

IEL: Perspectives of Women Scholars

International Environmental Law: A Case for Transformative Change through the Lens of Children’s Human Rights

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Abstract. The interpretative clarifications under the UN Convention on the Rights of the Child on children’s human right to a healthy environment help illuminate areas for transformative change through the evolutive interpretation and implementation of international environmental law. This article explores how the 2023 UN General Comment No. 26 on children’s rights and the environment, with a special focus on climate change, sheds new light on: a holistic approach to environmental protection; the minimum content of State obligations, including with regard to inter-generational equity; a more ambitious interpretation of precaution; and the inclusiveness of international environmental law fora.

Keywords: International environmental law, children rights, international human rights law, transformation, participation, precaution

1. Introduction

Despite fifty years of international environmental law making,¹ the collective efforts of the international community are failing to prevent irreversible environmental harm. The triple planetary crisis (climate change, biodiversity loss, toxic pollution) that we are facing as a result, is undermining also the collective efforts of the international community in other areas of sustainable development, from poverty and hunger eradication, to health protection and gender equality.² Part of this predicament is the continued disagreement among States about the extent, and sometimes even the legally binding nature,³ of their international environmental obligations, as demonstrated by the series of advisory opinions on climate change requested in 2022–2023 from three different international courts and tribunals.⁴

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- 1 E Morgera (2024), ‘The Progressive Development of International Biodiversity Law from the 1972 Stockholm Conference to the Synergistic Protection of Biodiversity and Human Rights, including at the Ocean-Climate Nexus’ in J Ebbesson and D Langlet, Eds. (2024), *International Environmental Law in Perspective* (CUP; forthcoming).
- 2 S Diaz et al (2019), Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, IPBES.
- 3 A Boyle and C Chinkin (2007), *The Making of International Law* (OUP) at 220-222.
- 4 ITLOS (2023), Case No. 31: Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request For Advisory Opinion Submitted To The Tribunal); Request for advisory opinion transmitted to the International Court of Justice pursuant to General Assembly Resolution 77/276 of 29 March 2023 on the obligations of states in respect of climate change (12 April 2023); and Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (9 January 2023).

Against this backdrop, the much-awaited⁵ international recognition of a human right to a healthy environment in 2022,⁶ preceded by decades of progress in national constitutions and international human rights case law,⁷ certainly provides a powerful interpretative lens to clarify the minimum content of States' international environmental obligations,⁸ the scope and extent of business due diligence,⁹ and the need for effective remedies in environmental law.¹⁰ The exploration of synergies between international human rights law and international environmental law has mainly focused on climate change.¹¹ More limited attention has been paid, however, to biodiversity and the protection of the marine environment, despite the critical role they play in climate change mitigation and adaptation.¹²

More fundamentally, for the past fifty years we have accepted the idea that incremental change in the design and implementation of international environmental law would suffice to achieve international environmental objectives. But it has become dramatically clear that transformative change is, instead, needed.¹³ The protection and full realization of the human right to a healthy environment could contribute to such transformation – the shift away “from the technocratic and regulatory fix of environmental problems to more fundamental and transformative changes in social-political processes and economic relations”¹⁴ – in environmental governance at different scales.¹⁵ Transformative change in environmental governance has been conceptualized as *integrative* and *inclusive* – to ensure that solutions also have sustainable impacts at other scales and in other sectors, and to empower those whose interests are currently not being met and represent transformative sustainability values.¹⁶ Transformative governance is also *adaptive* – based on learning, experimentation, reflexivity, monitoring and feedback – and precautionary. In addition, it has been underscored that transformation requires *transdisciplinary* governance – the recognition of different knowledge systems, and the inclusion of underrepresented types of knowledge in supporting integration, inclusion and learning for transformative change.¹⁷ The human right to a healthy environment can help explore all these dimensions. It can also help navigate the complex challenges of transformation, such as the “politics of transformative change,”¹⁸ preventing a shifting of the burden of response onto the vulnerable and addressing issues of power and legitimacy.¹⁹ As explored elsewhere, the human right to a healthy environment can also address equity among states, by revealing the human rights dimensions of inter-State obligations related to scientific cooperation, capacity-building and technology transfer.²⁰

5 Eg, D Anton and D Shelton (2011), *Environmental Protection and Human Rights* (CUP), at 72; and D Shelton (1991), ‘Human Rights, Environmental Rights and the Right to Environment’ 28 *Stanford Journal of International Law* 103; A Boyle (2012), ‘Human Rights and the Environment: Where Next?’ 23 *European Journal of International Law* 613.

6 UNGA Res 76/300 (2022).

7 As summarized in the 2018 UN Framework Principles on Human Rights and the Environment: UN Special Rapporteur on Human Rights and the Environment, John Knox, (2018) UN Doc A/HRC/37/59.

8 Human Rights Committee, *Daniel Billy and others v Australia*, 22 September 2022, CCPR/C/135/D/3624/2019 (*Torres Strait Islands*).

9 E Morgera (2020), *Corporate Environmental Accountability in International Law* (OUP, 2nd ed).

10 E Morgera (2018), ‘Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law’ 54 *Wake Forest Law Review* 691.

11 The literature is vast and still rapidly growing: eg, S Humphreys (2010), *Human Rights and Climate Change* (CUP); S Atapattu (2015), *Human Rights Approaches to Climate Change* (Routledge); M Wewerinke-Singh (2019), *State Responsibility, Climate Change and Human Rights under International Law* (Hart).

12 Morgera et al (2023), ‘Ocean-based Climate Action and Human Rights Implications under the International Climate Change Regime’ 38 *The International Journal of Marine and Coastal Law* 411.

13 IPBES (2021), Initial scoping report for Deliverable 1 (c): A thematic assessment of the underlying causes of biodiversity loss and the determinants of transformative change and options for achieving the 2050 Vision for Biodiversity.

14 I Visseren-Hamakers and M KoK (2022), “Introduction” in Visseren-Hamakers, I.J. and M. KoK Eds. (2022), *Transforming Biodiversity Governance* (CUP) 3.

15 Erinoshio et al, “Transformative Governance for Ocean Biodiversity” in Visseren-Hamakers and KoK (n 14) 313.

16 Visseren-Hamakers and M KoK (n 14) at 10-11.

17 *Ibid.*

18 *Ibid.*, at 8.

19 Erinoshio et al (n 15), at 328.

20 International Covenant on Economic, Social and Cultural Rights, Art. 15(3); Committee on Economic, Social and Cultural Rights, General Comment No 25 (2020) on science and economic, social and cultural rights (Article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights (2020) UN Doc E/C.12/GC/25; E Morgera (2015), ‘Fair and Equitable Benefit-sharing at the Crossroads of the Human Right to Science and International Biodiversity Law’ 4 *Laws* 803-831.

In this article, I focus on the distinctive contributions of children's human right to a healthy environment to transformation. I argue that the interpretative clarifications under the UN Convention on the Rights of the Child²¹ on children's human right to a healthy environment illuminate areas for transformative change in the evolutive interpretation and implementation of international environmental law. The 2023 UN General Comment No. 26 on children's rights and the environment, with a special focus on climate change,²² clarifies that States must take immediate action to protect the environment in order to protect children's human rights. In doing so, the General Comment sheds new light on: the need for a holistic approach to environmental protection; the minimum content of State obligations, including with regard to inter-generational equity;²³ a more ambitious interpretation of prevention and precaution; and the inclusiveness of international environmental law fora.

2. Environmental Protection: Need for a Holistic Approach

A holistic approach to environmental protection may appear obvious, but the fragmentation of international environmental law and the significant policy and funding priority attached to climate change have led to well-documented cases of climate change responses that have negatively impacted on biodiversity and on human rights.²⁴ While a growing body of literature has focused on climate change and human rights,²⁵ however, not enough critical attention has been paid to the need for the joined-up realization of the international law objectives related to a safe climate, healthy biodiversity and a non-toxic environment, with a view to holistically protecting the human right to a healthy environment.

With regard to children's right to a healthy environment, the General Comment 26 is characterized by an explicit emphasis on climate change. This is due to the origin of the process of developing the Comment as a response to a children-led communication on climate change, which the Committee considered inadmissible. Nevertheless, the Committee still took this opportunity to indicate that the children had sufficiently justified the jurisdiction of the Committee in relation to human rights violations caused by States' actions or omissions related to environmental harm both within and outside their territory.²⁶ In addition, the Committee had already engaged with climate change in its earlier work: for instance, it had called for taking into account the best interests of the child in the elaboration of policies and programmes with effect on the 'underlying determinants of health', referring to climate change specifically.²⁷

Despite the focus on climate change, however, the text of the General Comment provides repeated indications that a holistic approach to environmental protection is needed. This arguably provides a critical interpretative approach across international environmental treaties to respond to the indivisibility of children's human rights

21 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (CRC).

22 UN Committee on the Rights of the Child, General Comment No 26 (2023) on children's rights and the environment with a special focus on climate change (hereinafter, GC 26).

23 E Morgera and M Lennan (2022), 'Strengthening Intergenerational Equity at the Ocean-Climate Nexus: Reflections on the UNCRC General Comment No.26' 52 *Environmental Law and Policy* 445-459.

24 UN Special Rapporteur on Climate Change and Human Rights, Ian Fry, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change: Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation, UN Doc A/77/226 (2022) para 19 and 202; UN Special Rapporteur on Toxics, Marcos Orellana, 'The toxic impacts of some proposed climate change solutions' (2023) UN Doc A/HRC/54/25; and UN Special Rapporteur on Indigenous Peoples' Rights, 'Impacts of climate change and climate finance on indigenous peoples' rights' (2017) UN Doc A/HRC/36/46.

25 For a brief historic reflection, see N Tuana (2014), 'Climate Change and Human Rights' in T Cushman (ed), *Handbook of Human Rights* (Routledge) 410.

26 Committee on the Rights of the Child, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 108/2019' (*Sacchi et al v Argentina et al*) CRC/C/88/D/108/2019 (22 September 2021) at 4; see E Morgera, E., Sweeney, M. and Shields, S. 'SDG14 and Children's Human Rights' (One Ocean Hub, August 2022) <https://oneoceanhub.org/publications/sdg-14-and-childrens-human-rights/>.

27 CRC Committee, *General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, paras 4 and 50; W Vandenhole, G Erdem Türkelli, and S Lembrechts (2021), *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols (CUP)*, at 256 and 263.

that are affected by the inter-twined planetary crises, which is “an urgent and systemic threat to children’s rights globally”²⁸ and requires a dynamic interpretation of the Convention.²⁹

In this connection, the Committee clarifies that the application of the General Comment itself “should not be limited to any particular environmental issue”³⁰ and rather take into account that environmental degradation in all its forms is “a form of structural violence against children”.³¹ The Committee also underscored that environmental harm “can cause social collapse in communities and families”³² and undermines the realization of children’s right to health.³³ Significantly, the General Comment reflects on the reciprocal influences between the three planetary crises across scales, noting in particular the impacts on “microbial diversity, which is critical to the development of children’s immune systems, and the increasing prevalence of autoimmune diseases, with long-term effects”.³⁴ This is a significant clarification also vis-à-vis earlier interpretation by the Committee with regard to the scope of information on health-related issues that should be “physically accessible, understandable and appropriate to children’s age and educational level”, co-designed with children, included in school curriculum as well as disseminated widely to children who do not attend school.³⁵

The considerations of the General Comment on the triple planetary crisis and children’s right to life are also illuminating from a holistic perspective of environmental protection. Under the Convention on the Rights of the Child, children’s right to life is addressed together with their right to development and survival.³⁶

In that connection, the General Comment clarifies that “environmental degradation jeopardizes children’s ability to achieve their full developmental potential, with implications for a wide range of other rights under the Convention.”³⁷ This serves to clarify that States’ obligations to protect the opportunities for children “to experience outdoor activities and to interact with and play in natural environments, including the animal world.”³⁸ This has also implications for children’s right to education, including the development of respect for the natural environment,³⁹ and their cultural rights,⁴⁰ as far as the transmission of Indigenous and other forms of knowledge is deeply intertwined with ecosystems. This connection, in turn, also has impacts on children’s right to health.⁴¹

Accordingly, the General Comment 26 call for “the adoption and effective implementation of environmental standards . . . related to air and water quality, food safety, lead exposure and greenhouse gas emissions, and all other adequate and necessary environmental measures that are protective of children’s right to life”.⁴² The Comment also provides an indication that these measures can affect particularly children in poverty and conflict, or experiencing inequality.⁴³ The Comment further emphasizes that States’ obligations to protect children’s right to life extend to tackling “structural and long-term challenges arising from environmental conditions” through “the sustainable use of resources needed for covering basic needs and the protection of healthy ecosystems and biodiversity,” including special measures “to prevent and reduce child mortality from environmental conditions and for groups in vulnerable situations.”⁴⁴

The consideration of children’s right to development in the context of the interpretation and application of international environmental law is also critical to illuminate States’ obligations to consider impacts on younger

28 GC 26, para 1.

29 *Ibid*, para 9.

30 *Ibid*, para 5.

31 *Ibid*, para 35.

32 *Ibid*.

33 *Ibid*, para 39. See CRC Art. 24.

34 *Ibid*.

35 *Ibid*, para 58-59; Vandenhoe et al (n 27), at 264.

36 CRC Art. 6(2) at 88-99, particularly 89-90 and 94-95. See also N Peleg (2017), ‘Developing the Right to Development’ 25 *International Journal of Children’s Rights* (IJCR) 380, who underscores that the protection of this right entails giving “account for a child’s current stage of development and protect both the process of development, as well as its outcomes” (at 391).

37 GC 26, para 23.

38 *Ibid*.

39 Which is already enshrined in the CRC Art 28; Vandenhoe et al (n 27), at 94.

40 M Strand et al (2023), ‘Protecting Children’s Rights to Development and Culture by Re-imagining “Ocean Literacies”’ 31 *IJCR* 941.

41 WHO and CBD, State of Knowledge Review on Biodiversity and Health (2015).

42 GC 26, para 20.

43 *Ibid*.

44 *Ibid*, para 21.

children, who are “particularly susceptible to environmental hazards due to their unique activity patterns, behaviours and physiology.”⁴⁵ These children experience “developmental windows of increased vulnerability [that] can easily disrupt the maturational processes of the brain, organs and the immune system and cause disease and impairments during and beyond childhood, sometimes after a substantial latency period.”⁴⁶ Further, children’s right to development also intersects with their right to a standard of living (including housing, food, water and sanitation) adequate for their physical, mental, spiritual, moral and social development – all of which depend on a healthy environment.⁴⁷

Another illuminating dimension of children’s right to development is its interaction with children’s right to play.⁴⁸ The General Comment recalls that:

“Play and recreation are essential to the health and well-being of children and promote the development of creativity, imagination, self-confidence, self-efficacy and physical, social, cognitive and emotional strength and skills. Play and recreation contribute to all aspects of learning, are critical to children’s holistic development and afford important opportunities for children to explore and experience the natural world and biodiversity, benefiting their mental health and well-being and contributing to understanding, appreciation and care for the natural environment.”⁴⁹

On the whole, the Committee on the Rights of the Child confirmed the interpretation that children’s human right to a healthy environment is “implicit in the UN Convention on the Rights of the Child and is directly linked to children’s rights to life, survival and development, to the highest attainable standard of health, including taking into consideration the dangers and risks of environmental pollution, to an adequate standard of living, and to education.”⁵⁰ In providing this clarification, the Committee integrated the substantive definition of everyone’s human right to a healthy environment, as proposed by UN Special Rapporteur on Human Rights and the Environment, David Boyd.⁵¹ This confirms the need for a holistic understanding of the environment and its protection – the human right to “clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments.”⁵² It has the transformative potential to contribute to integrative governance.

3. State Minimum Conduct under International Environmental Law

Whenever environmental treaties leave a significant margin of discretion for States, which in itself can be helpful in identifying the appropriate means of implementation in a particular context, it may be virtually impossible to point at violations of international environmental law obligations, on the sole basis of the relevant treaty. States, for instance, continue to diverge in opinion over the scope, content and legally binding nature of the provisions of their international biodiversity treaties, and there has been an increasing trend in negotiating more recent environmental treaties with a mix of hard-law and soft-law provisions, or significantly qualified and open-ended provisions.⁵³ Recently, however, the understanding of the human rights implications of limited compliance (if not, non-compliance) with international environmental agreements has allowed international human rights bodies to point to instances where States’ implementation efforts of international environmental law are simply not good enough.⁵⁴

45 *Ibid*, para 24.

46 *Ibid*.

47 *Ibid*, para 45.

48 CRC Art. 31. See discussion in N Lott (2022), ‘Establishing the Right to Play as an Economic, a Social and a Cultural Right’ 30 *IJCR* 755.

49 GC 26, paras. 59-60.

50 *Ibid*, para 63.

51 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment UN Doc A/73/188 (2018).

52 GC 26, paras. 63-64.

53 For instance, Boyle and Chinkin (n 3); and L Rajamani (2016), ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’ 28 *Journal of Environmental Law* 337.

54 Human Rights Committee (2022), *Daniel Billy and others v. Australia*, 22 September 2022, UN Doc CCPR/C/135/D/3624/2019.

(i) Scope and rationale of children's right to a healthy environment

The interpretative clarifications on the scope and rationale of children's right to a healthy environment, and its paramount importance for the effective protection of other human rights of the child, sets the background against which the Committee on the Rights of the Child proceeded to clarify the content of State obligations under the UNCRC to protect the environment. The Committee has been quite explicit in asserting that:

“Subject to any obligations under international law, including those contained in multilateral environmental agreements to which they are party, States retain discretion in arriving at a reasonable balance between determining the appropriate levels of environmental protection and achieving other social goals in the light of available resources. Nevertheless, such leeway is limited by the obligations of States under the Convention. Children are far more likely than adults to suffer serious harm, including irreversible and lifelong consequences and death, from environmental degradation. Given their heightened duty of care, States should therefore set and enforce environmental standards that protect children from such disproportionate and long-term effects.”⁵⁵

In other words, States are under a due diligence obligation to “take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights,”⁵⁶ in order to avoid direct or indirect discrimination against children.⁵⁷ In other words, States must ensure that children are not disproportionately affected by environmental harm.⁵⁸

In general terms, the General Comment requires the full consideration of all children's rights under the Convention and its Optional Protocols in the context of environmental protection.⁵⁹ This entails realizing children's demands for “urgent and decisive measures to tackle global environmental harm”, after having provided opportunities for their effective and meaningful participation when an environmental decision may have a significant impact on children and the conduct of an assessment to determine children's best interests with a view to taking into account the possibility of future risk and harm to children's well-being and development.⁶⁰ It should be borne in mind that the notion of “best interests of the child” under the CRC “aims to ensure not only the full and effective enjoyment of all rights in the Convention, but also the physical, mental, spiritual, moral, psychological and social development, integrity and human dignity of the child”.⁶¹

(ii) Non-discrimination

The General Comment also clarifies States' obligations to take “all adequate and necessary environmental measures that are protective of children's right to life”, including in relation to “structural and long-term challenges arising from environmental conditions that may lead to direct threats to the right to life” such as “the sustainable use of resources needed for covering basic needs and the protection of healthy ecosystems and biodiversity.”⁶² States are further expected to “take positive measures to ensure that children are protected from foreseeable premature or unnatural death and threats to their lives that may be caused by acts and omissions, as well as the activities of business actors, and enjoy their right to life with dignity.”⁶³ In taking these measures, States should “explicitly and consistently consider all factors required for children of all different ages to survive, develop and thrive to their fullest potential and design and implement evidence-based interventions that address a wide range of environmental determinants during the life course.”⁶⁴

55 GC 26, para 73.

56 *Ibid*, para 69.

57 UNCRC, Art 12. ‘States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’

58 Human Rights Council (2020), Realizing the Rights of the Child through a Healthy Environment: Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/43/30 (2020), paras .52-55.

59 GC 26, para 6.

60 *Ibid*, para 17.

61 CRC Committee (2013), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), para. 14 (hereinafter, GC14).

62 GC 26, para 21.

63 *Ibid*, para 20.

64 *Ibid*, para 25.

In fact, the UN General Comment makes explicit reference to States' obligations to undertake measures to meaningfully engage with Indigenous children and their families in responding to environmental harm, drawing on Indigenous knowledge. The General Comment calls for "comparable measures . . . regarding the rights of children belonging to non-Indigenous minority groups whose rights, way of life and cultural identity are intimately related to nature".⁶⁵ The Comment also underscores discriminatory effects of environmental harm on children with disabilities and children living in disaster-prone or climate-vulnerable environments.⁶⁶ To prevent discrimination, States have an obligation to "collect disaggregated data to identify the differential effects of environment-related harm on children and to better understand intersectionality, paying special attention to groups of children who are most at risk, and to implement special measures and policies, as required."⁶⁷ This is a precondition for States' obligation to develop "legislation, policies and programmes that deal with environmental issues are not intentionally or unintentionally discriminatory towards children in their content or implementation."⁶⁸ With specific regard to national measures on climate change, States should "transparently and explicitly focus on children's rights when preparing, communicating and updating nationally determined contributions,"⁶⁹ They should, in addition, prevent discrimination against children at heightened risk both at the design phase and during the implementation of adaptation measures, taking additional measures for children in vulnerable situations and addressing the underlying causes of vulnerability.⁷⁰

States obligations to avoid discrimination against children in the context of environmental protection also include to "assess the environmental impacts of policies and projects, identifying and preventing foreseeable harm, mitigating such harm if it is not preventable and providing for timely and effective remedies to redress both foreseeable and actual harm."⁷¹ These assessment need to focus on the "specific circumstances that place children uniquely at risk in the context of environmental harm"⁷² and where an environmental decision may have a significant impact on children, States need to conduct "a more detailed procedure to assess and determine children's best interests that provides opportunities for their effective and meaningful participation."⁷³ In support of these obligations, the role of disaggregated data is, once again, emphasized, including "longitudinal data on the effects of environmental harm on children's rights, in particular on health, education and standard of living at different ages" that should be made publicly available.⁷⁴ High-quality data is necessary on "the local, national and transboundary health effects of environmental harm, including the causes of mortality and morbidity, while taking into consideration the entire life course of children and the vulnerabilities and inequalities that they face at each life stage."⁷⁵

All these provisions are then backed up by children's access to justice and effective remedies, which raise the bar higher than the general obligations on access to justice in environmental matters.⁷⁶ States need to establish mechanisms for "collective complaints, such as class action suits and public interest litigation"⁷⁷ on imminent or foreseeable harms and past or current violations of children's rights. These mechanisms should be "readily available to all children under their jurisdiction, without discrimination, including children outside their territory affected by transboundary harm resulting from States' acts or omissions occurring within their territories."⁷⁸

65 *Ibid*, para 58.

66 *Ibid*, Para 14.

67 *Ibid*, para 15.

68 *Ibid*.

69 *Ibid*, para 98.

70 *Ibid*, para 102.

71 *Ibid*.

72 *Ibid*, para 17.

73 *Ibid*, para 16. On the tension between the principle of best interests and children's rights to form their opinion and express their views as a tension between "protectionism and empowerment", see D Archard, 'Children's Rights' in Cushman (n 25), at 329-330.

74 GC 26, para. 74.

75 *Ibid*, para. 44.

76 UNEP (2023), *Environmental Rule of Law: Tracking Progress and Charting Future Directions* at 145.

77 GC 26, para. 85.

78 *Ibid*, para. 84.

States are also to “explore options for shifting the onerous burden of proof from child plaintiffs to establish causation in the face of numerous variables and information deficits.”⁷⁹

(iii) State obligations in the context of international cooperation

State obligations arising from children’s human right to a healthy environment also matter at the level of international cooperation. The General Comment clarifies State obligations to address transboundary and global threats to children’s health when developing and implementing environmental agreements.⁸⁰ The Comment further underscores developed States’ obligations towards developing countries on technology and financing, including meeting internationally agreed climate and biodiversity finance goals and considering “allocating a substantive part of that aid specifically to child-focused programmes.”⁸¹ This applies also to climate change-related loss and damage that have an impact on the enjoyment of children’s rights.⁸² At the same time, the General Comment notes the need to put in place safeguards for children’s rights in international environmental finance, in order “to assess the risk of harm to children into the planning and implementation of new environment-related projects and take measures to mitigate the risks of harm, in compliance with the Convention and the Optional Protocols,” including “mechanisms to provide access to effective remedies for violations of children’s rights in this context.”⁸³ Specific provisions in the General Comment address climate finance to ensure that it is “anchored in a child rights-based approach”⁸⁴ so as to “uphold and do not violate children’s rights [and] increase policy coherence between children’s rights obligations and other objectives.”⁸⁵

Obligations to protect children’s human right to a healthy environment also apply to the development of trade or investment agreements. In this connection, the General Comment specifically focused on international climate mitigation cooperation, and recommended assessing regularly climate change-related impacts on children’s rights connected to the implementation of the agreements, allowing for corrective measures.⁸⁶ The same interpretations of State obligations should apply to trade and investment agreements that address other areas of environmental cooperation, such as biodiversity, sustainable fisheries and agriculture, or management of toxic substances.

Finally, the General Comment clarifies that States home to multinational corporations should provide international assistance and cooperation with investigations and enforcement of proceedings in other States with regard to business responsibility to protect children from the climate change-related impacts on children’s rights.⁸⁷ Once again, the General Comment over-emphasized climate change here, as opposed to confirming the more holistic approach to all environmental threats and harm that arise from business activities.

On the whole, the interpretative clarifications in the General Comment serve to identify the minimum conduct of States in implementing a variety of areas of international environmental law, including at the intersection of international environmental and economic law. This has the transformative potential to contribute to integrative and inclusive governance.

4. Rethinking Prevention and Precaution

The rights and obligations under the UNCRC offer key guidance to substantiate the preventive and precautionary principles. Children’s human rights to life, survival, health and food call for immediate action, whereas their right to development can serve as a basis to assess the long-term effects of environmental impact on children’s life and well-being at later stages of their lives.⁸⁸ The General Comment thus emphasizes that “States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades.”⁸⁹

79 *Ibid*, para 87.

80 *Ibid*, para 42.

81 *Ibid*, para 42.

82 *Ibid*, para 106.

83 *Ibid*, para 93 and 111.

84 *Ibid*, para 111.

85 *Ibid*, para 111.

86 *Ibid*, para 110.

87 *Ibid*, para 108.

88 *Ibid*, para. 25.

89 *Ibid*, para 11

Accordingly, the prevention and precautionary principles need to be interpreted in the light of the UNCRC when States “take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights.”⁹⁰ To that end, States need to “assess the environmental impacts of policies and projects, identifying and preventing foreseeable harm, mitigating such harm if it is not preventable and providing for timely and effective remedies to redress both foreseeable and actual harm”.⁹¹ Precaution should further be understood in the light of the “differential impact of environmental decisions on children, in particular young children and other groups of children most at risk, as measured against short-, medium- and long-term, combined and irreversible impacts, interactive and cumulative impacts and impacts in the different stages of childhood.”⁹²

In addition, States should consider that the “effects of environmental contaminants may even persist in future generations” by considering “consistently and explicitly . . . the impact of exposure to toxic substances and pollution in early life”⁹³ and “each stage of childhood, the importance of each stage for subsequent stages of maturation and development and children’s varying needs at each stage.”⁹⁴

Precaution should also be understood in the context of children’s right to development⁹⁵ and the obligations of States to “create an optimal environment” for children. In that connection, the General Comment indicates that “States should explicitly and consistently consider all factors required for children of all different ages to survive, develop and thrive to their fullest potential and design and implement evidence-based interventions that address a wide range of environmental determinants during the life course.”⁹⁶ On the whole, the Committee on the Rights of the Child requires States to “take into account the possibility that environmental decisions that seem reasonable individually and on a shorter timescale can become unreasonable in aggregate and when considering the full harm that they will cause to children throughout their life courses.”⁹⁷

All these interpretative indications are significant in providing a potentially transformative approach to the understanding of “serious or irreversible damage” under the precautionary principle, and possibly move away from the emphasis on “cost-effective measures to prevent environmental degradation” found in the classic enunciation of this principle in the Rio Declaration.⁹⁸ These clarifications also help fleshing out the version of precaution enshrined in the 2018 Framework Principles on Human Rights and the Environment, which outline that “the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to prevent environmental harm, especially when there are threats of serious or irreversible damage”.⁹⁹ Fundamentally, children’s human rights expand significantly the usual time frame considered in environmental decision-making, as well as the scope of evidence to be considered. It has the transformative potential to contribute to adaptive and precautionary governance.

5. The Inclusiveness of International Environmental Law

One of the distinctive human right of the child is the right to be heard,¹⁰⁰ as part of their right to participate in decisions affecting their lives and “express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously.”¹⁰¹ The right to be heard has procedural and substantive

90 *Ibid.*, para. 69.

91 *Ibid.*

92 *Ibid.*, para 76.

93 *Ibid.*, para 24.

94 *Ibid.*, para 25.

95 *Ibid.*, para 14; and GC 14, paras. 16 (e), 71 and 74.

96 GC 26, para 25.

97 *Ibid.*, para. 19.

98 Rio Declaration on the Environment and Development, (13 June 1992) Un Doc A/ConF.151/6/rev.1, Principle 15; A Cançado Trindado, ‘Principle 15: Precaution’ in J Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP, 2015) 403.

99 Framework Principles on Human Rights and the Environment: Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/37/59 (2018).

100 CRC art 12(2). D Zlotnik Raz and S Almog (2023), ‘Children’s Political Rights and the UN Convention on the Rights of the Child’ 31 *IJCR* 500.

101 CRC Art 12.

dimensions,¹⁰² including the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of *art*, or through *any other media of the child’s choice*.”¹⁰³ These rights are essential to ensure that the consideration of inter-generational equity in international environmental fora is not only as a general – and rather inchoate – principle of international law¹⁰⁴ framed by adults. Rather, inter-generational equity should be seen and practiced as a matter of binding international law, on the basis of ‘clear and specific international obligations’¹⁰⁵ and accountability in as far as children’s rights are concerned.¹⁰⁶

The General Comment stresses that children must be recognized and fully respected as environmental actors, human rights defenders and agents of change who “have made historic contributions to human rights and environmental protection.”¹⁰⁷ It thus points to the transformative opportunity arising from the exercise by children of their rights to freedom of expression, participation and to be heard to lead to “more ambitious and effective, environmental policies.”¹⁰⁸ The transformative potential here lies in the fact that children offer unique and valuable insights which can support mutual learning between and within generations.¹⁰⁹ The realization of children’s procedural rights in international environmental fora could provide new spaces for intergenerational dialogue and partnership¹¹⁰ so as to not only avoid discrimination against children, but also co-develop equitable approaches to environmental protection.¹¹¹ This can contribute to transformation through inclusive and transdisciplinary governance.

That said, the barriers to children’s meaningful participation in environmental decision-making, at different scales, should be fully and critically appreciated. Special consideration must be given to children’s reliance on adults to facilitate their participation in spaces where decision-making is historically adult-driven,¹¹² consider children’s evolving capacity, and provide access to age-appropriate, child-friendly and accessible materials and avenues for children’s participation.¹¹³ There are issues related to overcoming stereotypes about children’s relevance and capacity to meaningfully contribute to international decision-making.¹¹⁴ Accordingly, the General Comment specifically requires States to “combat negative societal attitudes to children’s right to be heard.”¹¹⁵

Second, the General Comment merely indicates that States must “facilitate their meaningful participation in environmental decision-making.”¹¹⁶ But such obligation requires preventing any “unfair distribution of conceptual resources needed for speakers to have a say,” where age-appropriate and accessible resources are made available to children to ensure that they can meaningfully contribute, taking into account that adult audiences may be unaware of children’s communicative practices and “fail to give appropriate uptake to their attempts to communicate.”¹¹⁷

102 Engaging at least six UNCRC Articles: Arts 12, 13, 14, 15, 17, and 29(1)(e)).

103 CRC Art 13(1) – emphasis added.

104 C Molinari, ‘Principle 3: From a Right to Development to Intergenerational Equity’ in Viñuales (n 98), 139.

105 Archard (n 73), at 324

106 As former UN Special Rapporteur on Human Rights and the Environment John Knox indicated, the “discussions of future generations [must] take into account the rights of the children who are constantly arriving, or have already arrived, on this planet”: Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2018) UN Doc A/HRC/37/58.

107 GC 26, para 4.

108 *Ibid*, para 8.

109 A Daly (2023), ‘Intergenerational Rights Are Children’s Rights: Upholding the Right to a Healthy Environment through the UN Convention on the Rights of the Child’ 41 *Netherlands Quarterly of Human Rights* 123.

110 On inter-generational partnership, see E Brown Weiss (1990), ‘Our Rights and Obligations to Future Generations for the Environment’ 84 *American Journal of International Law* 198; and M Jesko Langer, ‘Principle 21: The Role of Youth’ in Viñuales (n 98), 519.

111 S Shields et al (2023), ‘Children’s Human Right to be Heard at the Ocean-Climate Nexus’ 38 *The International Journal of Marine and Coastal Law* 545-580.

112 S Shields, J Davidson and E Webster, ‘United Nations Convention on the Rights of the Child Incorporation in Scotland: Participation and Beyond’ [unpublished manuscript] *Inspiring Children Futures Learning Report Series*.

113 *Ibid*.

114 D Lupin and L Townsend, ‘The Right to Consultation is a Right to Be Heard’ in D Lupin (ed), *A Research Agenda for Human Rights and the Environment* (Edward Elgar, Cheltenham, 2023), pp. 103-121, albeit referring to adult human rights-holders.

115 GC 26, para 70.

116 *Ibid*, para 70.

117 Lupin and Townsend (n 114), at 107.

While there is still a significant lack of awareness, understanding and know-how in international environmental fora about children's participation,¹¹⁸ there is a whole body of experience and methodologies developed within the children's rights community, that can and should be drawn upon.¹¹⁹ The General Comment itself was developed with "16,331 contributions from children, from 121 countries, through online surveys, focus groups and in-person national and regional consultations,"¹²⁰ with the support of "a diverse and dedicated children's advisory team, comprising 12 advisors of between 11 and 17 years of age."¹²¹

Thus, the General Comment underscores that:

"Even from an early age, children can enhance the quality of environmental solutions, for example, by providing invaluable insights into issues such as the effectiveness of early warning systems for environmental hazards. Children's views should be proactively sought and given due weight in the design and implementation of measures aimed at addressing the significant and long-term environmental challenges that are fundamentally shaping their lives. Creative means of expression, such as art and music, may be used by children to participate and express their views. Additional support and special strategies may be required to empower children in disadvantaged situations, such as children with disabilities, children belonging to minority groups and children living in vulnerable areas, to exercise their right to be heard. The digital environment and tools can enhance consultations with children and expand their capacity and opportunities to be effectively engaged in environmental matters, including through collective advocacy, if carefully used, with due attention given to challenges regarding digital inclusion."¹²²

Furthermore, the General Comment makes critical connections between children's right to be heard and the right to be protected from misinformation about environmental risks and harm¹²³ through education and enabling environments.¹²⁴ To that end, States are to collect and make publicly accessible information about the environment and how it may harm children,¹²⁵ and equip children so that they can understand the effects of climate change-related decisions on their rights and exercise their participatory rights in effective ways,¹²⁶ which should be interpreted also to include understanding of the biodiversity-climate nexus and the ocean-climate nexus.¹²⁷ And downstream, States should provide children with "information about the outcomes of environment-related consultations and feedback on how their views were taken into account and have access to child-sensitive complaint procedures and remedies when their right to be heard in the environmental context is disregarded."¹²⁸

The General Comment also clarifies in this connection States' obligations as part of international cooperation. It indicates that

"At the international level, States, intergovernmental organizations and international non-governmental organizations should facilitate the involvement of children's associations and child-led organizations or groups in environmental decision-making processes. States should ensure that their obligations concerning children's right to be heard are incorporated into international environmental decision-making processes, including in negotiations and the implementation of instruments of international environmental law. Efforts to enhance youth participation in environmental decision-making processes should be inclusive of children."¹²⁹

118 For instance, Children's Environmental Rights Initiative, 'Centring Child Rights at COP28: Asks of UNFCCC Party Negotiators, prepared by members of the Children's Environmental Rights Initiative' (2023), https://ceri-coalition.org/wp-content/uploads/2023/11/CERI-Policy-Brief_Centring-Child-Rights-at-COP28.pdf.

119 Shields et al (n 111) at 21.

120 GC 26, para 2.

121 Shields et al (n 111), at 30.

122 GC 26, para 26.

123 *Ibid*, para 70.

124 *Ibid*, para 27. Jesko Langer (n 110), at 530-531 and 563.

125 Knox (n 7), at para. 71.

126 GC 26, para 102.

127 Morgera et al (n 12).

128 GC 26, para 27.

129 *Ibid*, para 28.

While there is a steep learning curve for international environmental fora to develop appropriate approaches to children's participation, this seems a particularly worthwhile and urgent task to support transformative change. As argued elsewhere,¹³⁰ "children's imagination is very different from adult cognition, as their experiences of time and place are distinctive,¹³¹ and can thus provide innovative thinking for improved environmental decision-making."¹³² In addition, engaging in children-centred participatory processes, which rely on fun, play and arts, can "disrupt normative ways of understanding"¹³³ and help challenge vested interests, power asymmetries and tendencies towards short-term decision-making that prevent transformation and leave behind those whose interests are currently not being met.¹³⁴

6. Conclusion

There are several promising provisions in the General Comment on Children's Rights and a Healthy Environment that can help address, in innovative ways, some long-standing challenges in international environmental law – fragmented approaches, lack of clarity of international obligations, limited accountability of States, short-termism, as well as exclusionary and unimaginative approaches in international environmental law fora.

There are several concepts and methodologies that will need to be learnt by the international environmental law community to be able to integrate children's human rights and children's participation effectively and carefully in environmental decision making. To realize the full transformative potential of the General Comment 26, it is recommended that the international environmental law community engage in mutual learning with the children's human rights community. It is essential to build on the methods and know-how that have already been co-developed, tried and tested with children, with a view to quickly building the capacity to generate meaningful inter-generational dialogue and partnerships to address more effectively the triple planetary crisis. This will also require integrating the UNCRC obligations in adopting or reviewing environmental laws, policies, plans, budget allocations, and administrative and judicial proceedings, as well as in data collection and research.¹³⁵

The efforts needed to bring closer together the international environmental and children's rights communities should also take into account the "clearly unresolved ambiguities" in UNCRC, including the relationship (and dividing line) between childhood and adulthood, with children being both "in need of protection and as capable of showing some but not all of the capacities of an adult decision makers",¹³⁶ as well as other areas of criticism and concern about the UNCRC.¹³⁷ One key example is the best interests of the child, which remains "one of the most controversial and debated provisions of the CRC".¹³⁸ The problematic dimension of this principle is that it can allow adult decision-makers to substitute their assessment of the child's interests with that of the children themselves, as part of a complex balancing act that needs to take into account the child's evolving

130 Shields et al (n 111), at 14.

131 D McGarry (2014), 'Empathy in the Time of Ecological Apartheid: A Social Sculpture Practice-led Inquiry into Developing Pedagogies for Ecological Citizenship' (PhD Thesis, Rhodes University, South Africa).

132 C Wyborn et al. (2020), 'Imagining Transformative Biodiversity Futures' 3 *Nature Sustainability* 670.

133 LHV Wright, K Tisdall and N Moore (2021), 'Taking Emotions Seriously: Fun and Pride in Participatory Research' 41 *Emotion, Space and Society* 100836; M Rosen (2020). *Book of Play* (Profile Books).

134 Erinosho et al (n 15).

135 UNCRC art. 3. Vandenhoe et al (n 27), at 60-61.

136 Archard (n 73), at 330-331.

137 K Hanson and L Lundy (2017), 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *IJCR* 285; M Cordero Arce (2015), 'Maturing Children's Rights Theory: From Children, With Children, Of Children' (2015) 23 *IJCR* 283; E Faulkner and C Nyamutata (2020), 'The Decolonization of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child' (2020) 28 *IJCR* 66; S Byrne (2020), 'Reclaiming Progressive Realisation: A Children's Rights Analysis' (2020) 28 *IJCR* 748.

138 Vandenhoe et al (n 27), at 60-63. See also M Strømmland et al, (2019) 'In Your Best Interest: A Discussion of How Capability Approach Could be Used as a Guideline to Strengthen and Supplement the Principle of the Child's best Interests' 27 *IJCR* 517; J Krutzinna (2022), 'Who is "The Child"? Best Interests and Individuality of Children in Discretionary Decision-Making' 30 *IJCR* 120; and S Sanz-Calballero (2021), 'Towards a Uniform and Informed Interpretation of the Best Interests of the Child by the Judiciary: Inter-American and European Jurisprudence' 29 *IJCR* 54.

capacities¹³⁹ and their views in matters affecting them.¹⁴⁰ These areas of challenge and discomfort can, in themselves, provide crucial opportunities for learning,¹⁴¹ experimentation and reflexivity across generations to re-imagine our solutions to the triple planetary crisis.

139 CRC art. 5; S Varadan (2019), 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' 27 *IJCR* 306.

140 CRC art. 12; Vandenhoe et al (n 27), at 64-69 and 71-73; A Daly (2018), 'No Weight for "Due Weight"? A Children's Autonomy Principle in the Best Interest Proceedings' 26 *IJCR* 61.

141 M Lombard et al, (2023). 'Principles for Transformative Ocean Governance' *Nature Sustainability* <https://www.nature.com/articles/s41893-023-01210-9>.