Norges institusjon for menneskerettigheter

The Committee on the Rights of the Child
Via Jonas Schubert at Terre des Hommes

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Submission to the UN Committee on the Rights of the Child regarding the General Comment no. 26 on Children's Rights and the Environment with a Special Focus on Climate Change

1. Introduction

The Norwegian National Human Rights Institution (NIM) welcomes the opportunity to provide input on the General Comment on Children's Rights and the Environment with a Special Focus on Climate Change (General Comment), which is currently being prepared by the Committee on the Rights of the Child (the Committee) in relation to the Convention on the Rights of the Child (CRC). We refer to the extension for our submission granted by Jonas Schubert at Terre des hommes via e-mail 14.02.2022.

NIM is an independent public body established by the Norwegian Parliament in 2015 to strengthen the implementation of human rights in Norway.[1] 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.[2] Together with the European Network of National Human Rights Institutions (ENNHRI), NIM has also submitted a third-party intervention to the European Court of Human Rights (ECtHR) in one of its first climate cases.[3] Throughout our work, NIM has acquired special expertise in this area.

In the Global Online Questionnaire to collect information to the first draft of the General Comment, the Committee raised several different issues concerning children rights and

[1] NIM has 'A status' accreditation with the Global Alliance of National Human Rights Institutions (GANHRI), which means we comply with the requirements of independence, impartiality and integrity under the Paris Principles.

[2] NIM, *Written submission from the Norwegian National Human Rights Institution to shed light on public interests in Case No. 20-051052SIVHRET,* 25.09.2021, https://www.nhri.no/wp-content/uploads/2020/10/Amicus-Curiae-from-the-Norwegian-National-Human-Rights-Institution.pdf; NIM, *Climate and human rights,* 19.05.2021, https://www.nhri.no/en/report/climate-and-human-rights/. The complaint over the judgement (HR-2020-2472-P) was recently communicated to the Norwegian authorities by the ECtHR, see *Greenpeace Nordic and Others v. Norway* (application no. 34068/21).

[3] ENNHRI, *Written observations in application no. 53600/20 Verein Klimaseniorinnen Schweiz et autres c. la Suisse*, 06.10.2021, https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen-_-website.pdf.

the environment. In this submission, we will address some of the questions and legal issues under part II, III and IV in relation to climate change, the defining crisis of our time. Our submission is thus not exhaustive and will not address other important environmental issues like pollution, preservation of biodiversity or chemical pollution.

NIM wishes to highlight that our focus in this submission will mainly be on climate change mitigation. States may have at least three different human rights obligations in the context of climate change: (i) a duty to mitigate climate change, (ii) a duty to adapt to climate change, (iii) other human rights, for example property or indigenous rights, as limits for mitigation measures.[4] All these elements are important and must be respected to ensure a comprehensive protection of human rights, as highlighted by the 2022 IPCC report on *Impacts, Adaptation and Vulnerability*. Nevertheless, NIM considers the most fundamental relationship between human rights and climate change as the one concerning a duty to mitigate climate change. This is because a) adaption measures are not sufficient to contain the risks climate change poses to life over time and "[t]he effectiveness of adaptation to reduce climate risk [...] will decrease with increasing warming"[5] b) 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.[6]

2. A child rights-based approach to environmental issues

2.1. Introduction

The Committee has asked the following question under part II:

> *How should the "four general principles" (namely non-discrimination; best interests; the right to life, survival and development, and the views of the child) shape decisions related to children's rights and the environment? Please provide concrete examples.*
>
> *What are the legal, policy and practical implications of applying the intergenerational equity principle in the context of children's rights and the long-term effects of climate change and other environmental harm?*

NIM will address (i) best interests of the child, (ii) the right to be heard and (ii) the right to non-discrimination and the principle of intergenerational equity.

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[4] NIM, *Climate and Human Rights,* chapter 3.

[5] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 23.

[6] 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).

2.2. Best interest of the child

CRC art. 3.1 sets out that "[i]n all actions concerning children [...] the best interests of the child shall be a primary consideration". The right has been further developed in General Comment no. 14, where the Committee held that this is a threefold concept; (i) a substantive right, (ii) a fundamental, interpretive legal principle, (iii) a rule of procedure.[7]

The Committee has underlined that the provision also applies for administrative decisions concerning the environment.[8] NIM thus wants to point to some elements of the right that are relevant in relation to climate change:

The word "concerning" must be understood in a very broad sense; the Committee has decided that this legal duty "applies to all decisions and actions that directly or indirectly affect children", and to "children as a group or children in general.[9] Furthermore, "where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate."[10] As confirmed by the IPCC in its latest report, every increment of global warming adds to the risk of exceeding 1.5°C and thereby triggering tipping points, leading to irreversible damage for children.[11] In the context of climate change, *all climate legislation, decisions to emit greenhouse gases and permission to extract fossil fuels* will have a "major impact" on children as a group, and thus "concern" them. One example of how permits to extract fossil fuels have been considered as affecting for children can be found in the *Sharma* decision, concerning the permit to coal extraction for 25 years that would result inn 100 million tons CO2-equvialents in exported combustion emissions:

> *I accept that [...] the prospective contribution to the risk of exposure to harm made by the approval of the extraction of coal from the Extension Project [the additional 100 Mt CO2] may be characterised as small. It may be fairly described as tiny. However, in the context of there being a real risk that even an infinitesimal increase in global average surface temperature may trigger a 4°C Future World, the Minister's prospective contribution is not so insignificant as to deny a real risk of harm to the Children.*[12]

[7] CRC/C/GC/14 para 6.

[8] Ibid para 30.

[9] Ibid para 19.

[10] Ibid para 20.

[11] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 20.

[12] *Sharma and others v. Minister for the Environment* (Federal Court of Australia) [2021] FCA 774, 08.07.2021 para. 253 (appealed).

The word "action" also includes inaction or failure to take action and omissions.[13] Thus, a state might fail to respect the best interests of the child by not taking sufficient measures to mitigate climate change.

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.[14] 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.[15] The Committee has previously underlined that the flexibility of the concept "best interests" have been manipulated and abused by States to justify e.g. racist policies.[16] In the General Comment, the Committee should thus clarify that it is in *children's best interest that climate change is limited to 1.5°C and that net zero emissions is achieved as fast as possible*. States must also carry out a holistic and transparent impact assessment to assess the interest of children in relation to decisions to emit greenhouse gases our permits to fossil fuel exploration. In this assessment, there should be a presumption for it being in the best interest of children that *no new permits to extract fossil fuels are granted by States* because of the harm decisions like these expose children to, which hardly can be outweighed by economic or other reasons.

Lastly, the best interest of children shall be a "primary consideration" in the decisions discussed. In other words, "it may not be considered on the same level as all other considerations".[17] The Committee has held the following:

> *This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.*[18]

Nowhere is this truer than with climate change; even though children will be the most impacted by the decisions we take to cut or not to cut emissions today, they are without political representation in our decisions-making processes. As the German Constitutional Court has held when discussing why environmental protection is elevated to the Constitution;

> *[T]he democratic political process is organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling*

[13] CRC/C/GC/14 para 17 and 18.

[14] Ibid para 32.

[15] Ibid para 35.

[16] Ibid para 34.

[17] Ibid para 37.

[18] Ibid para 37.

the ecological issues that need to be pursued over the long term [...] Future generations - those who will be most affected - naturally have no voice of their own in shaping the current political agenda.[19]

NIM would therefore like to highlight the importance of the best interest of children as a rule of procedure. In every decision-making process concerning climate change mitigation or leading to permits to emit or extract fossil fuels, States must:

1. Include an evaluation of the possible impact (positive or negative) of the climate related decision on children,
2. Show in the justification of the decision how the right has been taken into account,
3. Explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[20]

Without these obligations, the interest of children in a viable future will most likely continue to be overlooked and underprioritized. As held by the IPCC: "To successfully secure our own future and the future of the coming generations, climate risks must be factored into each decision and planning".[21]

2.3. Children's right be heard

CRC art. 12 decides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

According to the General Comment no. 12, this right applies to groups of children, like the children of a country.[22] States are therefore recommended to "exert all efforts to listen to or seek the views of those children speaking collectively" in relation to decision-making, policymaking, and preparation of laws.[23] For the same reasons as put forth out in point 2.1.2x regarding the word "concerning", climate mitigation and decisions to permit fossil fuels "affects" children as a collective.

Art. 12 compliments art. 3 by providing the methodology – the right for children to express their views – in order to identify what is in their collective best interest.[24] The

[19] *Neubauer and others v. Germany*, BvR 2656/18 (Federal Constitutional Court of Germany), 24.03.2021 para 205.

[20] CRC/C/GC/14 para 6c).

[21] IPCC, *Overarching Frequently Asked Questions and Answers,* 28 February 2022, question 3 at p. 5.

[22] CRC/C/GC/12 para 10.

[23] Ibid para 10 and 12.

[24] Ibid para 74.

Committee has previously identified several ways to involve children in national decision-making processes.[25] In relation to climate change mitigation and decisions to permit fossil fuel extraction, children representatives, for example through youth parliaments or NGOs, must be consulted and have a right to express their views. When children are consulted, account must be taken to make sure that the process meets the requirement of the CRC.[26] In the context of climate change, it is particularly important that the process is relevant and accountable, meaning that the views of children are followed up and evalued in the decision-making process, where children should also be provided with the opportunity to challenge and influence the findings. Moreover, "[i]f participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event".[27]

The State must also take steps to ensure that indigenous children as a group are consulted in decisions concerning them. The IPCC has stated that "[e]vidence shows that climate resilient development processes link scientific, Indigenous, local, practitioner and other forms of knowledge, and are more effective and sustainable because they are locally appropriate and lead to more legitimate, relevant and effective actions".[28] Indigenous children could thus provide important knowledge of their culture and how they are affected by climate change.

2.4. The right to non-discrimination and intergenerational equity

CRC art. 2.1 decides that all rights of the Convention shall be ensured "without discrimination of any kind, irrespective of the child's or his or her parent's [...] or other status". Art. 2 is of an ancillary nature and presupposes the applicability of a substantive right under the CRC.

Art. 2 is similar to the ancillary prohibition of discrimination under the European Convention on Human Rights (ECHR) art. 14. In relation to climate change, ENNHRI has previously held the following:

> *Article 14 applies not only to direct discrimination, but also to the indirect discrimination of "a general policy or measure that has disproportionately prejudicial effects on a particular group [...] even where it is not specifically aimed at that group and there is no discriminatory intent".[29] Indirect discrimination may*

[25] Ibid para 127-30.

[26] Ibid para 134 lists 9 elements that must be included in the process.

[27] CRC/C/GC/12 para 133.

[28] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers* p. 32

[29] S.A.S v. France, no. 43835/11, § 161.

arise from a neutral rule or a de facto situation.[30] *[...] Age is a prohibited discriminatory ground ("other status") under Article 14.*[31]

In NIM's view, the Committee could confirm that *age* is a relevant "other status" under the CRC and that art. 2 also prohibits a *de facto* indirect discrimination.[32] For example, if the right to life and physical integrity of adults are better protected than children from climate change, one could argue that children are *de facto* discriminated against due to lack of climate change mitigation. The generational injustice of climate change is well illustrated by the following example from the IPCC report:

> *[C]hildren aged ten or younger in the year 2020 are projected to experience a nearly four-fold increase in extreme events under 1.5°C of global warming by 2100, and a five-fold increase under 3°C warming. Such increases in exposure would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario.*[33]

The injustice is described in the above-mentioned *Sharma* judgment:

> *It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next. To say that the Children are vulnerable is to understate their predicament.*[34]

To counter this injustice, a principle of intergenerational equity has been developed in international law, which should be a relevant consideration under the CRC art. 2. In a separate opinion in a judgement from the International Court of Justice, judge Cançado Trindade observed that "inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary

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[30] Zarb Adami v. Malta, no. 17209/02, § 76

[31] Schwizgebel v. Switzerland, no. 25762/07, § 85

[32] This long-term disparate impact of climate change may also be seen as discrimination based on generation or birth-cohort as an "other status", see Axel Gosseries, 'Environmental degradation as age discrimination', Revista electrónica de Direito Público 2015 vol. N (5) p. 15 and Refia Kaya, 'Environmental vulnerability, age and the promises of anti-age discrimination law", Review of European, comparative & international environmental law, 2019 vol. 28 (2) p. 162-174.

[33] IPCC, *Overarching Frequently Asked Questions and Answers,* 28 February 2022, question 3 at p. 5.

[34] *Sharma* para 293 and 294.

public international law".[35] The concept of 'intergenerational equity' is e.g. included in the Paris Agreement preamble recital 11 and increasingly taken into account in domestic climate change judgements.[36] NIM considers at least these three implications to follow from the principle relevant under CRC art. 2:

First, adults and the generations of today cannot irreversibly offload a drastic obligation to cut emissions onto future generations without *de facto* discriminating children. On the contrary, stringent mitigation requirements today is necessary in light of the principle, considering that "[c]limate change has caused substantial damages, and increasingly irreversible losses", where other impacts "are approaching irreversibility".[37] Whether humanity can avoid triggering irreversible tipping points, depend on the "[s]ocietal choices and actions implemented in the next decade".[38] In order to make sure that States take the necessary action in this decade, the principle of intergenerational equity thus implies that States under the CRC must reduce emissions at the minimum rate of emission cuts necessary to avoid transiently exceeding 1.5°C in the coming decades or later (overshoot).[39]

Second, a legal review of a state's mitigation efforts is warranted and should be strict. This is because, as noted by the German Constitutional Court and the Venice Commission**,** the democratic political process cannot take into account the long-term interests of future generations in a viable environment.[40]

Third, as mentioned in 2.2, the State must take the interests of future generations into account in all decisions concerning climate mitigation or permission to emit or extract greenhouse gas emissions.

3. A safe, clean, healthy and sustainable environment as an integral part of the enjoyment of children's rights

3.1. Some civil rights affected by climate change

3.1.1. Introduction

The Committee has asked the following question:

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[35] *Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening),* 06/02/2014 Rep. 226, § 47.

[36] *Sharma* § 293, *Leghari v. Federation of Pakistan*, W.P. No. 25501/201 (Lahore High Court, Pakistan), 04.09.2015 § 13, *Shrestha v. Office of the Prime Minister et al*., no. 10210, Order no. 074-WO-0283 (Supreme Court of Nepal), 25.12.2018, p. 11 and *Future Generations v. Ministry of the Environment and Others*, STC4360-2018 (Supreme Court of Colombia), 05.04.2018 p. 34. See also Weiss, *Intergenerational Equity in a Kaleidoscopic World,* Environmental Policy and Law, 49/1, 2019.

[37] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers* p. 8.

[38] Ibid p. 35.

[39] Ibid p. 20.

[40] *Neubauer* §§ 146, 183, 192 and 205 and Venice Commission, *Opinion No. 997/2020*, 09/10/2020, § 114.

Are there other Convention rights whose realization requires a safe, clean, healthy and sustainable environment (e.g. life, survival and development, an adequate standard of living, food, water, play)? Why is this the case? Should particular rights receive more attention (e.g. freedom from exploitation and all forms of violence, participation in cultural life)?

As held by the Committee, "children are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken."[41]

Several human rights may thus be affected by climate change. NIM wishes to draw particular attention to the right to life and private life, the prohibition of inhuman and degrading treatment and the right of indigenous people to their culture. We believe that these rights should receive the most attention because (i) all (except private life) are fundamental and absolute rights under which there can be no interference due to other considerations (ii) these civil rights must be respected by States immediately and without any discussion of the available resources of the State.[42]

3.1.2. The right to life and private life – CRC art. 6 and art. 16

The right to life and private life are enshrined in art. 6 and art. 16. The Committee has previously held that States must protect children against imminent and foreseeable risks to the right to life.[43] ENNHRI has established that there is an emerging consensus in international and national law that climate change above 1.5°C, as well as associated air pollution, poses a real and immediate threat to life and health, even if the latent risks may only materialise in the longer term.[44] The positive obligation for States to protect children against climate change thus apply.

3.1.3. The prohibition of torture, inhuman or degrading treatment – CRC art. 37a)

Art. 37a) decides that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment". The committee has previously held that children are "particularly at heightened risk of harm to their health, due to the immaturity of their body systems".[45] In most countries children are not able to vote and, due to their citizenship, have no impact on other States' climate policies. This may give rise to severe

[41] UN Doc CRC/C/88/D/107/2019 para 9.13.

[42] As opposed to economic, social and cultural rights, see CRC art. 4 second sentence.

[43] CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/201 23.02.2022 para 6.7

[44] ENNHRI, *Climate Change and Human Rights in the European Context*, 06.05.2021 p. 29.

[45] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, *Joint Statement on "Human Rights and Climate Change",* 16.09.2021.

resignation and helplessness that, seen together with the existential threat of climate change and the vulnerability of children, may call for the application of CRC art. 37a in some circumstances.[46]

3.1.4. The right to culture for indigenous children – CRC art. 30

Art. 30 decides the following: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language." In General Comment no. 11, the Committee underlined the linkage between CRC art. 30 and art. 27 of the International Covenant on Civil and Political Rights (ICCPR) and referred to interpretations from the Human Rights Committee.[47] The Committee may therefore be informed by the following sources:

The word "denied" has been interpreted in jurisprudence both with relation to negative interferences and positive obligations to ensure the right. In relation to *interferences,* "there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment", considering the cumulative impacts from also other activities, both previous and planned.[48] In relation to the *positive obligation*, the Human Rights Committee has held that although article 27 is expressed in negative terms, it nevertheless obliges States to "ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required [...]".[49]

NIM has recently issued a report on ICCPR art. 27 called *Human Rights Protection against Interference in Areas Traditionally Occupied by the Sami.*[50] This report outlines how art. 27 is relevant for climate change issues in two different ways:

The first is indigenous rights as limits for climate mitigation measures *interfering* with the cultural rights of the indigenous people, for example building windfarms. The case *Fosen* from the Grand Chamber of the Norwegian Supreme Court illustrates this link.[51] The Grand Chamber unanimously found that the windfarms interfered with the reindeer herders' right to enjoy their own culture, which includes reindeer husbandry, under art. 27 of ICCPR. The case illustrates a general point; it is particularly important to respect indigenous rights in the green transition in light of their extra vulnerability to climate

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[46] See ENNHRI, *Climate Change and Human Rights in the European Context*, 06.05.2021 p. 32.

[47] CRC/C/GC/11 para 16 and 17.

[48] HR-2021-1975-S para 119 with further references, 11.10.2021, available in English here.

[49] HRC, General Comment No. 23, 26.04.1994, para 6.1.

[50] NIM, *Menneskerettslig vern mot inngrep i samiske bruksområder*, 21.02.2022, available here in Norwegian. It will be made available in English shortly.

[51] HR-2021-1975-S, 11.10.2021, available in English here.

hazards, “influenced by historical and ongoing patterns of inequity such as colonialism”, as recognized for the first time by the IPCC in the March 2022 report.[52]

The second is art. 27 as independent right obliging States to take *positive measures* cut emissions to *protect* the right indigenous people have to their culture. As recently stated by the IPCC, “[l]oss of ecosystems and their services has cascading and long-term impacts on people globally, especially for Indigenous Peoples and local communities who are directly dependent on ecosystems, to meet basic needs”.[53] A case concerning climate change and indigenous peoples’ human rights has been communicated to the Human Rights Committee by a group of indigenous peoples in Australia.[54] A group of *Torres Strait Islanders* claim that their right to cultural practice under ICCPR 27 has been violated because the Australian government does not have adequate plans and measures to reduce greenhouse gases, while at the same time not taking adequate measures to prevent damage due to rising water levels. The case was submitted in 2019 and is still under consideration by the Human Rights Committee.

Furthermore, successful mitigation measures may avoid the need for drastic reduction measures extensively interfering with indigenous rights in the future, which will likely be justified if climate change remains unmitigated. The already-mentioned *Fosen* case illustrates the potential for future rights collision. After stating that the right “appear to be absolute”, the Norwegian Supreme Court held that

> *[I]n situations where the rights in Article 27 conflict with other rights in the Convention, the at the outset conflicting rights must be balanced against each other and harmonised. A possible outcome of this is that Article 27 must be interpreted strictly [...] In a given case, the right to a good and healthy environment may, in my view, be such a conflicting basic right. In other words, the consideration for «the green shift» may be relevant*. (para 130-31).

In *Fosen*, there was no collision between with the right to a good and healthy environment because the windfarm could have been located in an area where the negative consequences for the reindeer herding could have been avoided (para 143). The case illustrates the potential for future human rights collisions where interferences might become justified if climate change is not sufficiently mitigated today.

3.2. Positive obligation for States to mitigate climate change

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[52] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 12

[53] Ibid.

[54] *Billy et al. v Australia*, Communication No. 3624/2019 (pending). For a summary of the case, see Climate Change Litigation Databases, “Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change”. http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/.

3.2.1. Overview

In this section, NIM will address the following question:

> *Given the scale and urgency of action needed, what implications are there for States to ensure they meet their obligations in relation to these children's rights in the context of responses to the climate crisis (e.g. mitigation, adaptation), pollution prevention, and the protection of ecosystems and biodiversity? What concrete legislative, policy, administrative and other appropriate measures are required for their implementation?*

CRC art. 4 first sentence sets out that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". In its General Comment, the Committee can provide interpretive guidance on the positive obligation to take "appropriate" to protect, *inter alia,* the rights discussed in 3.1. The Committee considers positive obligations as stronger where the risk in question threatens the fundamental right to life and the prohibition of inhuman or degrading treatment.[55] This is the case for climate change; the Committee has 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".[56] The necessity of this heightened obligation is also evident by the new IPCC report from March 2022, where the IPCC held that

> *Actions taken now to reduce emissions of heat-trapping greenhouse gases drastically and adapt to a changing climate will have a profound effect on the quality of their lives and their children's lives, as well as their health, well-being, and security. [...] [T]oday's children and future generations are more likely to be exposed and vulnerable to climate change and related risks such as flooding, heat stress, water scarcity, poverty, and hunger. Children are amongst those suffering the most, as we see today.*[57]

In this section, we will present some elements that should be included in such "heightened" positive obligation. This section is influenced by and will often refer to what ENNHRI has previously argued before the ECtHR in a third-party intervention.[58]

3.2.2. Mitigation efforts are only "appropriate" if compatible with 1,5°C

To determine whether the State in question is undertaking all "appropriate" measures to protect the rights of the CRC against climate related harm, the starting point must be

[55] CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/201 23.02.2022 para 6.6.

[56] UN Doc CRC/C/88/D/107/2019 para 9.13.

[57] IPCC, *Overarching Frequently Asked Questions and Answers,* 28 February 2022, question 3 at p. 4.

[58] ENNHRI*, Written observations in application no. 53600/20 Verein Klimaseniorinnen Schweiz et autres c. la Suisse*.

whether there is a legal and/or scientific consensus on the existence a climatic boundary that cannot be exceeded if we are to safeguard a liveable future for all.[59]

The United Nations Framework Convention on Climate Change (UNFCCC) aims to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (art. 2). The Paris Agreement, adopted under the UNFCCC, has defined what this means in more concrete terms by setting out that the agreement aims to hold "the increase in the global average temperature to well below 2° C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels" (art. 2.1a). 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.[60] These reports are shifting the legal consensus, where 1.5°C is increasingly referred to in laws and courts as the target necessary to protect human lives and health.[61] Moreover, States recognized in the Glasgow Climate Pact (2021) that "the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and resolve[d] to pursue efforts to limit the temperature increase to 1.5°C".[62]

Based on this emerging consensus, grounded in the best available science, 1.5°C must be the climatical boundary that cannot be exceeded in order to "appropriately" protect the rights under the CRC.

In order to determine whether the reduction targets of a given state is compatible with 1.5°C, the starting point is the necessary global reduction rates as identified by the IPCC and recognized by the State Parties to the Paris Agreement in the Glasgow Climate Pact;

> *[L]imiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century, as well as deep reductions in other greenhouse gases.*[63]

The recent IPCC 2022 report, however, highlighted the risks of overshooting 1.5°C:

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[59] Under the ECHR, the ECtHR refers to a "European consensus" or "common ground", see e.g. *Demir and Baykara v. Turkey* §§ 85–86. The Supreme Court of the Netherlands applied the ECtHR's "common ground" doctrine when determining the reduction targets necessary under the positive obligation to protect life and private life from climate change, see *Urgenda v. Netherlands*, Section 7.2.11.

[60] IPCC, 1.5°C Report, 2018, pp. 177–181, IPCC, AR6 SPM 2021, pp. 19–24.

[61] *Shell* paras. 2.3.3, 4.4.27; *Urgenda*, para. 4.3; *Friends of the Irish Environment*, para. 3.4; Regulation (EU) 2021/1119, 09.07.2021 (European Climate Law) preamble recital 3; Climate Change Act (2020) [Denmark] art. 1.2; Prop. 182 L (2020–2021) [Norway], p. 3.

[62] Glasgow Climate Pact -/CMA.3 para 20-21.

[63] Ibid para 22.

> *If global warming transiently exceeds 1.5°C in the coming decades or later (overshoot), then many human and natural systems will face additional severe risks, compared to remaining below 1.5°C (high confidence). Depending on the magnitude and duration of overshoot, some impacts will cause release of additional greenhouse gases (medium confidence) and some will be irreversible, even if global warming is reduced.*[64]

Even in the best-case IPCC reduction scenario SSP1-1.9, the best estimate is that 1.5°C will be overshooted between 2041–2060.[65] In order to avoid the risk of triggering irreversible tipping points by overshooting 1.5°C, emissions would therefore have to be reduced more than 45 % by 2030.

Based on the above, NIM considers that all States should reduce their emissions by at least 45 % by 2030. However, since States have "common but differentiated responsibilities and respective capabilities" (CBDR-RC), developed countries must cut at a higher rate than this global average.[66] A collaborative study suggests that, when adjusting for historic responsibility for climate change and GDP per capita, developed States should reach net zero emissions by 2030 in order to stay within their remaining part of the 1.5°C global carbon budget.[67] This should also inform the Committee.

3.2.3. States must reduce their emissions yearly to take "appropriate" measures

An "appropriate" human rights protection requires States to "ensure the effective functioning of the regulatory framework adopted" for the protection of life and private life.[68] A goal of GHG neutrality by a specific year and intermediate reduction targets would thus not be sufficient in themselves because, as noted by the German Constitutional Court, "there would be nothing to specify how much GHG may be emitted in the intervening period".[69] The IPCC recently underlined that greenhouse gas emissions must "rapidly decline" to keep 1.5°C within reach, where "[s]ocietal choices and actions implemented in the next decade determine" our future where "any further delay" in mitigation "will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all".[70] After the report, the UN Secretary General underlined that States and companies «cannot claim to be green while your

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[64] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 20.

[65] IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Summary for Policymakers (SPM)*, 2021, p. 14.

[66] UNFCCC, Art 3.1, Art 4.1; Paris Agreement, Preamble, Art 2.1, 4.1, 4.2, 4.3 and 4.4.

[67] Rajamani et al. "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law" in Climate Policy, 2021, p. 17. Similarly, the Climate Action Tracker (CAT) has developed a methodology for determining the 'fair share' of a country, available at https://climateactiontracker.org/documents/874/CAT_2021-09_RatingMethodology_FullDescriptionNewSystem.pdf.

[68] See e.g. the ECtHR judgement *Smiljanić v. Croatia* (35983/14) 25.03.2021 § 66 with further references.

[69] *Neubauer* paras. 155, 156

[70] IPCC, *Climate Change 2022; Impacts, Adaptation and Vulnerability, Summary for Policymakers,* p. 35.

plans and projects undermine the 2050 net-zero target and [ignore] the major emissions cuts that must occur in this decade».[71]

National courts have already reviewed whether the rate of planned GHG reductions is sufficiently specified and realistic in view of national carbon budgets. The German Constitutional Court found that the German per capita carbon budget was likely to be exceeded by 2030 at the expense of future freedoms, obliging the State to design and implement a specified reduction pathway to climate neutrality within the remaining carbon budget.[72] Similarly, the Irish Supreme Court and French Courts have held that domestic plans for emissions cuts were not sufficiently specific to allow for judicial review or failed to meet domestic climate targets.[73] The Administrative Court of Paris has also noted that future targets must be scrutinised where the State has failed to meet previous targets, since cumulative emissions lags inevitably deplete the remaining carbon budget.[74]

Based on the above, it is submitted that States Parties to the CRC should be obliged to explain and substantiate the reduction pathway towards achieving their reduction targets on the road to net zero.

3.2.4. The relevance of resource constraints and discretion to balance different interests (margin of appreciation)

The Committee has asked how the following question:

> *How should the acknowledgment that States face constraints due to limited resources and have discretion to balance different social goals be understood in light of their environmental obligations under the UN CRC? How might the concept of sustainable development provide helpful guidance to balance different children's rights in this respect?*

States cannot take resource constraints with regard to protecting and fulfilling civil and political rights, see CRC art. 4 first sentence. To determine the State's obligation to realize these civil and political rights, the Committee might look to the concept of a "margin of appreciation" as applied by the ECtHR to determine to which degree they should have a discretion to balance different social goals and invoke limited resources.

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[71] Remarks by António Guterres, Secretary-General of the United Nations, to the press conference launch of IPCC report, 28.02.2022.

[72] *Neubauer* paras. 183, 214–225, 229, 232–234, 243, 255.

[73] *Friends of the Irish Environment* paras. 9.2 and 9.3, *Commune de Grande-Synthe v. France* ("Grande-Synthe II"), no. 427301, (Le Council d'Etat) 01.07.2021 paras. 3–6; *Notre Affaire à Tous* paras. 30–34, Article 4.

[74] *Notre Affaire à Tous* paras. 30–31 and Article 4.

When interpreting the State's positive obligation to realize these rights under the ECHR, States are generally afforded a margin of appreciation in environmental cases.[75] However, ENNHRI has argued that this margin is narrower in the context of climate change due to four factors: (i) climate change is an existential threat to human civilisation and fundamental rights like the right to life and the prohibition of inhuman or degrading treatment,[76] (ii) the risk is "man-made" and "susceptible to mitigation",[77] (iii) the principle of precaution calls for precautionary measures even without full scientific certainty to prevent serious and irreversible climate change,[78] and (iv) the principle of intergenerational equity requires that current generations cannot irreversibly offload a drastic obligation to cut emissions onto future generations.[79] A depletion of the remaining carbon budget would inevitably impose an increasingly impossible or disproportionate burden to cut emissions in the future, at the expense of future generations (see point 2.4x). Hence, as pointed out by the Dutch Supreme Court and the German Constitutional Court, States should be afforded a margin of appreciation in the choice of means to reduce emissions, but not in the minimum rate of emission cuts necessary to avoid dangerous climate change.[80]

By extinction of this, it would be inappropriate for States to *rely heavily on negative emissions technologies*. 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.[81] Reliance on these technologies "is a major risk in the ability to limit warming to 1.5°C", and a "dangerous, high-risk approach".[82] This risk would be at the expense of future generations (see point 2.4).

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[75] *Hatton et al. v. The United Kingdom* [GC] (36022/97) 08.07.2003 §§ 101 from 2004 describes the margin of appreciation as "wide", while *Cordella et al. c. Italie* (54414/13 etc.) 24.09.2019 § 158 from 2019 describes it as narrower ("certaine").

[76] The "preservation of human society and civilisation" is the ultimate objective of the Council of Europe (Statutes, preamble, recital 1; ECHR, preamble, recital 3). Mutatis mutandis*, Evans v. the United Kingdom [GC]* (6339/05) 10.04.2007 § 77.

[77] *Budayeva et al. v. Russia* (15339/02 etc.) 20.03.2008§§ 135 and 137. See also *Sharma*, para. 293 ("none of this is the fault of nature itself") and IPCC, *AR6 SPM 2021*, pp. 5 and 36.

[78] The precautionary principle is recognised in, inter alia, UNFCCC Art. 3.3, Principle 15 of the Rio Declaration and TFEU Art. 191(2). Domestic climate judgements have also taken the principle into account, see e.g. *Neubauer*, para. 229, *Urgenda* paras. 5.3.2 and 5.6.2, *Sharma* paras. 254–256.

[79] ICJ, *Whaling in the Antarctic (Australia. v. Japan)*, 06/02/2014 Rep. 226, Separate Opinion by Judge Trindade, para. 47; Paris Agreement Preamble recital 11; *Neubauer* paras. 146, 183, 192 and 205; *Sharma*, para. 293; Leghari, para. 13; *Shrestha*, p. 11; *Future Generations*, p. 34.

[80] *Urgenda*, para. 8.2.7 and *Neubauer* paras. 207, 229 and 249. See mutatis mutandis, *Budayeva* §§ 134, 135; *Öneryildiz v. Turkey [GC]* (48939/99) § 107: *Greenpeace E.V. et al. v. Germany* (dec.) (18215/06) 12.05.2009., p. 4

[81] *Neubauer*, para. 33 and *Urgenda*, para. 7.2.5. See also, mutatis mutandis, *Sharma*, para. 256.

[82] IPCC, 1.*5°C Report 2018*, pp. 96, 121; IPCC, *AR6 FAQ 2021* FAQ 5.3, DNV's Energy Transition Outlook 2021 (ES p. 4).

3.2.5. Summary

Based on the above, it is respectfully submitted that Committee should find that States, to comply with CRC art. 6, 16, 30 and 37a) cf. art. 4, must adopt and implement a realistic and specified reduction pathway in accordance with the IPCC's reduction rates to limit global warming to 1.5°C, reaching carbon neutrality as soon as possible.

4. Access to justice in the context of environmental and climate protection

4.1. Introduction

The Committee asked the following question under part IV:

> *What concrete steps are required of States to strengthen children's access to timely and effective remedies for violations of their rights relating to the environment and climate change-related harm? E.g. measures with respect to accessible and child-friendly complaints mechanisms and legal procedures, rights of legal standing, including class actions and the ability to represent interests of future generations, the burden and standard of proof, human rights obligations of businesses, extraterritorial obligations and jurisdiction, and adequate reparation etc.*

In this section, we will address (i) the right to an effective remedy in general, (ii) extraterritorial jurisdiction and (iii) the victim requirement as required by the CRC.

4.2. The right to an effective remedy

Although there is no explicit obligation under the CRC that requires States to provide an effective legal remedy for a violation of a child's rights, the right to an effective remedy forms an implicit part of the Convention.[83] The rationale behind this is, as held by the Committee, that "[f]or rights to have meaning, effective remedies must be available to redress violations."[84] Moreover, the Committee considers that children's special and dependent status create real difficulties for them in pursuing remedies to address alleged violations of their rights.[85]

Remedies must be available both for addressing violations of substantive rights and procedural rights in the Convention. As the Committee has pointed out, States should establish appropriate procedures and mechanisms for for complaints, remedy or redress in order to "fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures,

[83] CRC/C/GC/5 para 24.

[84] Ibid.

[85] Ibid.

administrative and judicial proceedings relevant to and with an impact on him or her."[86] Moreover, mechanisms to review or revise decisions are considered a part of the procedural safeguards to guarantee the implementation of the child's best interest:

> *Mechanisms should be made known to the child and be accessible by him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given too much weight.*[87]

The Committee has also stated that complaints procedures and remedies must be available when children's right to be heard and for their views to be given due weight is disregarded and violated.[88]

In the context of climate change, NIM would like to highlight that these mechanisms must be extended to the decision-making processes that concerns children in general. Because children lack democratic voting rights and representation, they need other formal mechanisms to make their voices heard and to hold States accountable for actions or inactions that may violate their right to be heard and have their best interests consider. The Committee is therefore invited to recognize the particular importance for States to make judicial and quasi-judicial mechanisms available for children in the context of climate change. To be effective, these mechanisms must be child-friendly and accessible. Furthermore, it is important that the Committee address and discuss solutions legal barriers, such as the question of legal standing before the national courts and administrative complaints, as well as other barriers such as costs and access to legal assistance.

4.3. Jurisdiction – CRC art. 2 and art. 5.1 of the Optional Protocol

CRC art. 2 states that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their *jurisdiction* [...]".The optional protocol art. 5.1 reads that "[c]ommunications may be submitted by or on behalf of an individual or group of individuals, within the *jurisdiction* of a State party".

The concept of jurisdiction is primarily territorial but may encompass extra-territorial acts. The legislative history of the CRC shows that the State Parties purposely changed CRC art. 2 from "territory" to the broader "jurisdiction".[89] The Committee interprets extra-territorial jurisdiction restrictively, in light of international law and relevant

[86] CRC/C/GC/14 para 15 (c).

[87] CRC/C/GC/14 para 98.

[88] CRC/C/GC/12 para 46.

[89] Legislative history of the Convention on the Rights of the Child, Vol. 1, p. 75 (referral to previous draft of art. 4 on non-discrimination ("territories"), 83, 314, 330, 333.

jurisprudence from the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR).[90] In relation to climate change, the Committee has held the following in the case *Sacchi et al. v. Germany et al.* concerning extra-territorial jurisdiction:

> *[W]hen transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question. The Committee further considers that while the required elements to establish the responsibility of the State are rather a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction. [...]*
>
> *The Committee considers 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.* [91]
> (emphasis added)

The General Comment is an opportunity to confirm these findings, in addition to expanding and elaborate on the scope and the content of the extra-territorial jurisdiction. The Committee could also spell 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.

ENNHRI has analysed extraterritorial jurisdiction in relation to climate change under the European Convention on Human Rights (ECHR), which might inform the work by the Committee.[92] The conclusion was that "there is a consensus emerging from international and national law that a State's jurisdiction may be engaged in relation to territorial and extra-territorial emissions under its "effective control" that affect the human rights of individuals within its territory and abroad".

4.4. The victim requirement– third additional protocol to the CRC art. 5.1

[90] UN Doc CRC/C/88/D/104-108/2019, the view concerning Germany referred to here (no. 107) para 9.3 og 9.4.

[91] Ibid para 9.7 and 9.9.

[92] ENNHRI, *Climate Change and Human Rights in the European Context*, 06.05.2021 avaliable here pp. 18-22.

The Optional Protocol to the Convention on the Rights of the Child on a communications procedure art. 5.1 set out that "Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, *claiming to be victims of a violation* by that State party of any of the rights set forth" in among other the CRC (emphasis added).

The victim requirement been discussed by the Committee in *Sacchi et al. v. Germany et al.* Here, the Committee found that

> *The Committee considers that, as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due 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. [...]*
>
> *[T]he Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status.*

The Committee is invited to confirm this interpretation as to make sure that children can complain over the lack of emission reductions before the CRC. This is necessary to ensure that children are not excluded from effective access to the judicial remedies within the "brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all".[93]

ENNRHI has analysed this in relation the similar victim-requirement under ECHR Article 34.[94] Based on jurisprudence from the ECtHR, international and domestic jurisprudence, ENNHRI has argued that individuals and environmental organizations may claim to be victims in climate change cases today.

5. Conclusion

[93] Intergovernmental Panel on Climate Change (IPCC), *AR6 Climate Change 2022: Impacts, Adaptation and Vulnerability*, *Summary for Policymakers*, 28 February 2022 p. 35.

[94] ENNHRI, *Climate Change and Human Rights in the European Context*, 06.05.2021 avaliable here pp. 22-24. See also ENNHRI, *Written observations in application no. 53600/20 Verein Klimaseniorinnen Schweiz et autres c. la Suisse*, available here.

NIM is grateful for the opportunity to make a submission to the General Comment, which we believe will be important for children all over the world in this decisive decade.

We would be very happy to elaborate further on any of the matters below via further correspondence with the Committee. We consent to our names or NIM's name and submission to be credited publicly.

Kind regards
On behalf of the Norwegian National Human Rights Institution

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