

**The best interests of the child:
Another string to the environmental and climate protection bow?**

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1. *Introduction*

The principle of the best interests of the child (BIC) is one of the four overarching guiding principles on children's rights¹. The principle is anchored in Article 3(1) of the Convention on the Rights of the Child (CRC), but its significance had been already evident since the adoption of the human and children's rights instruments that predated the adoption of the CRC. Namely, the 1959 Declaration of the Child, the 1979 Convention on the Elimination of All Forms of Discrimination against Women and other instruments such as the 2006 Convention on the Rights of Persons with Disabilities, define the principle as 'the paramount' (Principle 2 of the 1959 Declaration of the Rights of the Child), 'the primordial' (Article 5(b) 1979 Convention on the Elimination of All Forms of Discrimination against Women) and 'the primary' (Article 7 of the UN Convention on the Rights of Persons with Disabilities) consideration, which similarly recurs in regional children's rights instruments like the African Charter on the Rights and Welfare of the Child that elevate the weight of the principle to be 'the primary consideration'.² Also in those legal orders where an explicit reference to the 'best interests of the

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¹ Thus, right to non-discrimination, best interests, the right to life, survival and development and the right to participation or right to express views and have them taken into account.

² U Kilkelly, T Liefwaard (ed), *International Human Rights of Children* (Springer 2019).



child' is lacking³, it has been the case law of the monitoring body that has interpreted the (principle of) best interests of the child. There, it is conceptualised in the light of the human rights-based approach thanks to a systemic and evolutive interpretation according to Article 31 of the Vienna Convention on the Law of the Treaties,⁴ on one hand, and thanks to the consensus among the member states of the Council of Europe 'in support of the idea that in all decisions concerning children, their best interests must be paramount',⁵ on the other hand.

The BIC principle in the practice related to the CRC appears in all contexts where the Committee adopts a child-centred approach.⁶ Unlike some other central articles of the CRC, it was present from the beginning of the drafting process⁷ and it was not the object of further discussion. This was probably due to the BIC has a less controverted nature of terms than others. It may also be due to an awareness of the near impossibility

³ See for instance the ECHR where this lack is not surprising, given that the text does not deal specifically with persons of minor age and that, in any case, in the 1950s the principle was still being defined in international law.

⁴ See F Ippolito, 'The Convention on the Rights of the Child in Litigation Before the European Social Charter Committee and the European Court of Human Rights: «Why Then, Can One Desire Too Much of a Good Thing?»' (2020) 14 *Diritti Umani e Diritto Internazionale* 93.

⁵ See *Neulinger and Shuruk v Switzerland*, App No 41615/07 (ECtHR, 6 July 2010) para 135 and the reference to the principle of best interests contained in positive domestic law – in the section on 'relevant domestic law' – of the ECtHR case law and in the respondent State Government's arguments on the necessity of interference with the parent's family life for the protection of the fundamental rights of the child under art 8(2) ECHR.

⁶ UN Committee on the Rights of the Child, 'General comment No 1 (2001), Article 29(1), The aims of education' (17 April 2001) UN Doc CRC/GC/2001/1 para 9; 'General comment No 3 (2003): HIV/AIDS and the Rights of the Child' (17 March 2003) UN Doc CRC/GC/2003/3 para 10. The CRC broadened the scope of the concept to 'all actions concerning' children. The scope can be inferred from the wording of article 3(1), and the UN Committee on the Rights of the Child further specifies in '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)' (29 May 2013) UN Doc CRC /C/GC/14, that the provision also applies to omissions and to cases indirectly concerning children, be it one child, children as a group or children in general (para 17-18). The UN Committee on the Rights of the Child underlines in General Comment 14 above that the list of actors that have to consider best interests is broad (paras 19-24).

⁷ EE Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in EE Sutherland, L-A Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (CUP 2016).



of providing a definition valid in all circumstances as it is a concept of a general nature and, therefore, open to multiple interpretations.⁸ At least the best interests are often characterised by what they are *not*. As such they are different from well-being,⁹ and cannot be equated with ‘development’,¹⁰ views¹¹ or with rights either,¹² even though taking children’s views into account alongside their best interests is often recommended.¹³ The interaction between best interests and children’s rights has not been explicitly addressed either.

The aim of this contribution is to discern the role of the best interests of the child in relation to the environment and the most pressing current environmental emergency represented by climate change. To do so, the present article will dissect the threefold dimension of the concept introduced by the CRC Committee itself when in 2013 it gave its authentic interpretation of Article 3 (1) CRC in its General Comment No 14,¹⁴ but leaving aside the first declared dimension of *substantive right*. In fact, to have the best interests as the primary consideration when other different interests are at stake or to be implemented whenever a decision is to be made is aimed at ensuring both the full and effective enjoyment of all rights recognised in the Convention (and the well-being of the child as defined in the Preamble and throughout the Convention) and the holistic development of the child. But ‘a plain reading of the text does not

⁸ *ibid* 29; N Cantwell, ‘Are ‘Best Interests’ a Pillar or a Problem for Implementing the Human Rights of Children?’ in T Liefgaard, J Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017) 65.

⁹ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Switzerland’ (26 February 2015) UN Doc CRC/C/CHE/CO/2-4 para 26; CRC Committee, ‘Concluding observations on the report of Marshall Islands’ (27 February 2018) UN Doc CRC/C/MHL/CO/3-4, para 25(c).

¹⁰ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Bolivia’ (11 February 2005) UN Doc CRC/C/15/Add.256 para 40; ‘Concluding observations on the report of Romania’ (30 June 2009) UN Doc CRC/C/ROM/CO/4 para 91(g).

¹¹ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Tajikistan’ (29 September 2017) UN Doc CRC/TJK/CO/3-5 para 26(b).

¹² UN Committee on the Rights of the Child, ‘Concluding observations on the report of Burundi’ (19 October 2010) UN Doc CRC/C/BDI/CO/2 para 47(c).

¹³ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Mongolia’ (21 September 2005) UN Doc CRC/C/15/Add.264 para 34(c).

¹⁴ UN Committee on the Rights of the Child, ‘General Comment No 14’ (n 6).



support the view that Article 3(1) [CRC] contains a right¹⁵, nor a directly applicable right (self-executing) that can be invoked before a court. Instead, best interests need to be assessed by decision-makers as part of a process where rules of procedure will be applied so that the best interest principle acts as one of the foundations for a substantive right: the guarantee that this principle will be applied whenever a decision is to be taken concerning a child or a group of children. And this bearing in mind mid- and long-term consequences so that the application of the BIC principle not only considers a short-term solution, but also takes into account the interests of the child's future. Since the child is always evolving, her/his interest should consequently be detached from the law of 'everything, immediately', in favour of long-range vision of the future. At that regard, States parties have an obligation to put in place mechanisms that will facilitate consideration of the best interests of the child, and must provide legislative measures to ensure that those with the authority to make decisions regarding children (judges, for example) must consider the 'best interests' rule as a matter of procedure.

The analysis will therefore proceed, first, to highlight the role played concerning environmental concerns and degradation by the BIC conceptualised in terms of a *rule of procedure*,¹⁶ which refers to the obligation to include an evaluation in decision-making processes of the possible impact on a specific child, an identified group of children or children in general so that 'the justification of a decision must show that the right has been explicitly taken into account'. The function as a rule of procedure also refers to the procedural guarantees required to assess and determine the best interests of the child, as well as to the obligation to explain how best interests have been defined in a specific case, what criteria the assessment is based on and how the child's interests have been weighed against other considerations. According to the Committee, a decision's

¹⁵ U Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in EE Sutherland, L-A Barnes Macfarlane (n 7) 57.

¹⁶ UN Committee on the Rights of the Child, 'General Comment No 14' (n 6) and for a similar characterisation before the General Comment was issued: see J Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 Intl J of Children's Rights 483, 485 and B Abramson, 'Article 2. The Right of Non-Discrimination' in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 2008) 1, 65-6 claiming that art 3(1) does not contain a principle but a procedural rule prescribing a step in the decision-making process.



justification must show that the right protected by Article 3(1) of the CRC has been explicitly taken into account.¹⁷

On the other hand, the contribution will argue a suitable role for the BIC as a fundamental, *interpretative legal principle* when connected with other rights, which means that if a provision can be interpreted in several ways, ‘the interpretation which most effectively serves the child’s best interests should be chosen’ that is potentially powerful.¹⁸ This is especially true in the environmental context as will be seen below considering that in the interpretation of the best interest of the child the state must ensure that the dignity of all children is respected (a negative duty) as well as ensure the ‘holistic development of every child’, which implies a positive duty.¹⁹

2. *BIC as a procedural positive obligation in relation to environmental and climate change issues*

When the BIC principle functions as a *procedural* positive obligation as to environmental and climate change issues²⁰ it encompasses the State’s duty to incorporate it in all relevant environmental policies, programmes and projects²¹ as well as to integrate it in all environmental

¹⁷ UN Committee on the Rights of the Child, ‘General Comment No 14’ (n 6) paras 6a-6c.

¹⁸ W Wandenhole ‘Distinctive Characteristics of Children’s Human Rights Law’ in E Brems, E Desmet, W Wandenhole (eds), *Children’s Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?* (Routledge 2017) 21, 26; U Kilkelly, ‘The ‘Best Interests’ of the Child: A Gateway to Children’s Rights?’ in EE Sutherland, L-A Barnes Macfarlane (n 6) at 61-2.

¹⁹ UN Committee on the Rights of the Child, ‘General Comment 14’ (n 6) para 42.

²⁰ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Ireland’ (1 March 2016) UN Doc CRC/C/IRL/CO/3-4 para 29 and ‘General Comment 14’ (n 6) para 42. See N Cantwell, ‘Are ‘Best Interests’ a Pillar or a Problem’ (n 8) 69.

²¹ UN Committee on the Rights of the Child, ‘Concluding observations on the report of Italy’ (28 February 2019) UN Doc CRC/C/ITA/CO/5-6 at para 16(a); ‘Concluding observations on the report of Côte d’Ivoire’ (12 July 2019) UN Doc CRC/C/CIV/CO/2 para 22. As general principles, including art 3, should guide planning and policy-making (UN Committee on the Rights of the Child, ‘Concluding observations on the report of Lithuania’ (21 February 2001) UN Doc CRC/C/15/Add.146, para 20).

legislative, administrative and judicial proceedings,²² in practice,²³ in impact assessments,²⁴ in the duty of cooperation and in budgeting.²⁵

This has been made evident as regards legislative and administrative policies, programmes and projects through the acknowledgment by the CRC Committee of a needed regulatory due diligence to reduce pollution and environmental degradation²⁶ and the maximum concentration of air pollution;²⁷ to reverse trends of increasing absolute emissions of

²² UN Committee on the Rights of the Child, 'Concluding observations on the report of Guinea' (28 February 2019) UN Doc CRC/C/GIN/CO/3-6 at para 18(a); 'Concluding observations on the report of Botswana' (26 June 2019) UN Doc CRC/C/BWA/CO/2-3 at paras 23–24 and already Committee on the Rights of the Child, 'General Comment No 9 (2006). The rights of children with disabilities' (27 February 2007) UN Doc CRC/C/GC/9 paras 29-30.

²³ UN Committee on the Rights of the Child, 'General Comment No 7 (2005). Implementing child rights in early childhood' (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 para 20.

²⁴ UN Committee on the Rights of the Child, 'General Comment No 2. The role of independent national human rights institutions in the promotion and protection of the rights of the child' (15 November 2002) UN Doc CRC/GC/2002/2 para 19(i); UN Committee on the Rights of the Child, 'General comment No 5 (2003). General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)' (27 November 2003) UN Doc CRC/GC/2003/5 para 45.

²⁵ UN Committee on the Rights of the Child, 'General Comment No 5' (n 24) para 51; 'General Comment No 13 (2011). The right of the child to freedom from all forms of violence' (18 April 2011) CRC/C/GC/13 para 61 and see also the paragraph above on Concluding Observations for related considerations in this practice as well and especially with regard to environment.

²⁶ UN Committee on the Rights of the Child, 'Concluding observations on the report of Nigeria' (21 June 2010) UN Doc CRC/C/NGA/CO/3-4 at para 47 (emphasis added).

²⁷ UN Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina' (5 December 2019) UN Doc CRC/C/BIH/CO/5-6 at para 36; 'Concluding observations on the combined fifth and sixth reports of Belgium' (1 February 2019) UN Doc CRC/C/BEL/CO/5-6; UN Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Japan' (5 March 2019) UN Doc CRC/C/JPN/CO/4-5. It has to be noted that the UN Committee on Economic, Social and Cultural Rights has also increased its attention to climate change impacts, mitigation and adaptation (see, for example, CESCR 'Concluding Observations, Australia' (12 June 2009) UN Doc E/C12/AUS/CO/4 para 27; CESCR 'Concluding Observations, Finland' (17 December 2014) UN Doc E/C12/FIN/CO/6 para 9; CESCR 'Concluding Observations, Canada' (23 March 2016) UN Doc E/C12/CAN/CO/6 para 53; CESCR 'Concluding Observations, Australia' (11 July 2017) UN Doc E/C12/AUS/CO/5 para 12; CESCR 'Concluding Observations, Russian Federation' (6 October 2017) UN Doc E/C12/RUS/CO/6 para 42; CESCR 'Concluding Observations, Bangladesh' (18 April 2018) UN Doc



greenhouse gases; to pursue alternative and renewable energy production²⁸ or to mitigate the impact of air pollution on children with measures able to prevent *foreseeable* human rights harms caused by climate change through regulating activities that contribute to such harm.²⁹ The *regulatory due diligence* obligation introduced by the CRC recommendations made along the years of activities, as identified in General Comment on Article 24 CRC corresponds to ‘reviewing the national and subnational legal and policy environment and where necessary, amending laws and policies; providing an *adequate* response to the underlying determinants of children’s health’.³⁰

That regulatory due diligence obligation is ‘outcome-based’³¹ or ‘outsourced’³² by the Committee, which signifies that it is limited to

E/C12/BGD/CO/1 para 13; CESCR ‘Concluding Observations, Mauritius’ (5 April 2019) UN doc E/C12/MUS/CO/5 paras 9-10.

²⁸ UN Committee on the Rights of the Child, ‘Concluding observations on the combined fifth and sixth periodic reports of Australia’ (30 September 2019) UN Doc CRC/C/AUS/CO/5-6. The same was observed by the CESCR in 2017 against the same State (‘Concluding observations on the fifth periodic report of Australia’ (11 July 2017) UN Doc E/C.12/AUS/CO/5).

²⁹ Joint Statement on ‘Human Rights and Climate Change’ by the 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 September 2019) available at <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>; UN Committee on the Rights of the Child, ‘Concluding observations on the combined fifth and sixth periodic reports of Norway’ (4 July 2018) UN Doc CRC/C/NOR/CO/5-6 para 27; CRC Committee, *Chiara Sacchi et al v Argentina, Brazil, France, Germany and Turkey* CRC 104/2019-108/2019 (23 September 2020) paras 196-201. See also See eg ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc A/HRC/37/58; ‘A Safe Climate’ (15 July 2019) UN Doc A/74/161.

³⁰ UN Committee on the Rights of the Child, ‘General comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)’ (17 April 2013) CRC/C/GC/15, at para 73.

³¹ P Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Edward Elgar Publishing 2018) 4.

³² International Law Commission, Sixth Report on State Responsibility by Mr. Roberto Ago, 15 April, 7 June 5 and 15 July 1977, UN Doc A/CN.4/SER.A/1977/Add.1 (Part 1) 9



formulate the desired outcomes or goals with the use of ‘duties of care’³³ without indicating how the goal needs to be reached, but only requiring the norm-addressee (States) to demonstrate the maximum efforts, being then within the competence of the norm addressee to decide how to attain the given goal.³⁴ The fact that the Committee requires that the State regulatory power should be exercised ‘adequately’ regarding children’s health, without prescribing what these rules and policies should look like gives the State discretion to decide how to reach the regulatory end-goal when it comes to implementation. The State has therefore to conduct a balancing exercise and determine which measures are reasonable to take depending on the circumstances of a given case.³⁵ That way, the due diligence obligation requires a State to give further meaning to the abstract notion of reasonableness and, henceforth, an element of due diligence is outsourced to the State with possibly only one fixed guiding principle that is BIC required to be placed by States at the centre of all decisions affecting their health and development, including the allocation of resources, and the development and implementation of policies and interventions that affect the underlying determinants of their health, and in particular should it influence the development of policies to regulate actions that impede the physical and social environments in which children live, grow and develop.

The reporting system of the CRC and the practice of its monitoring body could be used with reference to the Paris Agreement to better specify due diligence regulatory obligations and would arguably contribute to widely amending national laws and policies. If we consider that the open-ended due diligence obligation under Article 4(2) Paris Agreement is supported by a concrete procedural obligation of reporting on the States’ NDC progression every five years,³⁶ supplementing and ensuring that the Conference of Parties (COP) can supervise whether States have made serious efforts to reach their self-determined goals; it could be envisaged a parallel duty from States to report on that issue also to the CRC Committee in their periodical submissions do that the Committee could in its

³³ Westerman (n 31) 2-3.

³⁴ *ibid* 5.

³⁵ H Krieger, A Peters, ‘Due Diligence and Structural Change in the International Legal Order’ in H Krieger, A Peters, L Kreuzer (eds) *Due Diligence in the International Legal Order* (OUP 2020) 351, 371-72.

³⁶ Paris Agreement, arts 4(3), 4(9) and (12).



turn monitoring how mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to protect children's rights. Moreover, if that would be the case such a mechanism could proactively push the best interests of the child as a primary consideration to play a key role in allocating the costs and burdens of climate change mitigation and adaptation. Therefore, progressively and in a context of almost universal monitoring, the mitigation duty could become a duty of the group that explains and grounds the duties of its individual members.

From another standpoint, the BIC as a procedural positive obligation could also be ascertained (and so play a role) as to the State's due diligence obligation to promulgate, implement and enforce a regulatory framework which ensures that the business sector complies with international climate mitigation standards³⁷ and respect children's rights. In that regard, Principle 12 of the UN Guiding Principles on Business and Human Rights (UN GPHR)³⁸ refers to internationally recognised human rights – understood, not at a minimum, but 'depending on circumstances, business enterprises may need to consider additional standards' regarding especially individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them,³⁹ including the UN Convention on the Rights of the Child.⁴⁰ States should therefore encourage business to effectively

³⁷ In its 2019 'Concluding Observations to Cote d'Ivoire' (n 21) para 16 (a) the UN Committee on the Rights of the Child recommended the State: '(a)dopt and implement regulations to hold the business sector accountable for complying with international standards, including on ... the environment, that are relevant to children's rights.' The CRC Committee must fortify this language in Concluding Observations on the business sector and climate.

³⁸ 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs), annexed to Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, General Principles' UN Doc A/HRC/17/31 <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>. See J Bonnitca, R McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 Eur J Intl L 899.

³⁹ In line with the UNGPs, the OECD Guidelines (OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) 3 <<http://dx.doi.org/10.1787/9789264115415-en>>) also stipulate that additional standards may be needed for 'specific groups or populations that require particular attention' including children.

⁴⁰ UN Committee on the rights of the Child, 'General comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights' (17

integrating child rights into human rights due diligence by creating instruments to benchmark and recognise good performance by business with regard to children's rights in the identification, prevention and mitigation of their impact on children's rights throughout their operations, including those operations conducted by their subsidiaries and other business partners globally. Within such a child rights due diligence framework, the best interests of the child should have a prominent place and be taken into due consideration especially in the context of extra-territorial harm.

When a state institutes an adequate regulatory apparatus, the CRC Committee must condemn any retrogressive measures, ie, *de jure* or *de facto* deregulation. To avoid *de facto* deregulation of climate protection measures, the CRC Committee must mandate that States scrutinize business activities on an ongoing basis to ensure continued compliance with GHG emissions standards.⁴¹

Methodologically speaking, two considerations derive related to the BIC's enforcement. On one hand, in order to overcome the indeterminacy and vagueness of the concept of 'best interest' it could be helpful to include the involvement and consultation of children in discussions.⁴² In that regard, the CRC Committee itself has suggested to *develop toolkits* for holding public consultations with children on issues that affect them, especially regarding climate change,⁴³ placing the rights and participation

April 2013) UN Doc CRC/C/GC/16, But see also regionally the Council of Europe, 'Recommendation on Business and human rights' CM/REC(2016)3110.

⁴¹ UN Committee on the Rights of the Child UN Doc CRC/C/MWI/CO/3-5 para 12(a).

⁴² UN Committee on the Rights of the Child, 'Concluding observations on the report of Germany' (25 February 2014) UN Doc CRC/C/DEU/CO/3-4 at para 22 (d); 'Concluding observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN doc CRC/C/CHL/CO/4-5 at para 21; CRC, 'Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania' (3 March 2015) UN Doc CRC/C/TZA/CO/3-5 para 22 (b); 'Concluding observations on the combined third to sixth periodic reports of the Lao People's Democratic Republic' (1 November 2018) UN Doc CRC/C/LAO/CO/3-6 at para 36; 'Concluding observations on the combined fifth and sixth periodic reports of Australia', (1 November 2019) Un Doc CRC/C/AUS/CO/5-6 at para 22 (e); 'Concluding observations on the combined third to sixth periodic reports of Guinea' (1 February 2019) UN Doc CRC/C/GIN/3-6.

⁴³ On this aspect it should be noted that most recently the UN Committee on the rights of the Child also issued a statement in September 2019 voicing support for children campaigning on climate change, welcoming 'the active and meaningful participation of



of children at the centre of national and international climate change adaptation and mitigation strategies⁴⁴ and going beyond a recommendation to adopt a regulatory framework inclusive of impact assessments of natural resource exploitation on children's rights.

On the other hand, so as to preserve its effectiveness, the BIC's procedural monitoring could be insisted on to, for instance, shape the replies to the Concluding Observations on the model so far developed by the European Court of Human Rights in its procedural review of the best interests of the child, creating far-reaching obligations for States to show that they have considered the best interests of the child. Accordingly, the CRC Committee could range from considering the States to satisfy the requirement simply because of a State best interests consideration to paying attention to the quality of the best interests assessment or to take the child's views into account when assessing best interests; or by considering if States had also provided businesses with specific guidance for an accessible, inclusive and meaningful children's participation in the BIC assessment also involving civil society organisations that are competent in facilitating child participation.

3. BIC as an interpretative principle

Beside functioning as a procedural rule, the BIC as related to environmental issues could either play the role of interpretative principle in the wake of the 'interrelationships'⁴⁵ between Article 3 CRC and other substantive CRC rights and consistency 'with the spirit of the entire Convention'.⁴⁶ Accordingly, the best interests of the child should be

children, as human rights defenders, in relation to issues of concern to them along with everyone else.' The UN Committee on the rights of the Child stressed that in accordance with art 12 of the Convention on the Rights of the Child, children must be at the centre of the discourse on climate change and their opinion should be listened to and taken into account.

⁴⁴ UN Committee on the Rights of the Child, 'Concluding observations on the combined 3rd to 6th periodic reports of Malta' (26 June 2019) UN Doc CRC/C/MLT/CO/3-6.

⁴⁵ UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child' (3rd edn, 2007) 37 <www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf>.

⁴⁶ *ibid* 38.



employed as ‘cross-cutting standards’⁴⁷ in order to illustrate their relevance for substantive provisions of the Convention on the Rights of the Child and the active measures States need to take to implement the obligation both for individual children and for children as a group,⁴⁸ in those cases directly concerning children, or in those ‘about’ children – where *decision-makers* must focus on what serves the child best – and cases indirectly concerning children or ‘affecting’ children – where the focus is on searching for the best solution overall.⁴⁹ Accordingly, in the case of climate change, the BIC functioning as interpretative element of the right to life and development should conduce States in their exercise of legislative and administrative powers to choose the interpretation that advances the child’s right to [a dignified] life, eg, reduced GHG emissions allocating also ‘sufficient technical and financial resources to effectively mitigate the negative impacts of environmental pollution on children’.⁵⁰ States should mobilise the full extent of their available resources in a way that is consistent with their obligations of implementation, in such a manner as to ensure the ongoing adoption of policies and delivery of programs aimed at directly or indirectly realising children’s rights for current and future generations.⁵¹ And they should not postpone these efforts as the best interests of the child in relation to environment-related children’s rights requires that solutions to environmental risks and damage be found as quickly as possible,⁵² positively contributing to children’s survival, protection, and development and encompassing considerations

⁴⁷ K Hanson, L Lundy, ‘Does Exactly What it Says on the Tin?’ (2017) 25 *Intl J of Children’s Rights* 285, 298-302.

⁴⁸ UN Committee on the Rights of the Child, ‘General comment No 7 (2005). Implementing Child Rights in Early Childhood’ (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 paras 13(a)-(b); Committee on the Rights of the Child, ‘General Comment No 11 (2009). Indigenous children and their rights under the Convention’ (12 February 2009) UN Doc CRC/C/GC/11 paras 30-33.

⁴⁹ *ibid* 64.

⁵⁰ UN Committee on the Rights of the Child (CRC), ‘Concluding observations on the fifth periodic report of Mongolia’ (12 July 2017) UN doc CRC/C/MNG/CO/5 at para 35; CRC Committee, ‘Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania’ (3 March 2015) UN Doc CRC/C/TZA/CO/3-5 at para 22 (a).

⁵¹ *ibid* para 77 (f).

⁵² G Van Bueren, ‘The Right of the Child to Freedom of Expression’ in G Van Bueren (eds), *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995).



such as the child's need for 'bodily and mental health, normal intellectual development, adequate material security, stable and non-superficial interpersonal relationships and a fair degree of liberty'.⁵³

Alongside the decision-making process of national authorities, the BIC as an interpretative principle could as well play a role, *judicially*, in the subsequent phase of monitoring the choices of national decision makers. If that would be the case it could orientate the appreciation of State due diligence, for instance, looking at the irreparable harms of greater intensity on certain groups in vulnerable situations including children. If States under their human rights obligations must pursue drastically accelerated climate action, at the level of each state's highest possible ambition, monitoring bodies need to determine whether the measures were adopted with due diligence ie whether they are reasonable and adequate to prevent risk to the enjoyment human rights from climate change⁵⁴ or to reduce the level of environmental pollution. While this does not mean that the Courts should be prescriptive in what each and every State has to do or the exact type of measures States have to adopt, if necessary, monitoring bodies should request that States revisit their domestic policies and plans and regulatory and administrative framework to become consistent with the State doing *its utmost* to effectively address climate change in line with the goals of the Paris Agreement.⁵⁵

The BIC could be used as an interpretative principle to guide such an evaluation of a good performance of due diligence considering that *inter-generational* rights – rights that generations hold vis-à-vis other generations⁵⁶ – could 'intermediately' be based on a recognition within children's rights of an *intra* generational equity requiring wealthier members of the present generation to assist less wealthy members of the current generation in actualising their right to development that become

⁵³ S Wolfson, 'Children's Rights: the Theoretical Underpinnings of the Best Interests of the Child' in M Freeman, P Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff 1992).

⁵⁴ The test question for this is: are the climate measures at the level of the highest possible ambition and aimed at and effective for achieving rapid and deep reductions of greenhouse gas emissions so as to achieve a global net phaseout of GHG emissions around 2050, in line with art 2, para 1, and article 4, paras 1 and 3 of the Paris Agreement?

⁵⁵ See ie *Cordella et al. v Italy*, App nos 54414/13 and 54624/15 (ECtHR, 24 January 2019).

⁵⁶ E Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 Vermont J Environmental L 615, 610–616.



particularly relevant in a children's perspective as these are the first and current beneficiaries of this actualisation. 'A world which invests in its children and in which every child grows up free from violence and exploitation' could be seen as a possible 'commitment to prepare the world for the birth of the future generation' or as 'an obligation only to invest in the children already born into this world'.⁵⁷ Protecting future rights and future generations through an 'immediate' action, on one hand, would avoid the critical procedural profiles connected to the so far limited judicial recognition of the principle of inter-generational equity by international tribunals.⁵⁸ In fact, in no case has the principle of inter-generational equity formed the legal basis for resolution of a dispute before courts⁵⁹ nor has any case before an international tribunal expressly recognised the rights of future generations,⁶⁰ at best constituting a 'guiding principle'⁶¹ in the application of substantive norms, including existing

⁵⁷ O Spijkers, 'Intergenerational Equity and the Sustainable Development Goals', (2018) 10 *Sustainability* 3836, 3847.

⁵⁸ Examples may be drawn from the human rights context, including the Inter-American Court of Human Rights judgments in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (IACtHR, 31 August 2001), where in a joint Separate Opinion Judges Cançado Trindade, Pacheco-Gómez, and Abreu-Burelli noted their obligations to 'other generations (past and future)' (para 10); and *Bamaca-Velasquez v Guatemala* (IACtHR, 22 February 2002), where Judge Cançado Trindade in his Separate Opinion remarked that 'Human solidarity manifests itself not only in a spatial [sic] dimension . . . but also in a temporal dimension—that is, among the generations who succeed each other in the time, taking the past, present, and future altogether' (para 23).

⁵⁹ T Stephens, 'Sustainability Discourses in International Courts: What Place for Global Justice?' in D French (ed) *Global Justice and Sustainable Development* (Brill 2010) 39-56.

⁶⁰ E Brown Weiss, 'Opening the Door to the Environment and to Future Generations' in L Boisson de Chazournes, P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 338; V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle, D Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 19, 27-9.

⁶¹ D Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale J Intel L* 451, 501, 501, notes that the open-ended character of principles, and the uncertainty as to where they might lead, was one of the United States' objections to the inclusion of an article on general principles in the FCCC (as opposed to inclusion in the preamble as context for the interpretation of commitments, or as binding commitments per se). This remains true even considering national case law as various courts have found that future generations are protected by rights, that the principle of intergenerational equity should inform interpretation of rights, or that sustainable development to meet the needs of future generations is a fundamental right



treaty obligations, under international law.⁶² On the other hand, in so far as environmental protection ‘can contribute to human well-being and the enjoyment of human rights,’⁶³ and ‘human rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection’;⁶⁴ ensuring *children’s* environmental rights can improve the quality of life of children born *and still unborn*, simultaneously advancing environmental protection goals and indirectly the protection of the environment *per se* distinguished from another concept gaining momentum globally that is the rights of nature. The former, in fact, moves from the perspective of a human-centric recognition that humans are dependent on

in itself. See ie *Minors Oposa v Secretary of The Department of Environment and Natural Resources (DENR)*, Supreme Court of the Philippines (30 July 1993) (1994) 33 ILM 173; Lahore High Court in *Leghariv*, Pakistan (2015)25501/201WP(2018); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicación no 11001-22-03-000-2018-00319-01 (Colom.); *Juliana v. United States*, 947F.3d1159,1179 (9thCir.2020)(Staton, J.,dissenting).

⁶² C Redgwell, *Inter-generational Trusts and Environmental Protection* (Manchester UP 1999), 123; L Rajamani, *Differential Treatment in International Environmental Law* (OUP 2006), 84 citing a number of the binding and non-binding instruments noted above, concludes that the ‘notion of inter-generational equity, to the extent that it entails a responsibility to (and a consideration of) future generations for the care and use of the planet, is now well established in international environmental dialogue’. Given this qualifying language then, she unsurprisingly concludes that whether it is a legal obligation is less clear: *ibid* 85. See also E Brown Weiss, ‘Our Rights and Obligations to Future Generations for the Environment’, 84 AJIL 198 (1990) 202, and E Brown Weiss, ‘In Fairness to Future Generations and Sustainable Development’ (1992) 8 American U Intl L Rev 19, 30.

⁶³ The linkage between human rights and environmental protection has been a focal point of the deliberations of the United Nations Human Rights Council (UNHRC). For example: Resolution 10/4 of the UNHRC (‘Human Rights and Climate Change’) and Resolution 7/23 of the UNHRC (‘Human Rights and the Environment’). See, for a recent discussion on the human rights-environment discourse: A Boyle, ‘Human Rights and the Environment: Where Next?’ 2013 Eur J Intl L 23: 613 and most recently see the Resolution adopted by the Human Rights Council on 7 October 2020 45/30 ‘Rights of the child: realizing the rights of the child through a healthy environment A/HRC/RES/45/30’ (13 October 2020). See also the ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox’ (24 December 2012) UN Doc A/HRC/22/43.

⁶⁴ UN Human Rights Council Res 16/11 ‘Human Rights and the Environment’ 16th Sess Feb 28-Mar 25, 2011, UN GAOR 66th Sess Suppl No 53 (A/66/53) at 47. The Council also noted ‘that environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights’.



the environment while the latter concept acknowledges that environmental elements have intrinsic rights existing separately from any reliance we may have on them for our survival.⁶⁵

And this could be even strengthened if the BIC is applied as a precautionary principle under international environmental law so that where there is reasonable (not merely speculative, but even inconclusive) evidence that, despite the lack of a clear casual nexus, a particular practice is harmful to a child's best interests, the prohibition or regulation of that practice should not be precluded as to do otherwise would put the child's best interests at risk. This appears reinforced by an interpretation of Article 3 (2) CRC according to which States should ensure children's well-being not per se but by providing such protection and care as is necessary for that end, filling any lacunae in the Convention in that regard so that 'if a child's well-being is denied by virtue of an act or omission which is not specifically proscribed by the Convention, a State party would nonetheless be obliged by this umbrella provision to take appropriate measures to counteract this'.⁶⁶

BIC as interpretative principle has already indirectly showed its potential in the context of environmental migration since the *Teitiota* case decided by the Human Rights Committee.⁶⁷ There it had been acknowledged that the individual risk assessment to be conducted by returning countries should not only include a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under a

Articles 6 or 7 of the ICCPR but also the exposure of the individual to a real and reasonably foreseeable risk of exposure to a situation of indigence, deprivation of food and extreme precarity due to the effects of climate change that could threaten his right to life, including his right to a life with dignity. Though in *Teitiota* the very high threshold (of ie uninhabitability and State collapse) when the alleged risk depends 'only' on

⁶⁵ See A Hillebrecht, 'Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse' (2017) 6 Rachel Carson Center Perspectives 15; and M Maloney, 'Rights of Nature, Earth Democracy and the Future of Environmental Governance' in *The Green Institute Rebalancing Rights: Communities Corporations and Nature* (Report, March 2019) 11.

⁶⁶ J Eekelaar, J Tobin, 'Article 3' in J Tobin (ed) *The UN Convention on the Rights of the Child* (OUP 2019) 73, 102.

⁶⁷ UN Human Rights Committee, '*Teitiota v New Zealand*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2728/2016' (24 October 2019) UN doc CCPR/C/127/D/2728/2016.



the country's general situation had not been reached, since the Human Rights Committee assessed the claims of an author whose personal situation was not different from that of the rest of the population, its conclusions has left open the possibility that non-refoulement may be recognised also in geographical contexts characterised by an intermediate level of environmental degradation and recurrence of natural hazards caused by climate change for particularly vulnerable individuals such as children or when the Government of the receiving State discriminates among citizens or groups of citizens in its policies to respond to the effects of climate change.⁶⁸ In these situations, the BIC should play its interpretative role so as to downgrade the threshold of the seriousness of risk⁶⁹ in a precautionary approach⁷⁰ so that the adverse treatment might not reach the threshold of severity required instead for a violation of the right to life or of not being subject to degrading and inhumane treatment if inflicted on adults. A wider and more tailored net than the generic *non-refoulement* obligations⁷¹ is required to be assessed on a case-by-case basis, while taking into consideration the best interest of the child.⁷²

'Other irreparable harm' is open-ended, and may include harm to the survival, development, or health (physical or mental) of the child. In

⁶⁸ A Maneggia, 'Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee' (2020) 14 *Diritti Umani e Diritto Internazionale* 635.

⁶⁹ *Aydin and Yunus v Turkey* Apps No 32572/96, 33366/96 (ECtHR, 22 June 2004), *Renolde v France* App No 5608/05 (ECtHR, 16 October 2008); *Ribitsch v Austria* App No 18896/91 (ECtHR, 4 December 1995).

⁷⁰ *Blokbin v Russia*, App No 47152/06 (ECtHR, 23 March 2016) para 199; *Mihailova v. Bulgaria*, App No 35978/02 (ECtHR) 12 January 2006); *Abdullahi Elmi & Aweys Abubakar v Malta*, App Nos 25794/13 and 28151/13, (ECtHR, 22 November 2016) para 103; *N.T.P. et o. v France*, App No 68862/13 (ECtHR, 24 May 2018) para 44 where child vulnerability had taken precedence over their migrant status.

⁷¹ J Pobjoy, *The Child in International Refugee Law* (CUP 2017) 186; E Sommaro, 'When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision' (2021) 77 *QIL-Questions Intl L* 51.

⁷² Committee on the Rights of the Child and Committee on the rights of Migrant Workers, Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the context of International Migration (16 November 2017) UN Doc CMW/C/GC/3- CRC/C/GC/22 paras 28 and 29. According to the Committee on the Rights of the Child, the notion of 'harm' covers persecution, torture, gross violations of human rights, or other irreparable harm (para 45).

particular, States should take into account ‘the particularly serious consequences for children of the insufficient provision of food or health services’.⁷³ This is arguable also considering that Article 24 (1) ICCPR entitles every child ‘to such measures of protection as are required by his status as a minor on the part of his family, society and the State’. In fact it is clear that this article requires the adoption of special measures designed to protect the life of every child, *in addition* to the general measures required by Article 6 for protecting the lives of all individuals so that when taking special measures of protection, States parties should be guided by the best interests of the child and by the need to ensure the survival and development of all children and their well-being. This should apply also with specific regard to those positive obligations of a ‘special character’ which deal ‘with the conditions of the causes of the violation’ of Article 2 and 6 ICCPR.⁷⁴ Therefore, to that environmental degradation which both enables violations and –in the form of climate change, extreme weather events, desertification and the like – can also itself be one of the most ‘direct’⁷⁵ and ‘most pressing and serious threats’⁷⁶ to the ability to enjoy the right to life with dignity.

Dissenting opinions in *Teitiota* could be understood as confirming the argument, by pointing out that even if deaths are not occurring with regularity on account of the conditions (as articulated by the Immigration and Protection Tribunal), there can still be violations of the right.⁷⁷ Consideration of the author’s situation and that of his family, balanced with all the facts and circumstances of the situation in the author’s country of origin, reveals a livelihood short of the dignity that the Covenant seeks to protect. Also in the individual opinion of Committee member Vasilka Sancin (dissenting) the conclusion of the State party’s assessment that the measures taken by Kiribati would not suffice to protect the author’s right to life under Article 6 ICCPR was anchored to the consideration that ‘the

⁷³ UN Committee on the Rights of the Child, ‘General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin’ (1 September 2005) UN Doc CRC/GC/2005/6 para 27.

⁷⁴ Discussion of the Human Rights Committee, General Comment No 36 (Cont’d), HRC, 3323rd meeting, 118th Session (n 45) Special Rapporteur Mr Yuval Shany.

⁷⁵ UN Human Rights Committee (HRC), ‘General comment No 36, Article 6. Right to Life’ (3 September 2019) UN Doc CCPR/C/GC/35 para 26.

⁷⁶ *ibid* para 62.

⁷⁷ *ibid* para 9.4.



State party failed to present evidence of a proper assessment of the author's and his dependent children's access to safe drinking water in Kiribati' while all three of the author's dependent children were born in New Zealand and thus have never been exposed to water conditions in Kiribati. Expert testimony in national proceedings instead had demonstrated that, given their young ages, and heightened vulnerabilities, Mr Teitiota's children faced critical risks to their health and well-being, even death. The physiological and psychological stress associated with relocation from their native New Zealand to an unknown life in Kiribati exacerbated these risks. To bolster his argument, for instance, Mr Teitiota submitted written comments before the New Zealand Supreme Court which alleged that, upon the family's return to Kiribati, they had 'reasonably bad health issues' due to the lack of access to clean drinking water.⁷⁸ It was noteworthy that one of his children had 'suffered from a serious case of blood poisoning, which caused boils all over the body'.⁷⁹ Moreover, in the light of expert reports, inter alia, the Special Rapporteur on the human right to safe drinking water and sanitation on her mission to Kiribati in July 2012,⁸⁰ warning that the National Development Strategy 2003–2007 and the Kiribati Development Plan 2008–2011 containing policies and goals of direct relevance to water had not yet been implemented. Therefore, it would have fallen on the State party, not the author, to demonstrate that the claimant and his family would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with it.

4. *Some final remarks*

As the analysis has shown, within the doctrinal complexities that surround the environmental human rights debate⁸¹ it could be argued that

⁷⁸ [2015] NZSC 107, para 5.

⁷⁹ *ibid* para 2.1.-2.10.

⁸⁰ UN Doc A/HRC/24/44/Add.1.

⁸¹ P Pevato, *International Environmental Law* (Routledge 2003); A Boyle, M Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press 1999); C Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 *Santa Clara J Intl L* 151; B Weston, D Bollier, 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) 4 *J of Human Rights and the Environment* 116; B Lewis, 'Environmental Rights or Right to the Environment? Exploring the Nexus between Human Rights and Environmental

the existing international human rights law should be used to strengthen the environmental rights of children as an extension of the broader realm of human rights such as the right to life, health, water, food, education and development. If that is the case, one of the Convention on the Rights of the Child keystone principles – the BIC – becomes determinant for achieving some pragmatic environment-related goals.

In so doing, it could be prospected as a ‘third route’ for the conceptualisation of environmental rights that is not the perspective exclusively of present generations (nor of the school of thought of using/mobilising human rights to achieve environmental goals⁸² nor of the school of thought of reinterpreting existing human rights for achieving environmental goals⁸³ nor of the one of creating a new right to the environment⁸⁴) nor the one of future generations but a mid-one: the one of children that encompasses both present generations and embodies the future ones. This means that environmental treaties should be interpreted as inclusive of a children’s rights perspective. The Stockholm and Rio Declarations⁸⁵ require human beings to not cause harm to the environment, a harm that

Protection’ (2012) 8 *Macquarie J of Intl and Comparative Environmental L* 36; C Gearty, ‘Do Human Rights help or Hinder Environmental Protection?’ (2010) 1 *J of Human Rights and the Environment* 7; D Shelton, ‘Developing Substantive Environmental Rights’ (2010) 1 *J of Human Rights and the Environment* 89 and most recently P Mayer, ‘Climate Change Mitigation as an Obligation Under Human Rights Treaties?’ (2021) 115 *AJIL* 409-451; M Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9 *Climate L* 232; J Knox, ‘Climate Change and Human Rights Law’ (2009) 50 *Virginia J Intl L* 163; A Savaresi, ‘Human Rights and the Impacts of Climate Change: Revisiting the Assumptions’ (2020) *Oñati Socio-legal Series* <<https://onatifirstonline.wordpress.com/2020/11/26/human-rights-and-the-impacts-of-climate-change-revisiting-the-assumptions-annalisa-savaresi/>>; M Montini, ‘Verso una giustizia climatica basata sulla tutela dei diritti umani’ (2020) *Ordine internazionale e diritti umani* 506.

⁸² See A Boyle, ‘The Eole of Human Rights Law in the Protection of Environment’ in A Boyle, M Anderson (n 81) 50, insisting on adopting a more specific focus on health, 50; R Churchill, ‘Environmental Rights in Existing Human Rights Treaties’ in A Boyle, M Anderson (n 81) 93; M Fitzmaurice, ‘The Right of the Child to a Clean Environment’ (1999) 23 *Southern Illinois U L J* 611, at 613.

⁸³ M Anderson, ‘An Overview’ in A Boyle, M Anderson (n 81) 199-227.

⁸⁴ See P Sands, *Principles of International Environmental Law* 296 (Cambridge 2nd edn 2003).

⁸⁵ Principle 18 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) June 16, 1972 (1972) 11 *ILM* 1416 and Principle 7 of the Declaration of United Nations Conference on Environment and Development (Rio Declaration) 14 June 1992 (1992) 31 *ILM* 874.



disproportionately affects children,⁸⁶ which warrants that children's rights be considered when environmental obligations of different actors and environmental decision-making processes at the national and international levels are defined. In that process the BIC serves as a procedural positive obligation that should orientate decision makers in their actions and so in advancing environmental standards. Such standards could be monitored by either national or international monitoring bodies using the model so far employed by the European Court of Human Rights in its monitoring of the BIC as procedural positive obligation in different contexts from environment. Also, the BIC could play a determining role as interpretative principle of all the levels of powers at national and international levels possibly inviting dialogue between judges⁸⁷ and other monitoring bodies at international level or from one legal order to another. If developed, such a judicial consensus might also positively inform public understanding of, and debate about, climate change and environmental degradation from which children are more likely to suffer both physical and mental harm with foreseeable and irreversible threats that endanger their fundamental rights to survival and development.

⁸⁶ S Mathiarasan, A Hüls, 'Impact of Environmental Injustice on Children's Health-Interaction between Air Pollution and Socioeconomic Status' (2021) 18 Int J of Environmental Research and Public Health 795; A Prüss-Ustün, J Wolf, C Corvalán, R Bos, M Niera, 'Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks' (World Health Organisation 2016) <http://apps.who.int/iris/bitstream/10665/204585/1/9789241565196_eng.pdf?ua=1>; WHO, 'Inheriting a sustainable world. Atlas on children's health and the environment' (World Health Organisation 2017) <www.who.int/ceh/publications/inheriting-a-sustainable-world/en/>.

⁸⁷ A corpus of national jurisprudence on the matter is developing. See ie the website of the campaign 'Last Judgment' <www.giudiziouniversale.eu>. App nos 1904967, 1904968, 1904972, 1904976/4-1, Tribunal Administratif de Paris, decision of 3 February 2021; Commune de Grande Synthe v France, Conseil d'Etat, N 427301 (19 November 2020); Tribunal de premiere instance de Bruxelles, decision of 21 June 2021 on the 'Klimaatzaak' dossier; Constitutional Federal Court of Germany, Neubauer and others v Germany, decision of 26 April 2021; Federal Court of Australia, Anjali Sharma and others v Commonwealth and VickeryCoal Pty Ltd, decision of 27 May 2021; already the leading case The State of the Netherlands v Stichting Urgenda (2019) ECLI:NL:HR:2019:2007 (English version); Friends of the Irish Environment v Ireland (2020), Supreme Court of Ireland [Appeal No:205/19]. See R Luporini, 'The "Last Judgment": Early Reflections on Upcoming Climate Litigation (2021) 77 QIL-Questions Intl L 27; P Pustorino, 'Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale' (2021) Ordine internazionale e diritti umani 596.