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## Decision by the UN Committee on the Rights of the Child - An unsuccessful complaint that extends the application of human rights\*

The United Nations Committee on the Rights of the Child (the Committee) in *Sacchi et al v Argentina et al*<sup>1</sup> observed that a state party to the United Nations Convention on the Rights of the Child (UNCRC)<sup>2</sup> can be responsible for rights violations from its carbon emissions in relation to children, both within and outside of its borders. While the complaint was unsuccessful for the young people who filed the complaint (including the Swedish activist Greta Thunberg), the Committee took the opportunity to share its interpretation of the substantive issues. The Committee's comments on intergenerational equity and extraterritorial responsibility were ground-breaking for the application of human rights in relation to climate change. This briefing paper summarises and explains the main legal issues relevant for the decision of the Committee:

### *The extra-territorial nature of the complaints*

The transnational nature of the complaints was evident in the nationality and residency of the young people, and the choice of respondent states. The 16 young people argued that the five respondent states, Argentina, Brazil, France, Germany and Turkey, were violating their rights to life, health, and culture under the UN Convention on the Rights of the Child (UNCRC) by failing to reduce greenhouse gas emissions to levels that would limit climate change to 1.5 degree of warming (in accordance with the Paris Agreement and climate science). Although dealt with separately, the five decisions of the Committee were virtually identical.

The young people were from Argentina, Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the United States. The five respondent states were chosen out of the states that had also ratified the Optional Protocol on a Communications Procedure (OPIC) to the UNCRC.<sup>3</sup> The Protocol allows children to submit a complaint to the United Nations when their rights have been violated and their own country's legal system was not able to offer a solution. Four of the twelve young people are nationals and reside in one of the respondent states (Argentina, Brazil, France and Germany), while none of the young people are nationals or residents in the fifth respondent state (Turkey). The other eight young people are nationals and residents of other states.

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<sup>1</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey (CRC 104/2019-108/2019), 23 September 2020; available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/SessionDetails.aspx?SessionID=1351&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails.aspx?SessionID=1351&Lang=en)

<sup>2</sup> <https://www.unicef.org/what-we-do/un-convention-child-rights/>

<sup>3</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, entered into force on 14 April 2014; available at: <https://www.ohchr.org/en/professionalinterest/pages/opiccrc.aspx>.

The complaints were extraterritorial in their subject matter, that is, the impacts of carbon emissions in one state upon the rights of children residing in other states. Further, the complaints concerned not only domestic actions taken or not taken by states, but also diplomatic and economic actions in relation to other states. The young people emphasised the need for international cooperation in taking effective action to curb carbon emissions.

## Climate crisis and children's rights

**Children's rights:** The UNCRC is an international treaty between states that sets out fundamental civil, political, economic, social and cultural rights specifically for children. These include the right to life, protection from violence, right to education and a relationship with their parents. There are four general principles by which all other articles should be interpreted: non-discrimination, best interest of the child, right to life, survival and development as well as the right to be heard. State parties to the UNCRC can accept additional obligations under the "Optional Protocols" on the non-involvement of children in armed conflict, their protection from sexual exploitation and a communication procedure to submit complaints to the Committee.

The Committee met with the young people for an oral hearing, without any state party representatives. The young people explained the impacts of climate change on their lives, and their views on the case. The young people said that the climate crisis is already being experienced as heat waves, the spread of infectious diseases, forest fires, extreme weather patterns, floods, and sea-level rise. They explained that they were among the most impacted by the adverse effects of climate change, both physically and mentally. The young people argued that, by failing to prevent and mitigate the consequences of climate change, the state parties had violated their rights to life and development (under Article 6 of UNCRC), to health (Article 24 UNCRC) and to practice her or his own culture, religion or language in community with other members of her or his group (Article 30), read in conjunction with Article 3 of the UN Convention on the Rights of the Child. Article 3 broadly requires all government authorities, in their activities, to take into account the best interests of the child and their protection. In its decision, the Committee recognised that as children, the young people 'are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken'. The Committee also recognised that

'states have heightened obligations to protect children from foreseeable harm'. For the purposes of establishing jurisdiction, the rights violations were reasonably foreseeable, and the young people have *prima facie* established that they have personally experienced a real and significant harm in order to justify their victim status.<sup>4</sup>

## Failure to exhaust local remedies

**Exhaustion of local remedies:** In public international law – the law between states – traditionally individuals can only seek legal redress at the international level for harm caused by a state after they have exhausted the domestic legal remedies available in that state. This reflects the principle of state sovereignty and that no state or group of states should interfere with the international affairs or external affairs of another State. Exceptions generally recognized in this context include:

- There are no reasonably available local remedies, or they do not offer reasonable possibility of redress;
- There is undue delay in the remedial process attributable to the State;
- There was no relevant connection between the injured person, and the State alleged to be responsible at the date of injury;
- The injured person is manifestly precluded from pursuing local remedies; or
- The State alleged to be responsible has waived the requirement that local remedies be exhausted.

The complaints were found inadmissible on procedural grounds. Article 7(e) of the Optional Protocol on a Communications Procedure (OPIC) provides that the Committee shall consider a communication inadmissible when 'all available domestic remedies have not been exhausted.' None of the young people had brought legal proceedings before a national court, even where there were opportunities under the domestic laws to do so.

Article 7(e), however, also states that the admissibility requirement of exhaustion of domestic remedies 'shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.' The young people argued that pursuing remedies in the state parties would be unreasonably prolonged and that they face numerous challenges, including legal and factual obstacles to access to justice.<sup>5</sup> In their view, domestic remedies would be unduly burdensome because each respondent state recognises in its domestic law that foreign states have jurisdictional immunity for sovereign acts. The young people submitted that 'they are not aware of any domestic legal avenue in the respondent state<sup>6</sup> permitting judicial review of a state's diplomatic relations.'<sup>7</sup>

<sup>4</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey (CRC 104/2019-108/2019), 23 September 2020, at 12-13.

<sup>5</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey (CRC 104/2019-108/2019) at 13.

<sup>6</sup> Communication to the Committee on the Rights of the Child, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey available at <https://childrensclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-2.pdf> at 93.

The current and former Special Rapporteurs on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment provided an amici curiae ('friends of the court') brief to the Committee.<sup>7</sup> They were strongly in support of the arguments made by the young people, arguing that seeking local remedies would be unduly prolonged and unlikely to result in effective relief.

The Committee stated that 'in the absence of any specific information by the authors that would justify that domestic remedies would be ineffective or unavailable, and in the absence of any attempt by them to initiate domestic proceedings in the State party, the authors have failed to exhaust domestic remedies.'<sup>8</sup> It concluded that the complaint was inadmissible for failure to exhaust domestic remedies under article 7 (e) of OPIC. Lawyers for the young people, said that 'The Committee instructs the youth to each file claims in 5 countries, squander years in procedural delays, and then return to the UN after they've lost in national courts.'<sup>9</sup> Bringing these national claims will take further time that the young people do not have if immediate action is to be taken on climate change.

The Committee has taken a cautious approach in relation to the exhaustion of local remedies. Some legal commentators suggested that this could be to avoid undermining cases being brought in different national jurisdictions.<sup>10</sup> The German Federal Constitutional Court, in a decision in March 2021, for example, found that 'it was conceivable in principle' that duties of protection arising from fundamental rights meant that Germany has obligations to complainants outside its borders to take action on climate.<sup>11</sup> The court further ruled that the German constitution requires Germany to participate in internationally oriented activities to address climate change and requires it to promote climate action internationally. In reference to this decision by the German Federal Constitutional Court, the Committee stated that without 'further reasoning from the authors as to why they did not attempt to pursue these remedies, other than generally expressing doubts about the prospects of success of any remedy, the Committee considers that the authors have failed to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged

violation of their rights under the Convention'.<sup>12</sup>

Arguably, however, the Committee could have distinguished between the different respondent states, and particularly the position of Turkey. As none of the young people are the nationals or residents of Turkey, the task of bringing a national case in that jurisdiction would have been particularly challenging. The Committee noted that Turkey had submitted that non-nationals, including children, are able to bring proceedings in its domestic courts and that legal aid is available. The young people argued that their claims would most likely be dismissed due to lack of standing. However, the Committee took the position that 'mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them'.<sup>13</sup>

## Cross-border responsibility for climate impacts

Non-extra territorial application of human rights in international law: Under human rights treaties governments are usually under an obligation to protect the human rights of people 'under their jurisdiction' only. The UNCRC (in Article 2) states that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction...'. This means they must protect all those who are effectively under their authority or control. If, however, carbon emissions in country X lead to human rights violations in country Y on the other side of the world (where people are under another jurisdiction) legal accountability is still a significant challenge.

The Committee observed that State parties are responsible for the cross-border impacts of carbon emissions. The Committee elaborated on this point as follows: 'In accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location'.<sup>14</sup>

It noted the Inter-American Court of Human Rights'

<sup>7</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey at 7.

<sup>8</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey at 14.

<sup>9</sup> Earthjustice, 'UN Committee on the Rights of the Child Turns Its Back on Climate Change Petition from Greta Thunberg and Children from Around the World' (Press release, 11 October 2021) available at: <https://earthjustice.org/news/press/2021/un-committee-on-the-rights-of-the-child-turns-its-back-on-climate-change-petition-from-greta-thunberg-and>.

<sup>10</sup> Aoife Nolan, 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina' EJIL:Talk, Blog of the European Journal of International Law, 20 October 2021, available at: <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/>

<sup>11</sup> Constitutional Court of Germany, Neubauer, et al. v. Germany, Case Nos. I BvR 2656/18, I BvR 78/20, I BvR 96/20 and I BvR 288/20, Judgment of 24 March 2021.

<sup>12</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey at 16 (Germany).

<sup>13</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey, at 13.

<sup>14</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey, at 11.

Advisory Opinion on the Environment and Human Rights,<sup>15</sup> which entails that: 'When transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5(1) [jurisdiction] of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.'

The Committee stated that 'situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively.' It further noted that the Advisory Opinion found that States have an obligation to prevent transboundary environmental damage or harm, and that States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority.

Central to the Committee's reasoning was that scientific evidence shows that the carbon emissions in the respondent states parties contribute to climate change. The Committee said that the States parties had individual responsibility because they had effective control over carbon emissions from their territories through their ability to regulate and enforce regulations.<sup>16</sup>

## **Reasonable foreseeability of climate harm**

In relation to the issue of whether the harms caused by climate change are foreseeable, the Committee noted that the State parties had known about climate science for decades, had signed the United Nations Framework Convention on Climate Change, and the Paris Agreement. In relation to Germany, for example, the Committee stated that 'the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.'

<sup>15</sup> Inter-American Court of Human Rights, Advisory Opinion, OC-23/17, 15 November 2017 (State Obligations In Relation To The Environment In The Context Of The Protection And Guarantee Of The Rights To Life And To Personal Integrity: Interpretation And Scope Of Articles 4(1) And 5(1) In Relation To Articles 1(1) And 2 of the American Convention on Human Rights, available at: [https://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf).

<sup>16</sup> CRC, Chiara Sacchi, et al v Argentina, Brazil, France, Germany and Turkey at 11.

<sup>17</sup> [https://www.ohchr.org/Documents/HRBodies/CRC/Open\\_letter\\_on\\_climate\\_change.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/Open_letter_on_climate_change.pdf)

<sup>18</sup> Maria Antonia Tigre, Columbia Law School, 'Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in An International Youth Climate Case' Climate Law Blog, 12 October 2021: <http://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/>

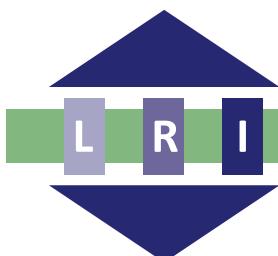
The Committee also stated that 'the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.' The Committee's reasoning on state responsibility reflects the principle of prevention or 'no harm' which is increasingly interpreted to require that states appropriately regulate carbon emissions to prevent and avoid the risk of significant harm to other states and in areas beyond national jurisdiction.

## **Final observations**

The Committee wrote an Open Letter to the young people that provided an overview of the decision and stated that: 'we want you to know that the Committee spent many hours discussing your case, and we struggled with the fact that although we entirely understood the significance and urgency of your complaint, we had to work within the limits of the legal powers given to us under the Optional Protocol on a Communications Procedure (OPIC).'<sup>17</sup>

Although the Committee dismissed the complaint, its decision contains important findings on foreseeability, causation and cross-border responsibility. Through its findings of intergenerational equity and extraterritorial responsibility, the Committee has made important statements on the extra-territorial application of human rights. By building on the advisory opinion of the Inter-American Court on Human Rights in its reasoning the Committee has contributed to the cross-fertilisation of international human rights courts and tribunals.<sup>18</sup>

It has made an important contribution to the continuing evolution of international human rights law in response to the climate crisis. Successful claims might be brought before the Committee and other international bodies in the future. The fundamental problem is that immediate and urgent action on climate is required now to mitigate emissions and avoid the worst impacts on child rights.



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