

**‘Baptism of fire?’
The first climate case before the
UN Committee on the Rights of the Child**

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1. *Introduction*

On 23 September 2020, sixteen children from twelve countries around the world presented the first climate-related petition¹ to the United Nations Committee on the Rights of the Child (CRC Committee). In the petition, Greta Thunberg, the 16-year-old Swedish climate activist and the 15 other child petitioners, aged between 8 and 17,² allege that the failure of States to tackle climate change constitutes a violation of their rights protected by the United Nations Convention on the Rights of the Child (CRC).³ They argue that the five respondent States (Argentina, Brazil, Germany, France and Turkey) have breached their obligations based on this convention, resulting in a violation of children’s rights to life and to health, and of indigenous children’s right to their own culture. According to the petition, which is based on the Third Optional Protocol to the CRC on a Communications Procedure (OPIC),⁴ the respondent

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¹ CRC, *Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey* (CRC 104/2019-108/2019 (23 September 2020) (hereafter ‘Petition’, or ‘*Sacchi v A*’).

² The petitioners are from Argentina, Brazil, France, Germany, India, Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia and the United States. They are represented by global law firm Hausfeld LLP and the NGO Earthjustice.

³ UNGA, *United Nations Convention on the Rights of the Child* UN Doc A/RES/44/25 (20 November 1989) (hereafter: ‘CRC’)

⁴ UNGA, *Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure* (19 December 2011) UN Doc A/RES/66/138 (hereafter: ‘OPIC’). This Protocol entered into force on 14 April 2014.



States also violated their obligation to make ‘the best interest of the child’⁵ a primary consideration in their climate action.

This initiative is significant for many reasons. Firstly, it is an example of the young generation claiming an active role in addressing global, potentially existential threats, calling for a fundamental change of attitude of States and of the international community. And, secondly, it demonstrates an ‘intergenerational’ recognition that international law, and especially human rights law, provide a normative framework which not only sets out how States -and other actors- should behave to achieve commonly agreed goals, but also provides concrete tools for everyone, including children, to hold States accountable, if they fail to do so. The question is, however, if the human rights framework, as it stands today, can indeed provide such a remedy in the face of the all-encompassing challenges of climate change, and how the inherent limitations of this framework can be overcome. So far, only a few climate related claims have been brought before regional and international human rights bodies, most of which are still ongoing.⁶

For the CRC Committee, *Sacchi v. A.* may be a ‘baptism of fire’, in the sense that it provides a first opportunity to consider the scope of children’s rights, and of the relevant obligations of States, in the context of climate change. As the Committee itself has asserted, the CRC, ‘like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time’.⁷ This ‘living instrument doctrine’ has first been explicitly invoked with regard to human rights in the case law of the European Court of Human Rights (ECtHR),⁸ followed by its Inter-American counterpart,⁹ and UN Human Rights Treaty Bodies.¹⁰

⁵ CRC (n 1) art 3.

⁶ See A Savaresi’s introduction to this issue of QIL.

⁷ CRC Committee, *General Comment No 8* (2 March 2007) UN Doc CRC/C/GC/8 para 20.

⁸ This doctrine was first introduced in ECtHR, *Tyrer v United Kingdom* App no 5856/72 (25 April 1978) and in numerous subsequent cases, both regarding procedural guarantees (eg ECtHR, *Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (23 March 1995) para 71, and substantive rights (eg ECtHR, *Demir and Baykara v Turkey* App no 34503/97 (12 November 2008) para 146.

⁹ Eg *Mapiripan Massacre v Colombia* (IACtHR, 15 September 2005) Series C No 35 para 106.

¹⁰ Eg UN Human Rights Committee, *Judge v Canada*, Communication No 829/1998 (5 August 2002) UN Doc CCPR/C/78/D/829/1998.



The essence of the doctrine that human rights conventions ‘must be interpreted in the light of present-day conditions’¹¹ has led to an evolutive interpretation both of the rights included therein and of the corresponding obligations of States. The (quasi-)judicial organs created by these treaties play a leading role by interpreting their provisions ‘by reference to changing social mores and changing norms of international law’.¹²

Against this background, the present contribution discusses *Sacchi v A* from two perspectives. On the one hand, it examines from a *procedural perspective*, how the petition has dealt with the main obstacles which human rights-based climate cases typically face in the admissibility phase before domestic courts, regional human rights courts, and international human rights monitoring bodies: standing and jurisdiction. Moreover, it also considers the arguments put forward in the petition with regard to the exhaustion of domestic remedies (Section 2). On the other hand, it looks at the petition from a *substantive human rights perspective*, considering the legal arguments that petitioners have used to substantiate how their rights are violated as a result of the States’ omissions (Section 3). The contribution concludes with some remarks on what role this petition may play in the emerging climate litigation before UN Human Rights Treaty Bodies and regional human rights courts.

2. *The procedural perspective: Addressing typical obstacles in human rights-based climate cases*

Applicants who intend to bring a legal case in relation to climate change before a national court, or to launch a similar complaint before a regional or international human rights court or monitoring body, generally need to overcome a number of procedural hurdles. The main obstacles are related to issues of (i) standing or ‘*locus standi*’ of the applicants before the relevant forum, (ii) jurisdiction of the court or monitoring body, and (iii) the exhaustion of local remedies before a complaint can

¹¹ ECtHR, *Tyrer v United Kingdom* (n 9) para 31.

¹² D Moeckli, N D White, ‘Treaties as ‘Living Instruments’ in D Kritsiotis, M Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2016) 136, 142.

be brought before a regional or international human rights body.¹³ In this section, each of these obstacles will be discussed, considering, *firstly*, if the respondent States in *Sacchi v A* have, so far, raised this objection,¹⁴ and on what grounds; *secondly*, the arguments raised by the petitioners, and *thirdly*, some examples of how domestic or regional courts, or international human rights bodies have dealt with such objections in previous cases.

2.1. *Standing or locus standi of the applicants*

The question whether the applicants have standing allowing them to bring their complaint before the chosen court or human rights body needs to be resolved in accordance with the relevant forum's rules. For the CRC Committee, Article 5(1), OPIC provides that

‘Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in (a) the Convention ...’.¹⁵

Therefore, in *Sacchi v A*, the petitioners first needed to demonstrate that they were within the jurisdiction of a State Party to the OPIC. The respondent States were chosen, in the first place, because they are among the 46 States who have ratified the OPIC, and therefore have explicitly recognized the Committee's competence to hear individual complaints introduced by children or their representatives.¹⁶ Four out of the twelve petitioners have the nationality of, and reside in one of the respondent

¹³ For an analytical account of the legal strategy adopted for this complaint by practitioners directly involved in the petition, see I Gubbay, C Wenzler, ‘Intergenerational Climate Change Litigation: The First Climate Communication to the UN Committee on the Rights of the Child’ in I Alogna, C Bakker, J P Gauci, *Climate Change Litigation: Global Perspectives* (Brill/BHICL forthcoming 2021).

¹⁴ At the time of writing, only three of the respondent States (Brazil, France and Germany) have submitted their Admissibility Objections to the CRC Committee.

¹⁵ CRC (n 5) art 5(1).

¹⁶ The other criteria for the choice of these Respondents were (i) they are also Parties to the 1992 United Nations Framework Convention on Climate Change, and they have ratified (or, in the case of Turkey, signed) the 2015 Paris Agreement on Climate Change, and (iii) they significantly contribute to global CO2 emissions. ‘Petition’ (n 1) paras 53-58, 195-240.

States (Argentina, Brazil, France¹⁷ and Germany), but there is no petitioner from the fifth Respondent State (Turkey), and the remaining eight petitioners are from, and reside in third States.¹⁸ The petitioners claim that while some of them are within the *territorial* jurisdiction of the Respondent States, all petitioners are within the *extraterritorial* jurisdiction of each Respondent State. This point is further discussed below (2.2).

Another aspect of the question whether the petitioners have standing before the CRC Committee is their legal capacity. In this regard, the OPIC Rules of Procedure confirm that communications can be submitted by individuals ‘regardless of whether their legal capacity is recognized in the State party against which the communication is directed’.¹⁹ This is an important element, since many States do not recognize legal capacity for all children under the age of 18. Children’s right to be heard by a court varies significantly among States: access to justice is often broader for older children, but many States limit these rights.²⁰ Indeed, ‘in almost every country in the world, it is a general rule that children do not have standing to bring a case to court by themselves, and proceedings on behalf of a child are initiated by a representative (...)’.²¹

In practice, *locus standi* has been denied to children in several climate related cases, both at the national and international levels. In the *Juliana* Case brought before a US court against the United States, the President, and other federal defendants, children supported by NGO *Our Children’s Trust* alleged that inadequate climate change mitigation measures constitute a violation of their constitutional rights, including their right to life. The case was declared inadmissible because the plaintiffs lacked standing. The US Court of Appeals (9th Circuit) concluded that ‘the plaintiffs’ case must be made to the political branches or to the electorate at large’ and that the fact that ‘other branches may have abdicated their responsibility to remediate the problem does not confer on Article III

¹⁷ However, the petitioner having the French nationality currently resides in the USA.

¹⁸ India, Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia and the United States.

¹⁹ CRC Committee, *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (8 April 2013) UN Doc CRC/C/62/3 Rule 13.

²⁰ *ibid.*

²¹ Child Rights International Network, ‘Access to justice for children: A comparative analysis of 197 countries’ <https://archive.crin.org/sites/default/files/a2j_detailed_findings.pdf> 7-8.

courts, no matter how well-intentioned, the ability to step into their shoes'.²²

Similarly, in the *Peoples Climate Case*,²³ the General Court of the European Union (EU) denied standing to 10 families and the Saami Youth Association Sáminuorra. The plaintiffs sought the annulment of three pieces of EU legislation arguing, *inter alia*, that the EU's 2030 climate target was insufficient to avoid dangerous effects of climate change and threatened the enjoyment of rights protected by the EU Charter on Fundamental Rights. The General Court dismissed the case, concluding that the applicants had not established that they had standing to bring the action because they could not satisfy the *Plaumann* test and demonstrate that they were 'individually concerned'.²⁴ The applicants have appealed this judgment.²⁵ Nevertheless, in these cases the lack of standing was not related to the fact that the applicants were minors, but to other factors which may be inherent to climate-related claims more generally, namely: the separation of powers in national legal orders, and the requirement (under EU law) that applicants must prove to be 'individually affected' by the disputed acts or omissions.²⁶

However, in other cases children have been granted standing before courts in climate-related cases. For example, in a case brought in the Philippines, the Supreme Court ruled that the State had an intergenerational responsibility to maintain a clean environment and that children could sue to enforce that right both on behalf of future generations and of their

²² United States Court of Appeals for the Ninth Circuit, *Juliana v United States*, No 18-36082, D.C. No 6:15-cv-01517- AA (17 January 2020)

²³ Case T-330/18, *Armando Carvalho and Others v The EU Parliament and Council* ('The Peoples' Climate Case') (8 May 2019).

²⁴ See M. Willers, 'Climate Change Litigation in European Courts: Jumping Procedural Hurdles to Hold States to Account?' in Alogna, Bakker, Gauci (n 14); *Plaumann v Commission* (15 July 1963) 25/62, EU:C:1963:17, 107.

²⁵ *ibid.*

²⁶ For an analysis of the implications of the *Plaumann* doctrine on the EU's compliance with the Aarhus Convention and the 2006 Aarhus Regulation, which provides environmental NGOs with the right to challenge administrative acts defined as measures of 'individual scope', see Milieu Consulting Sprl, *Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters*, Final report, September 2019 <https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf> 72.

own.²⁷ Children's standing rights have also been upheld in a case in Colombia, where the Supreme Court ruled that fundamental rights were threatened by climate change and deforestation.²⁸ A case brought by youth activists before the South Korean Constitutional Court, alleging that the nation's climate change law violates their right to live and a clean environment, is still pending.²⁹

2.1. *Jurisdiction*

Brazil, France and Germany have claimed that the petitioners are not 'within their jurisdiction' as required by Article 2(1) CRC and Article 5, OPIC, and in particular, that they do not fall within the scope of the respondent States' extraterritorial jurisdiction.³⁰ In their response to these objections, the petitioners argued that the CRC Committee and other human rights bodies 'have confirmed that State parties have extraterritorial obligations to protect those whose rights are impaired "in a direct and reasonably foreseeable manner" by activities "under the control of a State"'.³¹ These two latter elements – ie the direct and foreseeable nature of the violation of petitioners' rights, and the question when activities fall 'under the control of a State' – will be considered separately. However, before entering into the details of the arguments raised by the respondent States and the replies of the petitioners, a few introductory observations will be made. First, in human rights law, the term jurisdiction 'defines the scope of application *ratione personae*: towards which rights-holders does

²⁷ Supreme Court of the Philippines, *Minors Oposa v Secretary of the Department of Environmental and Natural Resources* (33 ILM 173 (1994) Judgment of 30 July 1993).

²⁸ Supreme Court of Colombia, *Future Generations v Minister of the Environment* (STC4360-2018, No 11001-22-03-000-2018-00319-01, Judgment of 5 April 2018).

²⁹ *Do-Hyun Kim et al. v. South Korea*, complaint brought before the South Korean Constitutional Court on 12 March 2020 (pending).

³⁰ This second element of the argument, related to the lack of extraterritorial jurisdiction, was put forward by Germany and France, but not by Brazil.

³¹ CRC, *Communications n 105/2019 (Brazil), n 106/2019 (France), n 107/2019 (Germany)* (unpublished). The arguments are summarized in the *Petitioners' Reply to the Admissibility Objections of Brazil, France, and Germany* (20 May 2020) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200504_Not-available_reply.pdf> (hereafter: 'Petitioners' Reply') para 18, referring (n 4) to UNHRC, *General Comment No. 36 (on the right to life)* (UN Doc CCPR/C/GC/36, 30 October 2018) para 63, and African Commission on Human and Peoples' Rights, *General Comment No 3* (14 November 2015).

a State Party hold obligations?³² The scope of such jurisdiction, and thus of the obligations of States deriving from each specific human rights convention, depends both on the definition provided in the relevant convention itself, and on its interpretation by the competent court or monitoring body. In other words, the scope of the obligations deriving from the CRC is defined by its own jurisdictional clause (Article 2(1)), and by its interpretation by the CRC Committee. While the case-law of *e.g.* the ECtHR concerning the scope of jurisdiction applicable to the ECHR does, therefore, not have any binding effect for the CRC, human rights courts and monitoring bodies nevertheless often refer to each other's interpretations, and to their legal reasoning. And parties in cases brought before these (quasi)judicial instances, such as the petition *Sacchi v A* also make use of such 'cross-references'. Similarly, the question under which conditions the jurisdictional scope of human rights treaties applies 'extraterritorially', *i.e.* beyond the territory of each State party, has been answered differently by regional human rights courts and international human rights, as will be shown below.³³

2.1.1. 'Direct and foreseeable' violation of rights

Referring to a Joint Statement by the CRC Committee and four other UN Treaty Bodies on 'Human Rights and Climate Change',³⁴ the petitioners point out that State parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peo-

³² W Vandenhoe, 'The 'J' Word: Driver or Spoiler of Change in Human Rights Law?' in S Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 414, 415.

³³ See below para 2.2.2. For a specific analysis of the issues surrounding (extraterritorial) jurisdiction in human rights claims related to climate change, see A Savaresi, J Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in J Lin, D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP 2020).

³⁴ 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) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> (hereafter: 'Joint Statement').

ples, and that these obligations include ‘taking measures to prevent foreseeable human rights harms caused by climate change, and regulating activities that contribute to such harm’.³⁵

Although Germany acknowledged that CO₂ emissions in one country contribute to climate change, it asserted that such emissions do not ‘directly and foreseeably impair the rights of people in other states’.³⁶ Similarly, France maintained that its emissions do not have any direct and foreseeable effects on the petitioners’ rights, arguing that climate change is a ‘global phenomenon’ and that ‘the emissions driving climate change are not directly attributable to a given country’.³⁷ In their response to the objections, the Petitioners reasoned that these violations are, instead, entirely foreseeable since climate scientists have warned, for decades, that unchecked emissions will have a direct effect on children around the world.³⁸ Moreover, they argued that even if emissions are local in their origin, their impact is global, concluding that ‘(t)he physics of climate change does not absolve the Respondents of their duty to take available measures to prevent foreseeable extraterritorial harm to Petitioners’.³⁹

The petitioners’ arguments are supported by statements from UN Human Rights Treaty Bodies,⁴⁰ the Human Rights Council⁴¹ and the UN Special Rapporteur on Environment and Human Rights.⁴² Moreover, in the *Urgenda* Case,⁴³ the Dutch Supreme Court also interpreted the ‘direct

³⁵ Petitioners’ Reply (n 31) para 19 (emphasis added).

³⁶ Response of Germany, para 5, cited in the Petitioners’ Reply (n 33) para 21.

³⁷ Communication by France cited in the Petitioners’ Reply (n 33) para 23.

³⁸ Petitioners’ Reply (n 31) para 23.

³⁹ *ibid* para 24.

⁴⁰ Eg, UN Human Rights Committee, *General Comment No. 36 (on the right to life)* (30 October 2018) UN Doc CCPR/C/GC/36 para 63; ‘Joint Statement’ (n 34); CRC Committee, ‘Concluding observations on the combined fifth and sixth periodic reports of Norway’ (4 July 2018) CRC/C/NOR/CO/5-6 para 27.

⁴¹ UN Human Rights Council, ‘Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child’ (4 May 2017) UN Doc A/HRC/35/13.

⁴² 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’ UN Doc A/HRC/37/58 (24 January 2018); ‘A Safe Climate’ UN Doc A/74/161 (15 July 2019).

⁴³ Supreme Court of The Netherlands, *The State of The Netherlands v Urgenda Foundation* (Case No 19/00135, 20 December 2019) (hereafter: ‘*Urgenda*’) Unofficial translation available at <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>>.

and foreseeable risk' criterion in the context of climate change. The Supreme Court confirmed that State parties to the European Convention on Human Rights (ECHR)⁴⁴ have positive obligations to prevent dangerous climate change, based on Articles 2 (right to life) and 8 of the ECHR (right to a private and family life), as interpreted in the environmental case law of the ECtHR. In particular, the Dutch Supreme Court recalled that these positive obligations come into play when there is a 'real and immediate risk' to persons and the State is aware of that risk.⁴⁵ The Supreme Court affirmed that the term 'immediate' does not mean that the risk must materialize in a short period of time,⁴⁶ and that 'protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole'.⁴⁷ It concluded that climate change constitutes a 'real and immediate risk', relying on the findings of climate science, especially the 5th IPCC Assessment Report, COP decisions, and UNEP reports.⁴⁸ Similarly, in *Sacchi v A* the petitioners extensively referred to climate science⁴⁹ to support their conclusion that the risks posed by climate change to the enjoyment of children's rights around the world were 'foreseeable':

'(t)he respondents have thus known for decades that every metric ton of CO₂ that they emitted or permitted was adding to a crisis that transcends all national boundaries and threatens the rights of children everywhere'.⁵⁰

2.1.2. *Effective control over emissions originating in a State's territory*

Citing the *Banković* judgment,⁵¹ France contended that the CRC Committee should not focus on the foreseeability criterion, but rather on the existence of extraterritorial jurisdiction, based on a narrow reading

⁴⁴ All the Respondent States in *Sacchi v A* are also State Parties to the ECHR.

⁴⁵ *Urgenda* (n 41) para 5.2.2.

⁴⁶ *ibid* para 5.2.2.

⁴⁷ *ibid* para 5.3.1.

⁴⁸ *Urgenda* (n 41) para 4.2 – 4.7. For further details, see C Bakker, 'Climate Change Litigation in the Netherlands: The *Urgenda* Case and Beyond', in Alogna and others (n 14).

⁴⁹ Petition (n 1) paras 196-200.

⁵⁰ *ibid* para 201.

⁵¹ ECtHR, *Banković and others v Belgium and others* (Admissibility) App no 52207/99 (12 December 2001).

of the ECtHR's 'effective control' test. The petitioners responded that (i) the ECtHR's own case law on extraterritorial jurisdiction has significantly evolved beyond the primarily territorial understanding of 'effective control' to include also 'state agent control' as a possible ground for extraterritorial jurisdiction, and that (ii) other regional human rights bodies have also developed a broader approach, recognizing that 'the State of origin has jurisdiction when it controls the domestic acts that produce extraterritorial harm'.⁵² In particular, the petitioners cite the Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights,⁵³ which suggests that a State's jurisdiction extends to transboundary environmental harm:

'The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation'.⁵⁴

The petitioners further assert that, since each respondent State has exclusive and effective regulatory control over emissions originating in its territory, 'the foreseeable victims of their downstream effects, including Petitioners, are within their jurisdiction'.⁵⁵ They therefore conclude that 'even under an "effective control" test, there is article 2 jurisdiction because each Respondent controls activities in its territory that produce transboundary harm to Petitioners'.⁵⁶

The recognition of extraterritorial jurisdiction for human rights violations resulting from environmentally harmful activities within a State is, at present, not firmly established in the practice of regional human rights courts. The Advisory Opinion of the Inter-American Court,⁵⁷ which provides the most far-reaching conclusion in that respect, does not have any legally binding effect, and so far, it has not been confirmed in a binding judgment. Nevertheless, this Opinion is the expression of a growing (or

⁵² *ibid* para 28, referring to ECtHR, *Andreou v Turkey* App no 45653/99 (3 June 2008); *Bastidas Meneses v Ecuador* (Inter-American Commission of Human Rights, Petition 189-03, Report No 153/11, 2 November 2011).

⁵³ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (15 November 2017).

⁵⁴ *ibid* para 104(h).

⁵⁵ Petitioner's Reply (n 31) para 29.

⁵⁶ *ibid* para 30.

⁵⁷ IACtHR, *Advisory Opinion OC-23/17* (n 53).

at least ‘emerging’) acceptance of a broader interpretation of extraterritorial jurisdiction related to environmental harm. Such a broader interpretation is also reflected in the ongoing negotiations on a treaty on business and human rights,⁵⁸ and in discussions on the adoption of due diligence legislation at the EU level.⁵⁹ Moreover, while the ECtHR has accepted the possibility of extraterritorial jurisdiction in several cases,⁶⁰ it has not explicitly done so in relation to environmental harm,⁶¹ though it may yet address this matter in two pending climate cases.⁶²

So far, the most explicit recognition of the fact that States have extraterritorial obligations to prevent human rights violations resulting from climate change can be found in statements adopted within the UN system. In particular, in a Joint Statement on Human Rights and Climate Change, the CRC and four other UN Treaty Bodies affirmed:

‘State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations’.⁶³

⁵⁸ Eg, the ongoing work by the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by the Human Rights Council in its resolution 26/9 of 26 June 2014.

⁵⁹ See Lise Smit and others, ‘Study on due diligence requirements through the supply chain, Final Report’, Study for the European Commission, Directorate-General for Justice and Consumers (BIICL, CIVIC Consulting and LSE, January 2020). On 29 April 2020, it was announced that, based on this study, the European Commission will launch a legislative initiative to consider the introduction of mandatory human rights and environmental due diligence regulation <www.biicl.org/newsitems/16415/biicl-led-due-diligence-study-basis-for-european-legislative-initiative>.

⁶⁰ Eg, *Andreou v Turkey* (n 50). For an overview of all judgments of the ECtHR concerning extraterritorial jurisdiction, see <www.echr.coe.int/documents/fs_extraterritorial_jurisdiction_eng.pdf>.

⁶¹ See H Duffy, L Maxwell, ‘People v Arctic Oil before Supreme Court of Norway – What’s at stake for human rights protection in the climate crisis?’ EJIL:Talk! (13 November 2020) <www.ejiltalk.org/people-v-arctic-oil-before-supreme-court-of-norway-whats-at-stake-for-human-rights-protection-in-the-climate-crisis/>.

⁶² Application before the ECtHR by Portuguese children and young adults against 33 Member States of the Council of Europe (filed on 3 September 2020), Application by Swiss Senior Women for Climate Protection Switzerland against Switzerland before the ECtHR (filed on 27 October 2020).

⁶³ Joint Statement (n 32) para ‘States’ Human Rights Obligations’ 1.

This same recognition has been expressed in the Concluding Observations of UN Treaty Bodies as part of their periodic review of State reports.⁶⁴ For example, in its concluding observations on Norway, the CRC Committee recommended that, in light of Norway's continuing exploitation of fossil fuels, it should increase its focus on alternative energy and 'establish safeguards to protect children, both in the State party *as well as abroad*, from the negative impacts of fossil fuels'.⁶⁵ Also, the Committee on Social Economic and Cultural Rights recommended that Argentina reconsider plans for the large-scale exploitation of shale oil and gas because those plans ran 'counter to the State party's commitments under the Paris Agreement and would have a negative impact on global warming and on the enjoyment of economic and social rights by *the world's population* and future generations'.⁶⁶ Furthermore, references to the extraterritorial obligations of States are also made in the reports by the UN Special Rapporteurs on Human Rights and the Environment.⁶⁷

Therefore, the Inter-American Court of Human Rights and the UN Treaty Bodies are clearly at the forefront of the debate on extraterritorial jurisdiction related to transboundary environmental harm, contributing to an evolutive interpretation of the relevant human rights treaties as 'living instruments'.

2.2. *Exhaustion of local remedies*

According to Article 7(e) OPIC, the Committee shall consider a communication inadmissible when '(a)ll available domestic remedies have not been exhausted'.⁶⁸ However, the provision then mentions two exceptions

⁶⁴ *ibid* notes viii and ix.

⁶⁵ Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth periodic reports of Norway* (4 July 2018) CRC/C/NOR/CO/5-6, para 27 (*emphasis added*).

⁶⁶ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Argentina* (1 November 2018) E/C.12/ARG/CO/4.

⁶⁷ UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (15 July 2019) UN Doc A/74/161, paras 66-67; *ibid* (1 February 2016) UN Doc A/HRC/31/52, para 42ff, focusing on States' duties of international cooperation to address climate change.

⁶⁸ CRC (n 5) art 7(e), first sentence.

in this regard, stating that '(t)his shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief'.⁶⁹

The petition argues that children face numerous challenges, when trying to vindicate their rights, including legal and factual obstacles to access to justice.⁷⁰ Moreover, the petitioners argue that they face unique obstacles, which fall within the exceptions of Article 7(e) OPIC. Specifically, the petitioners maintain that domestic remedies would be *unduly burdensome* because each respondent State recognizes in its domestic law that foreign states enjoy jurisdictional immunity for sovereign acts. Thus, the petitioners would be forced to exhaust local remedies in all five respondent States, facing unduly burdensome costs and efforts.⁷¹ Such remedies would be '*unlikely to bring effective relief*'⁷² because the petitioners' claims against their own States, which also address diplomatic decision-making, cannot be fully reviewed by their domestic tribunals. The petitioners allege that the respondent States have failed to use legal, economic, and diplomatic means to confront emissions from other G20 member-states and fossil-fuel industries, but 'they are not aware of any domestic legal avenue in the respondent states permitting judicial review of a state's diplomatic relations'.⁷³ Moreover, domestic remedies would be '*unreasonably prolonged*'⁷⁴, because judicial processes usually take many years before a final judgment is reached.⁷⁵

Brazil, France and Germany have claimed that the petitioners' decision not to first pursue domestic remedies renders the Communication inadmissible.⁷⁶ In response, the petitioners asserted that, as confirmed by other treaty bodies and human rights courts, they can invoke the above-mentioned exceptions, without having to first pursue these remedies. They furthermore maintain that the respondent States have the burden to establish that domestic remedies are accessible and effective,⁷⁷ which

⁶⁹ *ibid* second sentence.

⁷⁰ 'Petition' (n 1) para 309.

⁷¹ *ibid* paras 311-313.

⁷² *ibid* para 314 (emphasis added).

⁷³ *ibid* para 314.

⁷⁴ *ibid* para 316 (emphasis added).

⁷⁵ *ibid* para 316.

⁷⁶ Communications by Brazil, France and Germany (n 33).

⁷⁷ Petitioners Reply (n 31) para 87,

they failed to do. The petitioners cited precedents affirming that ‘in urgent situations, excessively prolonged remedies may be ineffective,’⁷⁸ and that the climate crisis requires urgent responses by States, without further delays.⁷⁹

3. *The substantive perspective: How are the petitioners’ child rights violated?*

The substantive part of the petition sets out how the rights of petitioners, as protected by the CRC, have allegedly been violated by the respondent States’ failure to take adequate climate action. It focuses on the following rights: children’s rights to life, to health, to have their ‘best interests’ be made a primary consideration in climate action and indigenous children’s right to their own culture. This section considers in further detail some positive obligations identified in the petition (3.1.) and how the petition attempts to prove a *causal link* between the alleged harm and the acts or omissions of the respondent States (3.2.).

3.1. *Respondent States’ positive obligations*

The petitioners argued that the respondent States have violated various rights protected by the CRC, by ‘recklessly causing and perpetuating life-threatening climate change’.⁸⁰ In doing so, these States have allegedly failed to take necessary preventive and precautionary measures to guarantee the petitioners’ right to life.⁸¹ The same reasoning is used with regard to children’s right to health (Article 24, CRC)⁸², and indigenous children’s right to enjoy their own culture (Article 30, CRC).⁸³ Thus, the key element is the respondents’ omission to take ‘necessary preventive and

⁷⁸ *ibid* para 111, referring to Committee on the Rights of the Child, *R.K. v Spain* (Communication No 27/2017, UN Doc CRC/C/82/D/27/2017, 5 November 2019) para 8.3; *N.B.F. v Spain* (Communication No 11/2017, UN Doc CRC/C/79/D/11/2017, 18 February 2018) para 11.3.

⁷⁹ Petition (n 1) paras 60-70; see also Petitioners Reply (n 31) para 111.

⁸⁰ Petition (n 1) para 274.

⁸¹ *ibid*.

⁸² *ibid* para 284

⁸³ *ibid* para 299 second sentence.

precautionary measures' to protect the petitioners' rights. Such measures fall within the scope of the positive obligations incumbent on States Parties to the CRC.

The petitioners refer to the case law of both regional human rights courts and UN Treaty Bodies, confirming that in order to protect the *right to life*, States have a positive duty to protect against deprivation of life by private persons or entities or by other States,⁸⁴ and that these obligations extend to 'reasonably foreseeable threats and life-threatening situations that can result in loss of life'.⁸⁵ They argue that the obligation to respect and ensure the right to life, and in particular life with dignity requires that States Parties take measures 'to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors,' adding that 'States parties should therefore ... pay due regard to the precautionary approach'.⁸⁶ The petition then outlines how the applicants' right to life has been directly threatened by extreme heat, drought, wildfires, flooding, intense storms and increased disease, all resulting from climate change.⁸⁷

Concerning the positive obligations related to children's *right to the highest attainable standard of health*, the petition cites the CRC Committee's own General Comment (GC),⁸⁸ which recognizes climate change as one of the biggest threats to children's health. According to the GC, 'States must put children's health concerns at the centre of their climate change adaptation and mitigation strategies'.⁸⁹

Turning to the *indigenous children's right to enjoy their own culture*, the petition refers to the caselaw of UN Treaty Bodies and of the Inter-American Commission and Court of Human Rights, which all recognize the importance of the environment, land and natural resources to the enjoyment of traditional ways of life and of the culture of indigenous peoples, and confirm the obligations of States to take appropriate measures

⁸⁴ *ibid* para 259.

⁸⁵ *ibid* para 260.

⁸⁶ *ibid* para 263, citing UNHRC, *General Comment 36* UN Doc CCPR/C/GC/36 para 62.

⁸⁷ *ibid* paras 265-274.

⁸⁸ CRC, *General Comment 15* (2013) *on the right of the child to the enjoyment of the highest attainable standard of health* (art. 24) UN Doc CRC/C/GC/15 (17 April 2013) para 50.

⁸⁹ *ibid*.

to protect these.⁹⁰ The petition provides examples of how the indigenous petitioners and their communities, have already experienced significant threats to their ways of life, including traditional food production, fishing and hunting, as well as ancient cultural ceremonies, as a result of, *inter alia*, rising sea levels, ocean acidification, and severe drought.⁹¹

Finally, the petition argues that, under Article 3(1) CRC, State Parties have a duty to ensure that in any governmental decision that involves weighing competing interests, and assessing costs and benefits, the interests of a child, a group of children, or children in general, must be made a priority over other competing interests. It asserts that the notion of *the best interest of the child* ‘parallels the principle of intergenerational equity’⁹² under the UN Framework Convention on Climate Change, which in turn ‘places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs’.⁹³ The petitioners argue that by delaying decarbonization, the respondents’ climate policies ‘have undervalued children’s lives and treated their present and future interests as lesser considerations’.⁹⁴ According to the petition, each respondent State has failed to comply with their obligations under the CRC, by adopting insufficiently ambitious targets in national climate policies, despite its commitments under the United Nations Framework Convention on Climate Change (UNFCCC)⁹⁵ and the Paris Agreement,⁹⁶ and despite scientific reports finding that States’ pledged emission reductions are insufficient to remain within the objective of keeping the rise of global temperature below 2 degrees.

Since the admissibility decision is still pending, the respondent States have not yet submitted their response to these allegations. Possible counterarguments could raise again the question of jurisdiction, asserting that

⁹⁰ Petition (n 1) paras 287-291.

⁹¹ *ibid* paras 292-298.

⁹² *ibid* para 302.

⁹³ *ibid* para 302, referring to OHCHR, *Analytical Study on Climate* UN Doc A/HRC/10/61 (15 January 2009) para 35, and to UNFCCC art 3(1).

⁹⁴ *ibid* para 303.

⁹⁵ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁹⁶ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1.

the respondents' positive obligations under the CRC do not extend beyond their territory. The respondents may also contend that they could not reasonably have foreseen that their emissions would harm these individual petitioners, and that compared to other States, their emissions are 'a drop in the ocean'. Finally, the respondent States may assert that the petitioners failed to prove the causal link between the harm suffered and emissions. This last point will be briefly considered next.

3.2. *Causality*

A significant hurdle in climate cases is the need to prove a causal link, or causality, between the alleged harm suffered as a result of climate change, and the acts or omissions of the defendant State or other actor. The Petition argues that

'(c)limate science (...) establishes a *causal chain* that links each harm to climate change. The same chain links climate change to emissions resulting, in substantial part, from Respondents' climate policies and their failure to protect children from the emissions of other States and private industries'.⁹⁷

By referring to a 'causal chain' instead of the generally used term 'causal link', the petitioners highlight that climate science establishes two levels of causality: firstly, a causal relationship linking each harm to climate change (e.g. the loss of life resulting from climate change-induced floods), and secondly a causal relationship linking climate change to global GHG emissions (to which the respondent States have substantially contributed). As already mentioned above,⁹⁸ the argument that climate science establishes the causal link between emissions and human rights-related harm was also accepted in the Dutch Supreme Court's *Urgenda* judgment.

Regarding the question of 'attribution' (ie how it can be determined that emissions by a certain State have resulted in certain harmful effects),

⁹⁷ Petitioners' Reply (n 31) para 14 (emphasis added).

⁹⁸ See para 2.2.1. (n 48).

referring to the International Law Commission's Articles on State Responsibility for Wrongful Acts⁹⁹ the petition asserts that '(c)ustomary international law recognizes that when two or more States contribute to a harmful outcome, each State is responsible for its own acts'.¹⁰⁰ This same principle was also applied in *Urgenda*, where the Supreme Court rejected the objection by the Dutch State that 'others have responsibility too'. In this connection the Court observed that accepting this argument would mean that 'an effective legal remedy for a global problem would be lacking. After all, each State held accountable would then be able to argue that it does not have to take measures if other States do not do so either'.¹⁰¹

The petitioners do *not* request the Committee to recommend the respondent States to provide any reparation or financial compensation for the harm suffered as a result of the alleged violations.¹⁰² Instead, they seek other 'remedies squarely within the competence of the Committee: declaring a breach and urging its cessation and non-repetition'.¹⁰³ Specifically, the petition asks the Committee to find that climate change is a children's crisis and that each respondent State has, together with other States, caused and perpetuated the crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change. Consequently, the petitioners argue that, by doing so, each respondent State has violated their rights. They request the Committee to recommend that the respondents review their climate laws and policies to accelerate mitigation and adaptation in order to protect the petitioners' rights; to make the best interest of the child a central consideration in their climate action; to strengthen international

⁹⁹ International Law Commission, *Articles on State Responsibility for Internationally Wrongful Acts*, annex to UN Doc A/RES/56/83 (12 December 2001) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>

¹⁰⁰ Petitioners Reply (n 31) para 32-33.

¹⁰¹ *Urgenda* (n 41) para 64. For a more detailed discussion of the question of causation in this Petition see Gubbay, Wenzler (n 13).

¹⁰² For the possible remedies that the CRC can recommend, see *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications* procedure (n 19) Rule 27(4). They include 'rehabilitation, reparation, financial compensation, guarantee of non-repetition, requests to prosecute the perpetrator(s) ...The Committee may also recommend that the State party take legislative, institutional or any other kind of general measures to avoid the repetition of such violations'.

¹⁰³ Petitioners Reply (n 31) para 13.

cooperation efforts, and to prevent further harm to the petitioners and other children. Finally, the petition requests the Committee to recommend that the respondents ensure the children's right to be heard and to express their views freely in all international, national, and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to their Communication.¹⁰⁴

4. *Concluding remarks*

By bringing this first climate-related complaint before the CRC Committee, the petitioners have taken forward 'a child-centred approach to the climate emergency'.¹⁰⁵ In doing so, they -and their lawyers- are challenging the legal framework of the CRC, and indirectly, they are also testing the limitations of the general human rights framework in the context of climate change. As already mentioned above,¹⁰⁶ the doctrine that human rights conventions are 'living instruments' has first and most prominently been developed by the European Court of Human Rights. Indeed,

'by its case-law the Court has extended the rights set out in the Convention, such that its provisions apply today to situations that were totally unforeseeable and unimaginable at the time it was first adopted, including issues related to new technologies, bioethics or the environment'.¹⁰⁷

The same is true for other human rights instruments, including the CRC. The relevance of *Sacchi v A* to the application of this doctrine to the changing conditions resulting from climate change is twofold. On the one hand, the petition sets out the 'state of the art' in the relevant judicial and 'quasi-judicial' practice of, *inter alia*, the regional human rights courts and UN human rights treaty bodies, by showing how existing human rights norms *have already been interpreted* in accordance with

¹⁰⁴ Petition (n 1) para 95.

¹⁰⁵ Gubbay, Wenzler (n 13).

¹⁰⁶ See para 1.

¹⁰⁷ 'The European Convention on Human Rights: a Living Instrument' (2020) <<https://edoc.coe.int/en/european-convention-on-human-rights/8528-the-european-convention-on-human-rights-a-living-instrument.html>>.

changing external social – and in this case environmental – conditions. One example is the affirmation of States’ positive obligations deriving from human rights instruments to protect citizens from the adverse effects of climate change.¹⁰⁸ Another example concerns the applicability of extraterritorial jurisdiction to transboundary environmental harm and to the foreseeable human rights harm caused by climate change.¹⁰⁹ A further illustration of this evolving practice is the reliance on climate science to establish that climate change poses a ‘real and immediate risk’ to the enjoyment of human rights.¹¹⁰

On the other hand, the petition also offers innovative insights on how concepts such as causality, precautionary measures, and shared responsibility could – or in the view of the petitioners ‘should’ – be applied when considering State responsibility for violations of rights protected under the CRC that are adversely affected as a result of climate change. In this way, *Sacchi v A* presents a unique opportunity for the CRC Committee to contribute to the clarification of these concepts in relation to climate-related risks. If the petition is declared admissible, the CRC Committee’s decision will constitute a significant precedent in the evolving interpretation of the provisions of the CRC. Moreover, the arguments developed in the petition itself are likely to inform future complaints and cases that will be brought before national or regional courts or before international quasi-judicial bodies. Thus, *Sacchi v A* provides an extremely valuable input to the international judicial debate on the protection of children’s rights in the context of climate change and, arguably, also on the limits of the ‘living instrument doctrine’ itself. And the young generation is likely to keep this debate, this ‘fire’ alive.

¹⁰⁸ See notes 39, 40, 86 and accompanying text.

¹⁰⁹ See notes 51, 52, 61-64 and accompanying text.

¹¹⁰ See notes 38-48 and accompanying text.