climate change-related experiences, as discussed above, needs to be further addressed by the Committee to facilitate a holistic and inclusive approach to climate change.

24. We end by emphasizing, as elaborated above, the call for the insertion of the explicit right to a clean, healthy and sustainable environment as an enforceable clause in the Convention.

24. CCL will be willing to provide further information on any aspect of this submission.

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Centre for Child Law

Faculty of Law,
Law Building (4-31)
University of Pretoria
Pretoria, 0002
South Africa

Tel: +27 (0) 12 420 4502

<https://centreforchildlaw.co.za>