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Litigating Climate Change before the Committee on the Rights of the Child in *Sacchi v Argentina et al.*: Breaking New Ground?

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ABSTRACT

In September 2019, 16 children petitioned against Argentina, Brazil, France, Germany and Turkey before the United Nations Committee on the Rights of the Child (UNCRC) in what has come to be known as the Sacchi case. The children requested that the UNCRC find that those States had caused and perpetuated climate change by knowingly disregarding scientific evidence, and that, in so doing, they had violated the children's human rights. In October 2021, the UNCRC dismissed the petition upon the grounds that it was inadmissible, as the petitioners had failed to exhaust domestic remedies. The Sacchi case gave rise to new challenges with regards to the admissibility of the decision: beyond the exhaustion of domestic remedies, the UNCRC had to grapple with the issue of victimhood in the context of climate change and extraterritorial climate obligations conferred to States in the Convention on the Rights of the Child. The Office of the High Commissioner for Human Rights declared the Sacchi decision a 'historic ruling'. But did the UNCRC's conclusions in Sacchi truly break new ground? This article explores that question by examining the three admissibility criteria in turn: extraterritorial jurisdiction, victimhood, and the exhaustion of domestic remedies.

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1. Introduction

The phenomenon of litigating for climate change has become familiar to domestic jurisdictions around the world. More recently, a trend to pursue such litigation on the international stage has developed, with particular emphasis on international judicial and quasi-judicial human rights bodies.[1] Jurisdiction and admissibility requirements before such bodies, meticulously built over time, are now being stretched or challenged by creative climate lawyers, and grappled with by judges and experts in the courtroom. This was

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[1]Julie Fraser and Laura Henderson, 'The Human Rights Turn in Climate Change Litigation and Responsibilities of Legal Professionals' (2022) 40(1) Netherlands Quarterly of Human Rights 3.

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recently seen in *Chiara Sacchi, et al. v Argentina, Brazil, France, Germany and Turkey* (*Sacchi*), where Greta Thunberg and 15 other children petitioned against those States in September 2019 before the United Nations Committee on the Rights of the Child (UNCRC).

In this case, the 16 children sought the remedies of 'declaration of a breach, cessation of a breach, and guarantees of non-repetition'.[2] More precisely, the petitioners requested that the UNCRC find climate change to be a children's rights crisis, that States have caused and perpetuated the climate crisis by knowingly disregarding scientific evidence, and that, in so doing, they are 'violating petitioners' rights to life, health, and the prioritisation of the child's best interests, as well as the cultural rights of the petitioners from indigenous communities'.[3] In terms of cessation and non-repetition, the petitioners requested that the State respondents (i) review their laws and policies to accelerate their efforts towards climate change mitigation and adaptation, (ii) initiate cooperative international action in this pursuit, and (iii) ensure children's rights be heard in the context of the climate crisis.[4]

In October 2021, the UNCRC dismissed the petition upon the grounds that it was inadmissible because the petitioners had failed to exhaust domestic remedies.[5] The *Sacchi* case gave rise to new challenges with regards to the admissibility of the decision: beyond the exhaustion of domestic remedies, the UNCRC had to grapple with the issue of victimhood in the context of climate change and extraterritorial climate obligations conferred to States in the Convention on the Rights of the Child. The Office of the High Commissioner for Human Rights (OHCHR) declared the *Sacchi* decision a 'historic ruling'.[6] But did the UNCRC's conclusions in *Sacchi* truly break new ground? This article explores that question by examining the three admissibility criteria: extraterritorial jurisdiction (2), victimhood (3), and the exhaustion of domestic remedies (4).

2. Extraterritorial Jurisdiction

A significant question in deciding on the admissibility of the *Sacchi* petition was that of extraterritorial jurisdiction. This section will assess whether the UNCRC's findings with relation to the latter broke new ground.

Extraterritoriality has become a matter of heightened legal concern in today's globalised world, where States increasingly carry out acts that violate the human rights not only of their citizens, but of individuals on foreign territory. These include acts (or omissions) taken by States outside of their territory and acts taken on the State's territory which produce effects outside their territory.[7] Countries emitting greenhouse gases

[2]UNCRC, Communications no. 105/2019 (Brazil), no. 106/2019 (France), no. 107/2019 (Germany), *Chiara Sacchi, et al. v Argentina, Brazil, France, Germany and Turkey*, Petitioners' Reply to the Admissibility Objections of Brazil, France and Germany (4 May 2020), para. 14, 78 [*Sacchi* reply].

[3]UNCRC, *Chiara Sacchi, et al. v Argentina, Brazil, France, Germany and Turkey*, Communications 104/2019 (Argentina), 105/2019 (Brazil), 106/2019 (France), 107/2019 (Germany), 108/2019 (Turkey) (23 September 2019), paras. 326–328 [*Sacchi* petition].

[4]*Ibid.*, paras. 329–331.

[5]UNCRC, *Decision adopted by the CRC under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019*, CRC/C/88/D/104/2019 (8 October 2021) [CRC Decision], para. 10.21.

[6]OHCHR, 'UN Child Rights Committee rules that countries bear cross-border responsibility for harmful impact of climate change' Press Release (Geneva, 11 October 2021) <https://www.ohchr.org/en/press-releases/2021/10/un-child-rights-committee-rules-countries-bear-cross-border-responsibility?LangID=E&NewsID=27644> accessed 10 June 2022.

[7]Nicola Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects' (2008) Max Planck Encyclopaedia of Public International Law.

produce the effect of climate change, which impacts people worldwide. In order for people to vindicate their human rights violated by a foreign State before an international human rights judicial body, it must be established that States generally have obligations concerning the prevention of climate change to individuals outside their territory. This was argued to be the case by the petitioners in *Sacchi*: while none of them was a Turkish national or lived in Turkey, for example, it was argued that Turkey had obligations with relation to preventing climate change to non-Turkish children in other countries across the world.[8] While territorial jurisdiction is presumed, extraterritorial jurisdiction is 'exceptional and has to be established'.[9]

The value of extraterritoriality in the context of climate litigation is that it expands the breadth of the public authorised to litigate on the international stage to defend their interests. A wider public outside the territorial confines of one State may sue that State if it can be established that States have extraterritorial jurisdiction relating to their human rights obligations. This would explain some attempts by quasi-judicial bodies to accept extraterritoriality of human rights obligations with the goal of widening human rights protection. For example, in its General Comment No. 31 of 2004, the Human Rights Committee deemed the obligations under the International Covenant on Civil and Political Rights (ICCPR) to be extraterritorially applicable.[10]

In the *Sacchi* case, the UNCRC conferred extraterritorial jurisdiction to State parties to the Convention on the Rights of the Child.[11] But was this a ground-breaking finding? Although such conditions were already found in the jurisprudence of UN treaty bodies, much of the Committee's reasoning relied on jurisprudential developments by the Inter-American Court of Human Rights (IACtHR) on extraterritoriality in the environmental context. In a recent advisory opinion, the IACtHR explained that States hold obligations to refrain from committing environmental harm to individuals outside their territories.[12] The UNCRC echoed this by stating that,

> In cases of transboundary damage the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.[13]

In this sense, the UNCRC finding was not novel on the international stage. But even beyond that, the UNCRC was bound to reach such a conclusion about extraterritorial jurisdiction in climate matters for three reasons. First, interpreting the object and purpose of the Convention on the Rights of the Child indicates that it confers extraterritorial obligations to its State parties (see section 2.1 below). Second, UN human rights treaty bodies generally lean towards extraterritorial jurisdiction (section 2.2). Third, UN

[8] *Supra* 3, paras. 34–49.
[9] Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) 9(1) ESIL Reflections 3.
[10] UNHRC, *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, (29 March 2004), para. 10.
[11] *Supra* 5, para. 10.9.
[12] Advisory Opinion OC-23/17 of 15 November 2017 Requested by the Republic of Colombia, IACHR, paras. 71–104, especially 81, 95 <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> accessed 11 June 2022.
[13] *Supra* 5, para. 10.5.

human rights treaty bodies had already indicated in discrete instances that climate obligations are extraterritorial (section 2.3). Each reason will be explored in turn here.

2.1. The Object and Purpose of the Convention on the Rights of the Child

The first reason why the UNCRC was bound to reach such a conclusion about extraterritorial jurisdiction in climate matters is that the Convention on the Rights of the Child (CRC, or the Convention) was designed to confer extraterritorial obligations to its State parties – a conclusion which can be reached by interpreting the Convention's jurisdictional clause in light of the object and purpose of the treaty.

The exercise of jurisdiction, as the Grand Chamber of the European Court of Human Rights (ECtHR) has aptly put it, 'is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms'.[14] Therefore, while some international human rights conventions – such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women – do not include a clause delimiting the scope of applicability of the obligations therein, others – including the ICCPR and the CRC – have jurisdictional clauses, which provide that the scope of their responsibility is limited to their 'jurisdiction'.[15] Due in part to the slight variations in wording across different conventions and 'vagueness of the provisions in the instruments',[16] the understanding of the scope of the term 'jurisdiction' has been subject to much debate in international legal practice and scholarship.[17]

Under Article 2(1) of the CRC, States parties are obliged to respect and ensure the rights of 'each child within their jurisdiction'.[18] Are States' obligations limited to their territorial sovereignty alone, or do they extend beyond – and if so, to what degree and in which circumstances?

The CRC has already extended a State's jurisdiction beyond its territory where it considered that the State exercised effective control over individuals or territory; it has found that Israel, for example, has obligations to ensure children's rights in the Occupied Palestinian Territories.[19] From this practice, we know that States' obligations under the CRC can be interpreted to be extraterritorial by its own Committee.

The reason for this is likely an interpretation of the object and purpose of the CRC, which indicates that extraterritorial application of the obligations therein is appropriate. Indeed, Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) tells us that a treaty shall be interpreted, inter alia, in light of its object and purpose.[20] While it is

[14] *Al-Skeini* (n.12), para. 133 ff. and 138, para.130.
[15] UN, *ICCPR*, 16 December 1966, Treaty Series, vol. 999, p. 171, Art. 2(1); Council of Europe, ECHR, 4 November 1950, Art. 1.
[16] Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12(4) Chinese Journal of International Law 639 para. 38.
[17] See for example: Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford Monographs in International Law 2011).
[18] Also cited in *supra* 5, para. 10.3.
[19] CRC, *Concluding Observations of the Committee on the Rights of the Child: Israel*, UN Doc. CRC/C/15/Add.195 (4 October 2002) paras.2, 5, 57–58.
[20] UN, VCLT, 23 May 1969, Treaty Series, vol. 1155, p. 331.

difficult to define the phrase 'object and purpose' in the abstract,[21] it can be understood to connote 'the essential provisions of the treaty, which constitute its *raison d'être*', in the words of Pellet.[22] The International Court of Justice (ICJ) has relied on the preambular provisions of a treaty to interpret its object and purpose.[23] The CRC's preamble emphasises the universality of dignity, human rights, and fundamental freedoms that 'everyone is entitled to'. It also 'recogni[zes] the importance of international cooperation for improving the living conditions of children in every country'.[24] The emphasis on universality and cooperation, as well as the acknowledgment that 'childhood is entitled to special care and assistance', makes it unlikely that the drafters sought to limit child protection to national borders.

This is supported by the fact that international human rights treaties have been interpreted expansively and dynamically by UN treaty bodies in a way that supports their adaptation to evolving standards, as opposed to in a narrow or restrictive manner.[25] Other judicial bodies have buttressed this approach to human rights treaties,[26] the ECtHR stating for instance that its convention must be interpreted in a way that 'is most appropriate in order to realize the aim and achieve the objective of the treaty *not that which would restrict to the greatest possible degree the obligations undertaken by States*'.[27] It is therefore considered that international human rights treaties 'require a generous interpretation as to the scope of each right'.[28] The ICJ has reasoned that extraterritoriality is aligned with the object and purpose of the ICCPR, and other human rights treaties should be treated no differently.[29] In one author's view, the 'precedence of the rights of individuals over the rights of States' in such treaties pleads in favour of an expansive scope of human rights 'globally, and not that which restricts it to the domestic sphere',[30] contrary to the restrictive pro-State *Lotus* doctrine advanced by the ICJ's predecessor.[31]

Article 32 of the VCLT indicates that recourse may be had to supplementary means of interpretation such as the *travaux préparatoires* (preparatory work of the treaty) in order to confirm the meaning resulting from application of Article 31.[32] Certain States, such as the USA, have argued that the *travaux préparatoires* of international human rights

[21] Jan Klabbers, 'Treaties Object and Purpose' (December 2006) Max Planck Encyclopaedia of International Law, para. 6.
[22] Alain Pellet, 'Tenth Report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur, Addendum I', June 2005, pp. 14–15.
[23] See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, I.C.J. Reports 59, para. 23. See also Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 Finnish Yearbook of International Law 138, 156.
[24] UNGA, *Convention on the Rights of the Child*, 20 November 1989, Treaty Series, vol. 1577, p. 3, preamble.
[25] See for example: HRC, *General Comment No 6: The Right to Life*, 30 April 1982, UN Doc HRI/GEN/1/Rev.7 paras 4–5; Roger Judge v. Canada, CCPR/C/78/D/829/1998, UN Human Rights Committee (HRC), 13 August 2003, para 10.3.
[26] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion, 1 October 1999, IACHR, paras. 114–15.
[27] See, for example, *Wemhoff v Germany* App no. 2122/64 (ECHR, 27 June 1968). See also, for example, *Minister of Home Affairs v Fisher* [1980] AC 319, 328.
[28] John Tobin, 'The UN Convention on the Rights of the Child: A Commentary' (2019) Oxford Commentaries on International Law 12 [hereafter CRC Commentary].
[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 883, para. 109.
[30] Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) European Journal of International Law 89.
[31] *The S.S. Lotus Case* (1927) PCIJ Series A10, p. 18: international rules are binding upon states when they 'emanate from their own free will' and that 'restrictions upon the independence of States cannot […] be presumed'.
[32] *Supra* 20.

conventions such as the ICCPR call for a more restrictive reading of their jurisdictional clauses.[33] This has been refuted by the Human Rights Committee itself, the ICJ, and academic scholarship.[34] Regarding the Convention on the Rights of the Child, its *travaux préparatoires* confirm its intended expansive scope. It was understood during negotiations that Article 2 was supposed to reflect universality.[35] Although the basic working document of the CRC referred to children 'in the territories' of the State parties,[36] the OHCHR confirmed in *Legislative History of the Convention on the Rights of the Child* that this wording had been amended to 'in their territories *or* subject to their jurisdiction' following a proposed amendment made by UNICEF, which considered 'in their territories' to offer 'a more limited range of application'.[37] The Finnish delegation later proposed that only 'subject to its jurisdiction' be retained, and any reference to territories was finally deleted.[38] This is confirmed by the Commentary of the CRC.[39]

This conclusion is further supported by Article 6bis(2) of the Convention, stating that 'a child whose parents reside in different States shall have the right to maintain on a regular basis save in exceptional circumstances personal relations and direct contacts with both parents'. In requesting its proposed amendment, UNICEF had pointed out that without it, if a child, 'having left their own country in order to maintain contact with their parents who reside elsewhere, was then refused permission to re-enter their home State, the rights granted by the convention would not be able to be invoked vis-à-vis the relevant State Party because the child would not, at the time of the request, be within the territory of the State'.[40]

2.2. UN Human Rights Treaty Bodies' Leaning Toward Extraterritorial Jurisdiction

A second reason why the UNCRC, in *Sacchi*, was bound to reach its conclusion that the CRC conferred extraterritorial obligations to its State parties in relation to climate protection, is that UN human rights treaty bodies are generally said to lean favourably towards extraterritorial jurisdiction. As mentioned earlier and recalled by the UNCRC

[33] *Supra* 7, para. 4.

[34] *Supra* 10; *Supra* 29, para. 109; Ibid.

[35] OHCHR, *Legislative History of the Convention on the Rights of the Child* (2007) vol. 1, p. 322, para. 51: '[I]f article 5 of the revised Polish draft contained a reference to a certain category of children (alien children), that would undermine the universality of paragraph 1.'

[36] UN Commission on Human Rights (Working Group on a Draft Convention on the Rights of the Child), Report of the Working Group to the Commission on Human Rights (Geneva, 1981) E/CN.4/L.1575, paras. 39–56, which is reproduced in the UN Commission on Human Rights, Report of the Commission on Human Rights (New York, 1981) E/CN.4/1475, para. 289; *Supra* 35, p. 321.

[37] *Supra* 35, p. 330–332; Ibid., Report of the Working Group; Working Group had before it a text (contained in document E/CN.4/1989/WG.1/WP.2) of paragraph 1.

[38] Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers 1992) 147; *Supra* 35, p. 74–75, 83, 331–33.

[39] *Supra* 36, p. 56:

> The jurisdiction of a State party extends to national and foreign children inside and outside its territory when that territory is occupied or protected by the State or when the State exercises a form of effective control over those children outside its territory.

[40] Statement by UNICEF, in: *Supra* 35, p. 330.

in *Sacchi*, extraterritorial jurisdiction is exceptional and must be proven, and for this reason it 'should be interpreted restrictively'.[41] However, scholarship has noted that since 2017, UN human rights treaty bodies have 'proposed expansive interpretations of extraterritorial human rights [jurisdiction]'.[42] Effective control is the main yardstick by which to measure extraterritorial jurisdiction of States, as applied by the ICJ and the ECtHR for instance.[43] The two traditional models used to characterise the State's extraterritorial effective control to date are the spatial model – holding that a State has effective control over a certain territory (whether it is the official territory of that State or not)[44] – and the personal model, holding that a State has effective control over a right-holder elsewhere due to the link between the State and the right-holder.[45] UN treaty bodies are described to be the latter model's 'staunchest proponents'.[46]

But other models have emerged in the jurisprudence of UN treaty bodies. One is a capacity model, where a State can be deemed to have extraterritorial jurisdiction if it has the capability, power, or ability to protect certain people, 'on the basis of numerous contextual factors'[47] including, inter alia, nationality.[48] This was reasoned in the UNCRC's recent *L.H. et al v. France* decision.[49] Although not all UN treaty bodies have exactly the same approach to extraterritoriality, and they do not often cite each other or communicate with each other when handling individual petitions,[50] the Human Rights Committee had confirmed this 'capacity model' earlier in its 2018 General Comment No. 36.[51] Raible argues that capability is 'usually relied upon to broaden the extraterritorial scope of international human rights law'.[52] UN human rights treaty bodies do not shy away from evolving their legal reasoning to expand situations in which extraterritorial jurisdiction may be recognised. This indicates a certain favouring of extraterritorial jurisdiction, creating fertile ground for the UNCRC to confirm the existence of such obligations in the CRC with regard to climate change.

[41] *Supra* 5, para. 10.3. This was even said by inter alia the Inter-American Court of Human Rights Advisory Opinion, para. 81 and *Catan and Others v the Republic of Moldova and Russia* App. Nos. 43370/04, 18454/06. 8252/05 (ECHR, 19 October 2012).

[42] *Supra* 9.

[43] See, for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 883,* para. 111; *Al-Skeini and Others v UK* App no. 55721/07 (ECHR, 7 July 2011) paras. 133, 138.

[44] *Supra* 9.

[45] This is reflected by the Human Rights Committee who, in its General Comment No. 31, defined a 'person subject to [the State's] jurisdiction' as 'anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'. *Supra* 10.

[46] Milanovic *supra* 17, p. 175.

[47] Marko Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' (*Blog of the European Journal of International Law*, 10 November 2020) <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> accessed 13 June 2022.

[48] Ibid.

[49] CRC, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No 79/2019 and No 109/2019' UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (2 November 2020), para. 9.7.

[50] See Elena Pribytkova, 'Extraterritorial Obligations in the United Nations System: U.N. Treaty-Based Bodies' in Mark Gibney et al. (eds), *Research Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), pp. 95–109.

[51] UNHRC, *General comment no. 36, Article 6 (Right to Life)*, CCPR/C/GC/36 (3 September 2019) para. 63.

[52] Lea Raible, 'Extraterritoriality Between a Rock and Hard Place' (2021) 82 Questions of International Law Journal 7, p. 12; Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford University Press 2020), p. 42.

2.3. UN Human Rights Treaty Bodies' Prior Indication that Climate Obligations Were Extraterritorial

A final indication that the UNCRC would confirm that States have extraterritorial climate obligations in *Sacchi* is that, prior to that decision, UN treaty bodies already took the view that States have extraterritorial human rights obligations in matters of climate change.

In 2019, five of these treaty bodies issued a joint statement on human rights and climate change which emphasised that 'State parties have obligations, *including extra-territorial obligations*, to respect, protect and fulfil all human rights of all peoples'[53] and that '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'.[54] Both the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) had made similar statements in 2018.[55] Beyond statements, UN treaty bodies – including the CESCR and the CEDAW – have also underlined States' extraterritorial climate obligations in their 'Concluding Observations' in response to States' periodical reports.[56]

The UNCRC itself has been no stranger to such assertions in the past either. It has warned specific States on the dangers of environmental degradation for children: Spain was instructed to 'carry out an assessment of the impact of air pollution from coal-fired power plants on children's health',[57] while Japan was told to, inter alia, 'reduc[e] its emissions of greenhouse gases in line with its international commitments to avoid a level of climate change threatening the enjoyment of children's rights'.[58] It had also already clarified that States are generally obliged to protect the rights of children beyond their territorial borders in its General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights.[59] But most relevantly, the UNCRC has confirmed that climate obligations towards children are extraterritorial, telling Norway to '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'.[60]

[53]OHCHR, 'Five UN human rights treaty bodies issue a joint statement on human rights and climate change: Joint Statement on 'Human Rights and Climate Change' (16 September 2019) para. 1 (emphasis added) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> accessed 13 June 2022. This was recalled in *supra* 5, para. 10.6.

[54]Ibid.

[55]OHCHR, 'Climate change and the International Covenant on Economic, Social and Cultural Rights: Statement of the Committee on Economic, Social and Cultural Rights' (8 October 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E> accessed 13 June 2022; CEDAW, *General Recommendation No. 37 'on the gender-related dimensions of disaster risk reduction in the context of climate change'*, CEDAW/C/GC/37 (13 March 2018) para. 43.

[56]CESCR, *Concluding Observations on the 4th Periodic Report of Argentina*, E/C.12/ARG/CO/4 (1 November 2018) paras. 13–14; CEDAW, *Concluding Observations on the 8th Periodic Report of Australia*, CEDAW/C/AUS/CO/8 (25 July 2018) paras. 29–30; CEDAW, *Concluding Observations on the 9th Periodic Report of Norway*, CEDAW/C/NOR/CO/9 (22 November 2017) paras 14–15.

[57]CRC, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Spain,* CRC/C/ESP/CO/5-6 (5 March 2018) para. 36.

[58]CRC, *Concluding Observations on the Combined 4th and 5th Periodic Reports of Japan*, CRC/C/JPN/CO/4-5 (5 March 2019) para 37.

[59]CRC, *General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, CRC/C/GC/16 (17 April 2013) para. 39.

[60]CRC, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Norway*, CRC/C/NOR/CO/5-6 (Geneva, 4 July 2018) para 27 (emphasis added).

Thus, in statements, General Comments, and Concluding Observations, UN treaty bodies have affirmed States' extraterritorial obligations in relation to climate change – particularly towards children. *Sacchi* was therefore not novel in its finding that States have extraterritorial human rights obligations towards children in the context of climate change. However, it was the first time that this assertion was claimed in a decision handed down in response to a petition.

Such a quasi-judicial decision could have an impact not only because the ICJ has stated that treaty bodies' interpretations should be accorded 'great weight'.[61] Confirmation of such a position in the jurisprudence of a treaty body in pending climate cases will likely have broader repercussions within the scope of its functions. Indeed, doctrine has confirmed that treaty bodies' quasi-judicial decisions in response to individual petitions are increasingly reflected in their General Comments.[62] With relation to the *Sacchi* decision, the UNCRC announced in June 2021 that it had resolved to prepare its next General Comment on Children's Rights and the Environment with a Special Focus on Climate Change.[63] A treaty body's decision in response to a petition may thus influence its renewed interpretation of the content and scope of certain human rights provisions that all State parties must respect.

2.4. Concluding Remarks

In sum, the UNCRC's finding that extraterritorial obligations in relation to climate change were conferred to the CRC's State parties was largely foreseen and therefore did not break new ground. Not only did the UNCRC rely on the IACtHR's advisory opinion to come to its conclusions, but there were several indications that such a finding would be reached: this was implied by the Convention's object and purpose, while UN human rights treaty bodies have been known to expand extraterritorial obligations and had already confirmed that States had them in relation to climate change. Nonetheless, this reinforced acknowledgement of States' extraterritorial obligations in relation to climate change further allows victims across borders to sue foreign governments for their human rights violations, thereby expanding possibilities for States to be held accountable. In this sense, the UNCRC's finding on extraterritoriality represented a step forward.

3. Victimhood

The assessment of the petitioners' victim status by the UNCRC in *Sacchi* was another important point of consideration in deciding on the admissibility of the petition. In this section, the extent to which the findings in that respect were ground-breaking will be discussed.

[61] *Supra* 29, paras. 107–11.

[62] Lutz Oette, 'The UN Human Rights Treaty Bodies: Impact and Future' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2019), 105.

[63] OHCHR, 'The UN Committee on the Rights of the Child commits to a new General Comment on Children's Rights and the Environment with a Special Focus on Climate Change' (4 June 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27139&LangID=E> accessed 15 June 2022. In pursuit of this objective, it launched a questionnaire for children to share their views and experiences on the environment and climate change: https://childrightsenvironment.org.

Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (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 […]'. Victims here can aptly be defined as 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law'.[64] A child must therefore be considered a victim to bring a complaint, and applicants before UN treaty bodies generally have the burden of proof to show that they are 'actually affected'.[65]

This creates a potential hurdle in the climate context, as climate cases are the type to be brought actio popularis, defined as a 'right resident in *any member of a community* to take legal action in vindication of a public interest'.[66] Anyone – as opposed to the victim of a violation – may therefore take legal action on behalf of everyone. Such a prerogative is attractive in the context of climate litigation, as climate change is considered to be a global issue concerning everyone. Therefore, litigating for climate change as an actio popularis allows more people to sue governments without necessarily having to prove that they are victims in this legal sense. In the famous *Urgenda* case, for example, the Dutch foundation Urgenda opened a lawsuit against the Netherlands on the grounds of Article 3:305A of the Dutch Civil Code, allowing for any foundation protecting a general interest to bring to court any legal claim to protect that interest.[67] The foundation itself was not required to be a victim or be directly affected by the violation of the Netherlands.

However, international judicial human rights bodies generally do not allow for such actio popularis claims, which are in tension with the typical international human rights litigation model requiring applicants to be victims who were directly injured. Article 5(1) OPIC is clear in only authorising an individual or group claiming to be victims to file a petition. A 'collective complaints procedure'[68] – where someone who is not a victim brings a complaint on behalf of a group of victims – is not authorised, and has been vehemently opposed by States in the negotiation processes for other human rights conventions, such as the International Covenant on Economic, Social and Cultural Rights, for instance.[69] The Human Rights Committee, guardian of the

[64]UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147, p. 5, para. 8.

[65]UNHRC, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 (7 January 2020) para. 8.4; see also UNHRC, *Mohamed Rabbae, A.B.S and N.A. v. The Netherlands*, CCPR/C/117/D/2124/2011 (29 March 2017) para. 9.5.

[66]*South West Africa* (*Ethiopia and Liberia v South Africa*), *Judgment of 18 July 1966, I.C.J. Reports 299*, p. 47, para. 88 (emphasis added).

[67]*State of the Netherlands v. Urgenda Foundation* (Dutch: *De Staat Der Nederlanden v. Stichting Urgenda*) ECLI:NL:HR:2019:2006 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>. An English translation of the judgement is available here: <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 10 June 2022.

[68]Lina Johansson, 'The Third Optional Protocol to the International Convention on the Right of the Child: A Success or a Failure for the Enforcement of Children's Rights?' (2015) 2(1) Queen Mary Human Rights Review 74.

[69]HRC, A/HRC/6/8, *Report of the Open-ended Working Group to consider on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session*, 30 August 2007, para. 24; HRC, A/HRC/8/7, *Report of the Open-ended Working Group to consider on an Optional Protocol to the International Covenant on Economic Social and Cultural Rights on its fifth session*, 23 May 2008, para. 44.

ICCPR, has a similar practice, having deemed one petition inadmissible because 'the author of a communication must himself claim, in a substantiated manner, to be the victim of a violation by the State party concerned', yet 'the authors of the communication have not demonstrated that they are themselves actually and personally affected'.[70] With the exception of the African Court on Human and Peoples' Rights, regional human rights courts have demonstrated similar reluctance to actio popularis claims.[71]

Therefore, the petitioners in *Sacchi* had to demonstrate that they were victims of human rights violations because the government respondents were not upholding their climate obligations. While the connection between human rights and climate change has been established in recent practice[72] and academic scholarship,[73] the challenge in climate litigation is to *prove* that individuals have been victims of a State's acts or omissions, suffering harm as a result. This could only be proven through a careful assessment of 'climate science'.[74] Unable to make such assessments themselves, judicial bodies have been observed to turn to the reports of scientific experts. For instance, the Dutch Supreme Court in *Urgenda* successfully drew conclusions about climate change based on IPCC and United Nations Environment Programme scientific reports.[75] The question in *Sacchi* was how these would be interpreted and if the UNCRC would deem them sufficient or of a high enough standard to establish the required causal link. The petitioners argued extensively that such a link existed.[76] Without giving too much insight into what threshold it established in its decision-making, the UNCRC considered that the *Sacchi* petitioners 'personally experienced a real and significant harm in order to justify their victim status'.[77]

Victimhood will remain an admissibility requirement before international and regional human rights judicial bodies; they are unlikely to change their stance on actio popularis claims anytime soon. The flexibility in interpreting victimhood could, however, evolve over the years before bodies such as the ECtHR, which has stated that 'the term "victim" […] must be interpreted in an evolutive manner in the light of conditions in contemporary society. […An] excessively formalistic […] interpretation of that concept would make protection of the rights guaranteed by the Convention

[70] *Group of associations for the defence of the rights of disabled and handicapped persons in Italy and Persons signing the communication (on behalf of Disabled and handicapped persons in Italy) v Italy*, Admissibility, CCPR/C/21/D/163/1984, Communication No 163/1984, IHRL 2531, UNHRC, 10 April 1984, para. 6.2. See also Erica De Wet, 'Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1997) 13 (4) South African Journal on Human Rights 514, 533.

[71] Françoise Hampson, Claudia Martin, Frans Viljoen, 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa (2018) 16(1) International Journal of Constitutional Law 161, 180–182 (section 3.1).

[72] *Teitiota*, *supra* 65, para. 9.4; David Boyd, United Nations Human Rights Special Procedures: Special Rapporteurs, Independent Experts, and Working Groups, *Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment*, A/74/161 (2019), pp. 18 et seq.; HRC, *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: Mapping Report*, A/HRC/25/53 (2013).

[73] See, for example: Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 31–42; Sébastien Duyck et al., 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12(3) Carbon & Climate Law Review 191.

[74] *Supra* 2, para. 14.

[75] *Supra* 67.

[76] *Supra* 3, para. 50.

[77] *Supra* 5, para. 10.14.

ineffectual and illusory'.[78] This could expand the breadth and reach of the public aspiring to litigate on the international stage for climate matters. But even if it does not, the precedent had already been set on the international stage for people to be victims of human rights violations in relation to climate change obligations. Indeed, the UN Human Rights Committee had already acknowledged the victim status of individuals for the purposes of admissibility in a climate-related case: *Ioane Teitiota v. New Zealand*.[79]

In this decision, Kiribati national Ioane Teitiota petitioned against New Zealand for having rejected his asylum request, thereby exposing him to a lack of fresh drinking water, an inability to sustain a livelihood via agriculture due to soil salinisation, and flooding, inter alia.[80] He argued that New Zealand, in so doing, had violated his right to life under Article 6(1) ICCPR. The UNHRC explained that victimhood could be established if the State party's actions resulted in a violation or presented an existing or imminent threat to the individual's enjoyment of this right.[81] It then clarified that: 'the question before the Committee [was] not whether he was, at the time of submission, a victim of a past violation of the Covenant, but rather whether he has substantiated the claim that he faced upon deportation a real risk of irreparable harm to his right to life'.[82] At the admissibility stage, the UNHRC concluded that such a risk indeed existed, therefore establishing victimhood.[83]

The finding with respect to victimhood in *Sacchi* therefore did not break new ground. Rather, it reinforced a finding that another UN treaty body had made at the admissibility stage one year prior. Nonetheless, this important reinforcement, as well as the example set by judicial bodies relying on climate science for admissibility evidence, could pave the way for further litigation possibilities on the international level before other UN human rights treaty bodies and regional human rights courts. In fact, in September 2022 the UNHRC found that Australia's failure to sufficiently protect Torres Strait Islanders – victims of adverse impacts of climate change – was a breach of the ICCPR.[84] The precedent with respect to victimhood will likely continue to be bolstered in international human rights jurisprudence.

4. The Exhaustion of Domestic Remedies

It has been established that the UNCRC's findings in relation to victimhood were not ground-breaking, nor were its conclusions on extraterritorial obligations. The third admissibility requirement addressed in this article is also arguably the most controversial: the exhaustion of domestic remedies. Indeed, the UNCRC decided that *Sacchi* was inadmissible because the children had failed to exhaust judicial remedies in their respective countries before approaching the UNCRC.

[78] *Gorraiz Lizarraga and others v. Spain* App no. 62543/00 (ECHR, 17 April 2004), para 38. See also *Stukus and Others v. Poland* App no 12534/03 (ECHR, 1 April 2004), para 35; *Zięta v. Poland* App no. 64972/01 (ECHR, 12 May 2009), para. 54–59. Also see ECHR, *Practical Guide on Admissibility Criteria*, last updated 20 April 2022, p. 11, para. 19 <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 11 June 2022.
[79] *Teitiota*, *supra* 65, para. 8.4–8.6.
[80] Ibid., para. 2.5–2.6.
[81] Ibid., para. 8.4.
[82] Ibid., para. 8.5.
[83] Ibid., para. 8.6. It was ultimately concluded by the UNHRC that the risk could not be established: para. 10.
[84] UNHRC, *Torres Strait Islanders*, CCPR/C/135/D/3624/2019 (22 September 2022).

The condition of exhausting domestic remedies in international law requires that before taking an issue to an international judicial body, an individual has sought to resolve it on the domestic plane by seeking legal remedies before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.[85]

In response to objections raised by the State respondents in *Sacchi*, the 16 children claimed that arguing their cases in separate domestic lawsuits in each country would be 'futile' and 'unlikely to secure any effective relief', in contrast to proceedings before the UNCRC, which would have 'far-reaching ramifications'.[86] Needless to say, disappointment resonated following the UNCRC's decision, with the children's legal representatives reporting that the Committee had 'delivered a rebuke to young people around the world who are demanding immediate action on the climate crisis. In dismissing the case, the Committee told children that climate change is a dire global emergency, but the UN's doors are closed to them.'[87]

I submit that it would have been challenging for the UNCRC to waive the admissibility requirement of the exhaustion of domestic remedies, for two main reasons: this would potentially undermine its past jurisprudence on the question (section 4.1), as well as its own legitimacy (section 4.2). In this section, it will therefore be argued that the UNCRC's restrictive finding with relation to the exhaustion of domestic remedies did not break new ground due to the challenges in waiving the admissibility requirement. However, in adopting such a restrictive approach to this admissibility criterion, the UNCRC provided a clear blueprint to facilitate future climate claims on the international level.

4.1. Undermining the UNCRC's Jurisprudence

All UN treaty bodies require petitioners to exhaust domestic remedies before filing a petition. However, Article 7(e) OPIC exempts this 'where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief'.[88]

The children in *Sacchi* did not attempt to initiate any domestic proceedings in their State parties, citing both reasons for exemption and adding that 'it would be unduly burdensome for them'.[89] Regarding domestic proceedings being unlikely to bring effective relief, the children argued that 'domestic courts would most likely dismiss their claims […] because of the non-justiciability of foreign policy and foreign sovereign immunity'.[90] However, the UNCRC noted that this was only in relation to a specific form of remedy,[91] and took note of the other forms of remedy listed by the defendant State,[92] commenting that the children had not provided evidence that they would be barred from such

[85]ILC, *Draft Articles on Diplomatic Protection* (2006) Art. 14(2).
[86]*Supra* 2, para. 16.
[87]Bridget Uebel, 'UN Committee on the Rights of the Child Turns Its Back on Climate Change Petition from Greta Thunberg and Children from Around the World' (*EarthJustice,* 11 October 2021) <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> accessed 15 June 2022.
[88]Similar wording is in *supra* 85, Article 15.
[89]*Supra* 5, para. 10.18.
[90]Ibid., para. 10.18.
[91]Ibid., para. 10.18–10.19.
[92]Ibid., para. 10.18.

proceedings.[93] The UNCRC has clarified what is meant by 'unlikely to bring effective relief' in *D.C. v. Germany* (2018):[94]

> domestic remedies need not be exhausted if they objectively have no prospect of success, for example in cases where under applicable domestic laws the claim would inevitably be dismissed or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[95] However, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.[96]

The children had not provided evidence that this would be the case. The second exemption from the requirement to exhaust local remedies requires proving that domestic proceedings would be unreasonably prolonged. The petitioners argued that 'the unique circumstances of their case meant that they would have to pursue five separate cases, in each respondent State party, each of which would take years'.[97] The UNCRC dismissed this argument, stating that the petitioners had failed to provide any specific information to prove that it would be unreasonably prolonged.[98]

The UNCRC's reasoning sheds light on the fact that the burden of proof rests on the petitioner, and that the UNCRC seems to set a fairly high threshold. We know from *D.C. v. Germany* that 'the current constitutional texts and a few general precedents' were insufficient for the UNCRC to find that there was no prospect of success.[99] The legal representatives in *Sacchi* argued that there were 'tomes of case law and expert evidence showing that none of those cases would succeed' and that '[i]n the cases of Germany and Turkey, for example, the Committee disregarded national court decisions that would deny foreign nationals the right to bring environmental claims'.[100] In the *Sacchi* petition, however, the general approach was to explain the unduly burdensome nature of the requirement in terms of cost and process, without specifically referring to case-law from any of the respondents' countries.[101] The UNCRC has indicated in decisions such as *D.C. v. Germany* that previous jurisprudence should be elaborate and specific, and 'further reasoning' should be provided by the authors to justify why they had not pursued domestic remedies fully or at all.[102]

In *D.C. v. Germany*, the UNCRC found that 'the author [did] not substantiate his allegations [that there is no prospect of success in seeking a constitutional remedy] through previous jurisprudence' and that he should 'not be considered to be bound to fail simply

[93]Ibid., para. 10.18.
[94]CRC, *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 60/2018*, CRC/C/83/D/60/2018 (10 March 2020), para. 6.5.
[95]See, for example, UNHRC, *Pratt and Morgan v. Jamaica*, Communication No. 210/1986 & 225/1987, UN Doc. CCPR/C/35/D/225/1987 (1989) paras. 12.3–12.5; *Barzhig v. France*, Communication No. 327/1988, UN Doc. CCPR/C/41/D/327/1988 (1991) 92 para. 5.1; and *Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003) para. 9.4.
[96]See, for example, UNHRC, *R.T. v. France*, Communication No. 262/1987, UN Doc. CCPR/C/35/D/262/1987 (1989) para. 7.4; and *S.S. v. Norway*, Communication No. 79/1980, UN Doc. CCPR/C/15/D/79/1980 (1982) para. 6.2. See also *Sadic v. Denmark,* CERD/C/62/D/25/2002, para. 6.5; *Supra* 5, para. 10.17.
[97]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' (*Blog of the European Journal of International Law*, 20 October 2021) <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/> accessed 15 June 2022.
[98]Ibid.
[99]*Supra* 94, para. 6.6.
[100]*Supra* 87.
[101]*Supra* 3, paras. 309–318.
[102]*Supra* 94.

because of the current constitutional texts and a few general precedents'.[103] Because of this, the UNCRC assessed the petitioner's argument to reflect 'the mere doubt of prospects of success' without 'further reasoning from the author as to why he did not attempt to pursue the constitutional remedy'.[104]

It would have perhaps been challenging for the UNCRC to overlook such recent findings and adopt a lower threshold in *Sacchi*. It was, however, recently implied that the threshold should be lowered in the climate context. In the abovementioned *Ioane Teitiota v. New Zealand*, one member dissented that the State party had placed an unreasonable burden of proof on the petitioner, which was inappropriate in the context of climate change.[105] He argued that the Committee should have 'handle[d] critical and significantly irreversible issues of climate change with an approach that seeks to uphold the sanctity of human life',[106] and that a 'potentially unreachable standard' must be counterbalanced with the need to consider all relevant facts and circumstances of the case.[107]

The reasonableness of such requirements in the specific context of climate litigation, widely understood to concern a global emergency, may indeed be questioned. In *Duarte Agostinho*, before the ECtHR, the applicants (consisting of 16 Portuguese children) argue for exemption from pursuing domestic remedies because 'it would not be feasible to pursue domestic proceedings against each of the States, considering the urgency of climate change'.[108] This was emphasised by the children in *Sacchi* as well, who claimed in their initial communication that the world is 'going over the edge',[109] that non-action would 'endanger the lives of over 2 billion children by 2100'[110] and that '[i]f the world does not reduce its carbon emissions urgently and drastically, the impacts of the climate crisis will significantly worsen'.[111] The Paris Agreement also acknowledges the urgency of mitigating climate change.[112] Does the unique and dire condition of climate change justify the UNCRC adopting a lower threshold – or even no threshold at all? While that can certainly be argued, an important consideration to make in answering this question is the impact of such a finding on the Committee's legitimacy.

4.2. Undermining the UNCRC's Legitimacy

The UNCRC's decision may have been underpinned by a desire to uphold its legitimacy in various respects. Legitimacy may broadly be understood as a 'right to rule'[113] or an

[103] Ibid.
[104] Ibid.
[105] *Teitiota supra* 65, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), para. 1.
[106] Ibid.
[107] Ibid., para. 3.
[108] Daria Stanculescu, 'The Requirement to Exhaust Domestic Remedies and the Future of Climate Change Litigation before the ECtHR' (*Public International Law Policy Group,* 26 April 2021) <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/4/26/the-requirement-to-exhaust-domestic-remedies-and-the-future-of-climate-change-litigation-before-the-ecthr> accessed 15 June 2022.
[109] *Supra* 2, para. 68.
[110] Ibid.
[111] Ibid., para. 167.
[112] The Conference of the Parties, *Paris Agreement*, FCCC/CP/2015/10/Add.1, 12 December 2015, UN Treaty Collection TREATIES-XXVII.7.d of 17 March 2016, Preamble, 'Recognizing the need for an effective and progressive response to the *urgent threat* of climate change on the basis of the best available scientific knowledge' (emphasis added).
[113] Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 79; Daniel Bodansky, 'Legitimacy in International Law and International

'authority […] perceived as justified',[114] according to standards such as justice, democracy, effectiveness, or technocratic expertise.[115]

First, the exhaustion of domestic remedies holds an esteemed place in international law. As well as being featured in multiple international conventions[116] and codified by the International Law Commission in its Articles on State Responsibility[117] and on Diplomatic Protection,[118] the exhaustion of local remedies criterion has been consistently consolidated as customary practice by the ICJ and its predecessor in many cases.[119] It is therefore well anchored as an international legal requirement; side-stepping it due to the urgency of climate change would not have been taken lightly and may have called the Committee's legitimacy into question.

Second, the UNCRC's decision to respect its own legal framework, including the jurisprudence developed around the exhaustion of domestic remedies, was likely also been motivated by its desire to uphold its legitimacy. It explained to the 16 children 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.'[120] Nolan argues that 'the decision reflects a strong grasp of principle, procedure and pragmatism: the Committee has made clear that climate change is a child rights crisis but one that it can only respond to where the admissibility criteria it is required to apply are complied with'.[121]

There may have been a desire to preserve the UNCRC's legitimacy before States in particular. The decision to waive the requirement of domestic remedies would have certainly generated staunch criticism from States.[122] There is no denying, as clearly stipulated by the UNCRC, that 'States parties still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it' even if it is a 'global collective issue that requires a global response'.[123] Thus, the rationale behind the requirement to exhaust domestic remedies is to consider 'fairness to the

Relations' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 324; Daniel Bodansky, 'The Concept of Legitimacy in International Law' in Rudiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer-Verlag 2008) 313; Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman and Geir Ulfstein, 'Legitimacy and International Courts – A Framework' in Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, and Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 3.

[114]Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) American Journal of International Law 596, 600; Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 George Washington International Law Review 107, 5.

[115]See further Harlan Grant Cohen, *supra* 139, p. 3. 'Moral legitimacy' has also been separately identified in Grossman, Ibid.

[116]ECHR *supra* 23; OAS, *American Convention on Human Rights,* 22 November 1969), Article 35, Article 46; UN, *Optional Protocol I, ICCPR,* 16 December 1966, Treaty Series, vol. 999, p. 171, Article 5; UNCLOS, 19 December 1982, *Treaty Series*, vol. 1833, p. 3, Article 295.

[117]ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), Article 44.

[118]*Supra* 85, Article 14.

[119]See, for example: *Panevezys-Saldutiskis Railway* (1939) PCIJ Series A/B, pp. 18–21; *Interhandel (Switzerland v. United States of America), Judgment of 21 March 1959, Preliminary Objections, I.C.J. Reports 205*, p. 27; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment of 20 July 1989, I.C.J. Reports 563*, p. 42; *Anglo-Iranian Oil Co. case, Judgment of 22 July 1952, Preliminary Objection, I.C.J. Reports 1952*, para. 10; *Ambatielos case (Greece v. United Kingdom), Merits, Judgement of 19 May 1953, I.C.J. Reports 1953*, paras. 4–6; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgement of 30 November 2010, I.C.J. Reports 1001, para. 32–49.

[120]OHCHR, Committee on the Rights of the Child, 'Open Letter on Climate Change' <https://www.ohchr.org/sites/default/files/2021-12/Open_letter_on_climate_change.pdf> accessed 16 June 2022.

[121]*Supra* 97.

[122]Ibid.

[123]*Supra* 5, para. 10.8.

[allegedly responsible] host State', according to Crawford.[124] The ICJ explained in *Interhandel* that through this requirement, 'the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system'.[125] The fact that the UNCRC's existence and survival hinge on the cooperation of States may explain its reticence to do away with the requirement in this context. Çalı therefore comments that the UNCRC's decision allows it to 'fend off backlash from states, whilst at the same time telling the children that the Committee is willing to take on the climate crisis'.[126]

Practical reasons impacting the UNCRC's legitimacy may have also been on the minds of its members when deciding on the requirement to exhaust domestic remedies. For instance, discarding such a requirement would set a precedent and potentially open floodgates that the Committee would not be able to handle, against the background of the well-known backlog issues of UN treaty bodies in general, which the UN Secretary-General recently anticipated 'would need more than six years to clear […], without considering any new individual communications received'.[127] An inability to handle volumes of cases may impact the UNCRC's long-term legitimacy.

4.3. A Blueprint for Future International Climate Litigation?

Litigating children are keen for international judicial and quasi-judicial bodies to make rulings on States' climate change obligations as expediently as possible. Similar to *Sacchi*, the children in *Duarte Agostinho* argued that 'pursuing domestic remedies in each of the States would impose an unreasonable burden on them'.[128] In my view, however, the UNCRC's decision with relation to the exhaustion of domestic remedies provides a blueprint towards successful future attempts in international climate change litigation, rather than an eternal defeat. While the legal representatives in *Sacchi* state that 'the Committee instructed the youth to squander years waiting for inevitable dismissal', certain aspects in the practice of judicial and quasi-judicial human rights bodies could inspire more optimism.[129]

First, it has been made clear that the burden of proof rests on the applicants to substantiate that the exemptions are applicable to them with jurisprudence as opposed to 'mere doubts or assumptions', as explained above.[130] Wewerinke-Singh reflects that domestic remedies would be unavailable in countries with 'little or no control over the entities that are mostly responsible for greenhouse gas emissions' or 'relatively minor historical contributions to climate change [and therefore] minor responsibility for compensating victims'.[131] Such

[124] James Crawford, Thomas D. Grant, 'Local Remedies, Exhaustion of' (January 2007) Max Planck Encyclopedias of Public International Law, para. 7.
[125] *Interhandel, supra* 119, p. 27.
[126] Başak Çali, 'A Handy Illusion? Interpretation of the 'Unlikely to Bring Effective Relief' Limb of Article 7(e) OPIC by the CRC in Sacchi et al.' (*Blog of the European Journal of International Law*, 1 November 2021). <https://www.ejiltalk.org/a-handy-illusion-interpretation-of-the-unlikely-to-bring-effective-relief-limb-of-article-7e-opic-by-the-crc-in-Sacchi-et-al/> accessed 16 June 2022.
[127] UNGA, *Report of the Secretary-General, 'Status of the human rights treaty body system'*, A/74/643, 10 January 2020, para. 18.
[128] *Supra* 108.
[129] *Supra* 13.
[130] *Supra* 94, para. 6.5.
[131] Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9(3) Climate Law 224.

obstacles could accordingly serve as evidence that a domestic proceeding would be unlikely to bring effective relief, if sufficient evidence of this can be demonstrated.

But how long would the applicants have to wait before they could be considered to have exhausted domestic remedies? There is no uniform specific time frame that UN treaty bodies apply in the interpretation of 'unreasonably prolonged', as this often depends on different factors specific to the case. However, international human rights law practice indicates that certain circumstances of the *Sacchi* children may expedite the process in the context of a second attempt in the future.

During the drafting process of the OPIC, it was suggested that 'in situations where children do not have the capacity to pursue domestic remedies the criterion should not be strictly applied'.[132] Domestic proceedings involving children have generally been deemed 'unreasonably prolonged'. For example, the Human Rights Committee found in *Sandra Fei v. Colombia* that '[domestic] judicial remedies should operate swiftly' in custodial disputes and disputes over access to children.[133] Another human rights body, the Committee for the African Charter for the Rights and Welfare of the Child, has stated that 'the unduly prolonged [domestic] court process in the present Communication is not in the best interests of the child principle (Article 4 of the Charter)'.[134] The best interest of the child was therefore a determinative factor in deciding whether domestic remedies were unreasonably prolonged. On the basis of that ruling, it has been argued that this overarching principle at the heart of international child protection has the capacity to render the requirement of exhausting domestic remedies more 'child-friendly'.[135]

Other relevant factors considered by treaty bodies in assessing the unreasonably prolonged nature of domestic proceedings have included the age of complainants or whether they somehow caused the delay.[136] More generally, empirical studies have shown that UN treaty bodies tend to consider two years insufficient,[137] and over three years sufficient.[138] Such indications can be helpful as the pursuit for climate justice on the international stage continues.

5. Conclusion

While the law is a blunt instrument that is limited by its slow pace through the courts and related bodies, it has been emphasised that lawyers must accept that they may not be able to

[132]Peter Nevell, Chair of the UN Committee on the Rights of the Child, *Submission to Open-ended Working Group of the Human Rights Council, considering the possibility of elaborating an Optional Protocol to provide a communications procedure for the Convention on the Rights of the Child* (2009) para. 44.

[133]UNHRC, *Sandra Fei v. Colombia*, Communication No. 514/1992, Views of 25 April 1995, UN Doc. CCPR/C/53/D/514/1992 (1995) para. 5.1 (see also para. 3.7), <http://undocs.org/CCPR/C/53/D/514/1992> accessed 16 June 2022.

[134]ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, 22 March 2011, para. 32.

[135]*Supra* 68; see also Durojaye and Foley, 'Making a First Impression: An Assessment of the Decision of the Committee of Experts in the Nubian Children Communication' (2012) 12(2) African Human Rights Law Journal 564, 571–572.

[136]International Justice Resource Center, 'Exhaustion of Domestic Remedies in the United Nations System' (August 2017) <https://ijrcenter.org/wp-content/uploads/2018/04/8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.pdf> accessed 16 June 2022. Including the specific matter at issue in the case, such as child custody; the complexity of the case; whether the delay is caused by the complainant or the State party; and the age of a complainant, among other things.

[137]Ibid.

[138]Ibid.

present perfect, watertight cases, but need to work with the avenues at their disposal and be bold in presenting climate change legal challenges.[139]

The *Sacchi* case before the UNCRC was an example of this, challenging the traditional confines of admissibility criteria due to the uniqueness of the climate crisis. Specifically, the UNCRC had to grapple with the issue of victimhood in the context of climate change, extraterritorial climate obligations conferred to States in the Convention on the Rights of the Child, and the exhaustion of domestic remedies. Did these new questions lead to new findings? Did the UNCRC's conclusions in *Sacchi* break new ground?

The UNCRC's findings in relation to victimhood had already been established by the UNHRC in the admissibility stage of *Ioane Teitiota v. New Zealand*. As for extraterritorial jurisdiction, this article has explained that the finding was predictable given the Convention on the Rights of the Child's object and purpose, and the UN treaty bodies' boldness with extraterritoriality in general and recent approaches to the specific question of extraterritorial climate obligations. Finally, the UNCRC would have broken new ground in relation to the requirement of the exhaustion of domestic remedies had it decided that the children were exempt due to the urgency of climate change. It very much stuck to the status quo in upholding the strict conditions, however, and in so doing it did not break new ground.

A more important and forward-looking question would be whether this decision, beyond being ground-breaking, represents progress for international climate change litigation. I believe this to be the case. While some celebrated the UNCRC's progressive findings on victimhood and extraterritoriality,[140] petitioners and practitioners alike expressed disappointment at the final decision in relation to the exhaustion of domestic remedies.[141] The UNCRC's buttressing findings on victimhood and extraterritorial jurisdiction will likely pave the way for more international climate disputes before regional or international human rights judicial or quasi-judicial bodies. But perhaps counterintuitively, so will its finding on the exhaustion of domestic remedies: there is now greater clarity in the evidence required to be exempt, facilitating any future attempts. Thus UN Special Rapporteurs David R. Boyd and John H. Knox had long anticipated that the *Sacchi* decision would 'provide vital and timely guidance to other human rights bodies, international and domestic tribunals, States, international organisations, communities, and individuals all over the world.'[142] Indeed, the impact of the *Sacchi* decision on the international stage will unfold in the years to come.

Disclosure Statement

No potential conflict of interest was reported by the author.

[139] Ivano Alogna, Eleanor Clifford, British Institute of International and Comparative Law, 'Climate Change Litigation: Comparative and International Perspectives', published version of the Conference on Thursday 16 January 2022, pp. 18–19 <https://www.biicl.org/documents/88_climate_change_litigation_comparative_and_international_report.pdf> accessed 16 June 2022.

[140] *Supra* 6.

[141] *Supra* 13. One of the petitioners also called it a 'delusional ruling and turn of events' – see <https://twitter.com/AlexandriaV2005/status/1447641079214268416>

[142] *Supra* 3, *Amici curiae* brief of Special Rapporteurs on Human Rights and the Environment in support of admissibility, para. 16.