CATÓLICA LAW REVIEW

The Development of the UN CRC's Approach to Children and Climate Change: Any Impact On the Future of Youth-led Climate Litigation?

Enikő Krajnyák

Assistant Lecturer and Ph.D. Candidate, Faculty of Law, University of Miskolc;
Scientific Researcher, Central European Academy, Budapest, Hungary
ORCID No. 0009-0003-2457-9491

SUMMARY

Abbreviations: ACHR – American Convention on Human Rights; CRC – United Nations Convention on the Rights of the Child; ECHR – European Convention on Human Rights; ECtHR – European Court of Human Rights; GC – General Comment; HRC – United Nations Human Rights Committee; IACtHR – Inter-American Court of Human Rights; ICCPR – International Covenant on Civil and Political Rights; ICESCR – International Covenant on Economic, Social and Cultural Rights; ICJ – International Court of Justice; IHRL – International Human Rights Law; ITLOS – International Tribunal for the Law of the Sea; OPIC – Optional Protocol to the Convention on the Rights of the Child on a communications procedure; PIL – Public International Law; UDHR – Universal Declaration of Human Rights; UN – United Nations; UNFCCC – United Nations Framework Convention on Climate Change.

1. Introduction

Children are particularly vulnerable to the negative effects of climate change, which is recognized in the Paris Agreement by "[a]cknowledging that […] Parties should, when taking into action to address climate change, respect, promote and consider their respective obligations on human rights, […] children, […] and intergenerational equity."[1] Their vulnerable situation is twofold: first, children are physically, and psychologically more vulnerable than adults, and they are more at risk of death from diseases that are likely to be exacerbated by climate change; and second, they have their whole lives ahead of them, meaning that they are more likely to live longer, and therefore, to be exposed to the harms caused by climate change in the upcoming decades.[2] However, the treaty with the strongest universal recognition concerning children's rights, the UN Convention on the Rights of the Child, does not explicitly recognize their vulnerable situation in the context of climate change, which is mainly due to the fact that the Convention was adopted in 1989, a few years before the basic framework of climate change law, the UNFCCC was established in 1992.[3] Against this background, there have been numerous attempts before judicial and quasi-judicial bodies to interpret children's particular vulnerability to climate change, especially after 2015, the adoption of the mentioned Paris Agreement, which was the first international environmental treaty to explicitly mention human rights.[4] The fact that this reference appeared in the Preamble opens a wide margin of appreciation for jurisdictions to assess the extent to which States Parties are bound to consider climate change as a human rights issue,[5] and the position of children in this respect.

Children's vulnerability to climate change is strongly intertwined with the principle of intergenerational equity, which imposes planetary obligations upon each generation to conserve the natural environment for future generations regarding the diversity of choice, the quality comparable to that which has been enjoyed by the previous generations, and comparable or non-discriminatory access to natural resources.[6] This principle implicitly appears in several international environmental

1 UNFCCC (2015), Preamble, Recital 12. For an overview of how the Paris Agreement fits in the international framework for the protection of children's rights, see Bakker (2020).

2 UNICEF (2021), p. 11.

3 See UNFCCC (1992).

4 See Knox (2018).

5 The Preamble does not have any legally binding force; it may not be capable of creating rights or obligations on its own, yet, it determines the interpretation of the operative provisions of the treaty. Therefore, in light of customary international law, and also of general treaty interpretation, Parties must comply with their human rights obligations in addressing climate change. See Mayer (2016) and Bakker (2016).

6 Weiss (1987), p. 127. The concept was elaborated in Weiss (1989). Weiss also positioned the theory of intergenerational equity in the context of climate change, see Weiss (2008).

treaties, including the Stockholm Declaration on the Human Environment,[7] the Rio Declaration on Environment and Development,[8] and it is also explicitly mentioned in the Paris Agreement, as cited above. The questions of who belongs to future generations, namely, whether it only encapsulates unborn people or already-born children as well, and how many generations are covered naturally emerge, as they would clarify obligations for present generations and young people's standing before courts on behalf of future generations.[9] The answers are not settled in international documents, which does not hinder but encourages young people all around the world to seek the answers from domestic courts, human rights treaty bodies, and other supranational courts, which manifests in an increase in the number of youth-led climate litigation cases.[10] The outcome of these cases is variable: courts rather tend to accept the argumentation of people challenging inadequate measures addressing climate change when the group of plaintiffs includes children or young people, considering them as members of future generations.[11] The only UN Treaty Body that was asked to deal with the issue was the Committee on the Rights of the Child, which, as presented below, refrained from addressing the issue in 2019, and there are also youth-led climate cases pending before the ECtHR. This is the context in which GC26 was published in the summer of 2023, and therefore, it is particularly topical to assess it in light of the Committee's previous approach to children's claims, as well as to examine its potential impact on youth-led climate cases to be decided in the near future.

7 Principle 1 of the Stockholm Declaration reads as follows: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations […]."

8 See Principle 3 of the Rio Declaration: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

9 Bándi (2022), pp. 46-47.

10 Setzer & Higham (2022), pp. 1-3. On the interrelation between youth climate activism and human rights, see Daly (2022). The strategies of successful yout-led climate litigation was mapped in Peel & Markley-Towler (2021).

11 Children were considered as part of future generations in *Neubauer et al. v. Germany* or in *Future Generations v. Ministry of the Environment et al.*, while the legal standing of future generations was avoided to be addressed, for instance, in *Juliana v. the United States*. Donger (2022), pp. 272-274.

2. Climate Change and the UN Committee on the Rights of the Child

2.1. The First Encounter with Climate Change: *Sacchi et al. v. Argentina et al.*

UN Treaty Bodies were the first international (quasi-)judicial bodies to be asked to deliver their opinion in connection with climate change. The first petition, Ioane Teitiota v. New Zealand, was adopted by the HRC in 2020, in which the Committee did not find a violation of the right to life (Article 6 of ICCPR) in the case of a climate refugee.[12] Shortly after the submission of this petition, the Committee on the Rights of the Child was asked to assess whether the Respondent States violated children's rights by insufficient climate regulation: this is *Sacchi et al. v. Argentina et al.*, in which the Committee rejected the claim as inadmissible in 2021.[13] More successful was the petition of the Torres Strait Islanders before the HRC: in 2022, in the decision of Daniel Billy et al. v. Australia, the Committee found that the State violated the indigenous petitioners' rights to private and family life (Article 17 of ICCPR) and minority rights (Article 27 of ICCPR).[14] The comparative analysis of the three decisions would exceed the limits of this paper, and given that the present piece focuses on children's rights and climate change, only the decision of the Committee on the Rights of the Child will be shortly presented.

In *Chiara Sacchi et al. v. Argentina et al.*, sixteen children filed a claim against Argentina, Brazil, France, Germany, and Turkey, alleging that these States violated their rights under the CRC by knowingly causing and perpetuating the climate crisis, and asked the Committee on the Rights of the Child to find that climate change is a children's rights crisis, and that each Respondent had caused the climate crisis, violating petitioners' rights.[15] The petitioners also requested the Committee to recommend that the Respondents review, and where necessary, amend their national and subnational laws and policies in order to protect petitioners' rights and make the best interests of the child a primary consideration; that each Respondent initiate cooperative international action to establish

12 UN HRC (2020). The impact of the Teitiota case was assessed in, for instance, Behrman & Kent (2020) from the perspective of climate change and human rights, and in Rose (2021) from the perspective of international refugee law.

13 UN CRC (2021).

14 UN HRC (2022). The petitioners also sought the violation of Article 24 of ICCPR (rights of the child), which was not addressed by the HRC, as, having found the violation of Articles 17 and 27, the Committee considered it no longer necessary to examine. Consequently, the rights of the child in the context of *Daniel Billy et al. v. Australia* were not interpreted by the HRC. See Feria-Tinta (2022).

15 Gubbay & Wenzler (2021), pp. 343-345.

binding and enforceable measures to mitigate the climate crisis, prevent further harm to the petitioners and other children; and that the Respondents shall ensure the child's right to be heard and to express their views freely to mitigate or adapt to the climate crisis.[16]

The Committee did not assess the merits of the case, as it found the petition inadmissible for the failure to exhaust domestic remedies.[17] Exhaustion of domestic remedies is a fundamental rule in any international adjudicatory proceeding, which, on the other hand, could be a significant hurdle in cases that require immediate solutions, such as the climate crisis. Petitioners claimed that the exhaustion of domestic remedies was ill-suited for climate challenges, given that the present case concerns five jurisdictions, which would pose an unduly burden on the petitioners, and it would be unlikely to bring effective relief, and it would unreasonably prolong the procedure, especially taking into account that children have more difficulties in access to courts than adults.[18] The petitioners relied on Article 7(e) of the OPIC, which provides an exception from the inadmissibility of cases where domestic remedies have not been exhausted, namely, "where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief". The Committee did not find it justified why the petitioners had not attempted to initiate any domestic remedy in any of the Respondent States and concluded that generally expressing doubts about the prospects of success of any remedy does not exempt them from the general rule of exhausting all domestic remedies. In addition, Respondent States pointed out available effective remedies that had not been proven to be ineffective or unsuccessful.

The petition is embedded in the phenomena of so-called youth-led climate litigation,[19] in which children or young people strategically try to hold States (or non-State actors) liable for their share in contributing to the negative impacts of climate change.[20] Strategic climate cases form a special subcategory of climate cases, given that the impacts of these cases are aimed at extending beyond the individual case and producing systemic changes by the consciously and carefully designed argumentation.[21] By the time the application was filed to the Committee in 2019, there had been numerous child-led initiatives to hold States accountable in climate cases at the domestic level,[22] but there had been no such climate case before any supranational adjudicatory body. Therefore, had the

16 *Sacchi et al. v. Argentina et al.* (2019), 325-331.

17 UN CRC (2021), 10-11.

18 *Sacchi et al. v. Argentina et al.* (2019), 309-318.

19 For an overview of youth-led strategic climate litigation, see Donger (2022).

20 See Peel and Osofsky (2020).

21 Peel and Markey-Towler (2021), p. 1486.

22 Cf. 11.

Committee engaged with the merits of the case, it would certainly have created a precedent for future youth-led cases. By-passing one of the most esteemed rules of PIL without sufficient justification would somewhat undermine the Committee's and UN Treaty Bodies' legitimacy, as well as its previous jurisprudence, and question the well-established case law of the ICJ.[23]

In the author's opinion, the fact that the Respondent States claimed that there were effective and available remedies was a decisive factor. In comparison with the case of Daniel Billy, the State itself pointed out that there were no available remedies for the petitioners for climate-related human rights violations, which the HRC could not contest. Consequently, in this case, the HRC found the petition admissible because Australia admitted the absence of any domestic remedy in this matter, while in the Sacchi case, each of the Respondent States presented the means that could have been used by the petitioners. Argentina, for instance, submitted that Article 41 of the Constitution recognized the right to a healthy environment, and Article 43 established an environmental writ, in addition to a writ of redress for collective environmental damage and the legal aid provided by children's ombudsperson.[24] Therefore, the State's approach to the availability of domestic remedies will be crucial in future cases, especially in Duarte Agostinho et al. v. Portugal et al. pending before the ECtHR, which will be assessed later on in this paper.

Notwithstanding the fact that the Committee did not decide on the merits of the case, its decision is still remarkable for its findings concerning extraterritoriality. The question of extraterritorial jurisdiction in transboundary environmental harms was not adjudicated by the UN Treaty Bodies, nor by human rights courts in any contentious case, but the IACtHR delivered its opinion in the form of an Advisory Opinion in 2017 (OC-23/17), which clarified States' obligations in the face of potential environmental damage.[25] The echo of this Advisory Opinion extends beyond the scope of States falling under the jurisdiction of the IACtHR, which is also shown by the fact that the Committee referred to it in the Sacchi decision. In line with the Court's position, the Committee acknowledged that "persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement

23 Suedi (2022), pp. 560-565.

24 UN CRC (2021a), 4.5.

25 IACtHR (2017). Advisory Opinions have a significant role in the Inter-American human rights system. In contrast to contentious cases, they give opportunity to the IACtHR to articulate general legal principles without the need to assess the specificities of a contentious case. Buergenthal (1985), p. 18. As of October 2023, the Court issued 30 advisory opinions on various human rights issues. See IACtHR, 2023. In addition to the application of extraterritorial jurisdiction to environmental obligations, the above cited Advisory Opinion OC-23/17 significantly elaborated on the human right to a healthy environment as well. Abello-Galvis & Arevalo-Ramirez (2019), pp. 220-221. See also: Siwior (2021), pp. 181-185.

of the human rights of persons outside its territory,"[26] under which States could be found accountable for transboundary harm in case the link is strong enough between the State's action and the human rights violation of other citizens.

The importance of the Sacchi decision is manifold: first, it was the first climate case before a supranational human rights adjudicatory body, which was followed by numerous climate petitions, including *Daniel Billy et al. v. Australia before the HRC*, and *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland*, *Carême v. France*, and *Duarte Agostinho et al. v. Portugal et al.* pending before the Grand Chamber of the ECtHR. The growing number of such petitions shows that domestic solutions may not be adequate or successful in tackling the climate crisis, and there is an increasing need for global-level solutions, especially in countries with limited control over entities responsible for greenhouse gas emissions.[27] Second, it opens the door for States to reconsider the remedies available for petitioners in climate cases, as the comparison between the Respondent States' approach to admissibility shows in Daniel Billy and Sacchi. Furthermore, the decision serves as an outstanding example of the cross-fertilization between international human rights bodies,[28] by the reference to the findings of the IACtHR. Interaction between different human rights bodies is particularly important in climate change cases, given that the climate crisis is a global issue, which should be treated with the same importance all over the globe.

2.2. Children's Rights and Climate Change: A Substantive Approach by General Comment No. 26

Parallel to the proceedings in the Sacchi case, on June 4, 2021, the Committee announced that its next GC would address children's rights and the environment with a special focus on climate change. Adopting a GC to the CRC allowed the Committee to develop its understanding of children's rights enshrined by the CRC in light of the climate crisis, without assessing an actual petition. As presented above, the procedural hurdles did not allow the Committee to formulate its standpoint on the merits of the case, and even though there is no official connection between the Sacchi case and the new GC, it could be concluded that the Committee wanted to engage in the ongoing dispute concerning climate change and human rights to a certain extent.[29] The GC elaborates on various

26 UN CRC (2021b), 10.5.

27 Wewerinke-Singh (2019), p. 233.

28 See Cançado Trindade (2019).

29 Tigre & Iliopoulos (2023).

cross-cutting issues, including the implicit environmental aspect inherent to specific rights under the Convention, implementation measures, and climate change from the perspective of mitigation, adaptation, business behavior, and climate finance. The analysis in the present paper is limited to the GC's implications on climate litigation, thus, its most relevant findings will be addressed further on.

GC26 offers a comprehensive overview of children's rights and the environment. It is the first document in which the Committee on the Rights of the Child could elaborate on the issue in detail, however, there had been some early attempts to interpret the rights guaranteed by the CRC from an environmental perspective. In addition to the Sacchi case, which, as we could see, did not interpret substantive rights of the Convention, General Comment No. 15 (GC15) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24) could be mentioned.[30] The right to the highest attainable standard of health is laid down in Article 24 of CRC, and provides that States Parties shall take appropriate measures to implement this right by combatting "[…] disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution."[31] The Committee pointed out that under this provision, States shall also address climate change, and put children's health concerns at the centre of their climate change adaptation and mitigation strategies, considering that climate change is one of the biggest threats to children's health.[32] Therefore, in GC15, the Committee recognized the link between environmental protection and the enjoyment of human rights, by considering a healthy environment a precondition to the realization of children's rights.

GC26 builds on this approach and develops it further, by acknowledging that "[a] clean, healthy and sustainable environment is both a human right itself and necessary for the full enjoyment of a broad range of children's rights."[33] The recognition of an autonomous human right to a healthy environment is not settled in the binding instruments of IHRL: the major UN Human Rights Treaties and the ECHR do not guarantee an explicit right to a healthy environment, while certain regional human rights treaties, such as the ACHR (Article 11 of the Protocol

30 In contrast with the right to a healthy environment, of which recognition is still not settled in international law, as presented below, the right to health was already declared in the UDHR (1948) and the ICESCR (1966). In light of this, the UN CRC was criticised for taking almost 20 years to adopt a GC that provides guidance for States on the implementation of this right in the context of children's rights. Kilkelly (2020), pp. 367-368.

31 UN Convention on the Rights of the Child (1989), Article 24(c).

32 UN CRC (2013), 49-50.

33 UN CRC (2023) 8.

of San Salvador) and the Banjul Charter (Article 24) expressly recognize it. The development of soft law is particularly remarkable in this matter, as the right to a clean, healthy and sustainable environment was first recognized at the global level by the UN Human Rights Council in 2021,[34] and the General Assembly in 2022.[35] The Committee strongly relies on the latest developments, which is also unique among the UN Treaty Bodies: for instance, the HRC – the other treaty body that encountered environmental/climate change cases – issued General Comment No. 36 (GC36) of the ICCPR on the right to life (Article 6) in 2019, before the right to a clean, healthy and sustainable environment was recognized by the United Nations, and its latest one, General Comment No. 37 on the right of peaceful assembly (Article 21) was adopted in 2020. GC36 embraces the view that a healthy environment is a precondition for the enjoyment of rights, in this case, the right to life.[36]

The recognition of the right to a healthy environment in international law is also subject to scientific discussion. Different theoretical approaches to the interrelation of human rights and the environment were developed,[37] which may not exclude each other, but – as the practice suggests – they rather appear complementary to each other in the interpretation of the different legal instruments. First, the environment may serve as a precondition to the enjoyment of existing rights, such as the right to life, private and family life, personal security, and health. This approach could be observed in the case law of the ECtHR, which, in the absence of any environmental provision in the ECHR, gave effect to environmental considerations indirectly through the evolutive interpretation of the Convention.[38] The second approach considers human rights, particularly procedural rights as tools to address environmental issues, including information rights, participatory rights, and access to justice.[39] A third approach suggests the recognition of an autonomous right to a healthy environment, which, over the course of time, was incorporated in more than 100 national constitutions over the globe.[40] Notwith-

34 UN Human Rights Council (2021).

35 UN General Assembly (2022). See also: Knox (2023), pp. 164-165.

36 UN HRC (2019) 62.

37 Shelton (1991), pp. 105-106.

38 Article 8 of ECHR (the right to respect for private and family life) is particularly important in the environmental case law of the ECtHR. In the frames of this Article, the Court dealt with industrial pollution, noise pollution, waste management, and soil and water contamination, inter alia. See Fitzmaurice (2019), pp. 148-150.

39 Procedural environmental rights are guaranteed in regional human rights treaties, such as the Aarhus Convention and the Escazú Agreement. Environmental issues also appear in the case law of Article 6 (right to a fair trial), Article 10 (freedom of expression), and Article 11 (freedom of assembly) of ECHR. See Peters (2018).

40 Boyd (2019), p. 33.

standing the high number of States recognizing this right, its recognition in IHRL seems more problematic: in addition to the anthropocentricity of human rights,[41] which is contrasted with the ecocentric approach to environmental protection,[42] it should also be seen that a global-level recognition of the right to a clean, healthy and sustainable environment could also be hindered by the absence of consensus among States with strong political weight.[43] Furthermore, the difficulties of the establishment of an autonomous right to a healthy environment could also be observed in the example of the slow advancement of the adoption of a new protocol to the ECHR on the right to a healthy environment,[44] and its criticism expressed by the former President of the Court, Judge Robert Spano in his keynote speech of May 3, 2023 at the Council of Europe Conference on the Right to a Clean, Healthy and Sustainable Environment in Practice.[45]

Nonetheless, the express recognition of the autonomous right to a clean, healthy and sustainable environment could be regarded as the most significant contribution of the General Comment to IHRL.[46] The Committee recognizes that this right is implicit in the Convention and is directly linked to the rights to life, survival and development (Article 6), to the highest attainable standard of health (Article 24), to an adequate standard of living (Article 27), and to education (Article 28). In this regard, the Committee's approach is comparable with that of the ECtHR which, in its case law, developed an environmental dimension to certain human rights enshrined in the ECHR – especially to the right to life (Article 2) and to private and family life (Article 8) –, adding an implicit environmental aspect to these rights. However, as of September 2023, the ECtHR did not go so far as to recognize a self-standing right to a healthy environment in any of its judgments.

41 Boyle (1992), p. 628.

42 Protection of the environment in human rights law mainly reflects the anthropocentric aspect of the environment, which supports nature conservation for the benefit of people, while the ecocentric approach considers the intrinsic value of the environment worthy of protection, regardless of its economic or lifestyle implications. Gagnon Thompson & Barton (1994), pp. 149-150.

43 The problem of the lack of a common understanding on the content and scope for the right to a clean, healthy and sustainable environment also emerged in connection with the antecedent of the above Resolution, namely with Resolution 48/13, adopted by the Human Rights Council on October 8, 2021. The Russian Federation, for instance, impugned the quality of the Human Rights Council to promote the right to a healthy environment. In addition, China consideres human rights protection as essentially an internal affair, rather than a global one, which approach certainly poses challenges to the effective implementation of this right. See Tang & Spijkers (2022), pp. 90-92.

44 PACE, (2021). See also Kobylarz (2023).

45 According to Judge Spano, in its current form, the ECHR is not suitable to address human rights claims resulting from climate change and he expressed his doubts about whether the adoption of an additional protocol would solve the issue. Instead, he proposes the active engagement of States and other stakeholders in the effective implementation of the right to a healthy environment. See https://rm.coe.int/coe-speech-environment-spano-final-2787-8240-6407-v-1/1680aae80b (31.10.2023.)

46 Nolan (2023).

The official standpoint of the Court is that "[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such,"[47] although the need for the recognition of an autonomous environmental right in the European human rights system started to appear in Concurring Opinions of the Judges.[48]

The Committee also outlines the procedural elements of the right, which include access to information, participation in decision-making, and (child-friendly) access to justice,[49] which are the three core procedural environmental rights that are also codified in regional human rights treaties, such as the Aarhus Convention in Europe[50] and the Escazú Agreement in the Americas.[51] Particular attention should be given to the right to access to justice: children are recognized as rights holders in IHRL – also under the CRC – but the GC does not reflect on the pressing debate whether they are part of future generations and whether they could act on future generations' behalf before (quasi-)judicial bodies, such as the Committee. The GC does not engage in this dialogue, yet it recognizes the principle of intergenerational equity and the interests of future generations.[52] On the one hand, delineating the scope of who belongs to future generations would be crucial for future climate litigation: had the Committee recognized children as part of future generations, it would have paved the way for more youth-led cases claiming rights on the basis of intergenerational equity – especially before the Committee, which is a specialized treaty body for children's rights. Alternatively, considering future generations as people yet to be born would also have posed challenges to the enforcement of their alleged rights, notwithstanding the fact that assigning rights to unborn humans would also be arguable. On the other hand, had the Committee elaborated on the question of future generations, its consequences would have been unforeseeable for future litigation: either children are recognized as future generations or not, it would certainly shape legal thinking, and it is presumable that the Committee intentionally did not want to go beyond the position of any domestic or international adjudicatory body at the moment it adopted the GC.

Furthermore, the findings of GC26 could also be contrasted with the Committee's standpoint in the Sacchi case. It is beyond any doubt that the recognition of the right to a clean, healthy and sustainable environment is a milestone for the Committee on the Rights of the Child but also for UN Treaty Bodies in

47 *Kyrtatos v. Greece*, 52.

48 Serghides (2022), Krenc (2022) in *Pavlov et al. v. Russia* (2022).

49 UN CRC (2023) 66.

50 UNECE (1998) Articles 4-9.

51 ECLAC (2018) Articles 5-9.

52 UN CRC (2023) 11.

general. In light of this, it is remarkable that the petitioners in Sacchi did not claim the violation of a healthy environment as an inherent right in the rights alleged to be violated (right to life, right to health, and indigenous peoples' right to culture).[53] Instead, they referred to the mentioned IACtHR Advisory Opinion OC-23/17, highlighting that "the enjoyment of virtually all human rights depends on a healthy environment."[54] As presented above, the case was found inadmissible on procedural grounds, i.e., the non-exhaustion of domestic remedies, which is strongly intertwined with the procedural aspect of the right to a clean, healthy and sustainable environment. The GC tends to follow the approach it embraced in Sacchi regarding the non-exhaustion rule, and confirms that supranational bodies generally require the exhaustion of domestic remedies prior to filing a complaint. To this aim, the Committee advises States to ensure that they have access to free legal assistance, and the opportunity to be heard in judicial or administrative proceedings affecting them.[55] Therefore, the GC did not develop its interpretation of Article 7(e) OPIC in light of the climate crisis, and did not open the way for petitions in which there are available domestic remedies for such claims. This may suggest that supranational bodies, such as the UN Treaty Bodies strongly rely on the subsidiary nature of IHRL, and grant admissibility only where States do not contest the absence of suitable remedies, such as in the Daniel Billy case before the HRC.

The other key issue the Sacchi case raised in the question of extraterritorial jurisdiction of States, which the Committee did not decide due to the inadmissibility on grounds of the non-exhaustion of domestic remedies, yet it strongly relied on the findings of OC-23/17. The GC builds on the Committee's approach to acknowledging extraterritorial jurisdiction of States regarding transboundary environmental harms provided that there is a reasonable link between the State and the activity concerned.[56] These findings could be crucial for future climate litigation, especially for the Duarte Agostinho case pending before the ECtHR, as the claim addresses the responsibility of 33 high-emitting European States for transboundary human rights impacts of climate change.

It could be concluded that GC26 is an important milestone in the jurisprudence of the Committee on the Rights of the Child, as it provided a platform for the Committee to elaborate on its approach to the interrelation of climate change and children's rights after it dismissed its first case in this matter. The GC also developed the interpretation of CRC rights – in comparison with the Sacchi

53 *Sacchi et al. v. Argentina et al.* (2019), 254-300.

54 *Sacchi et al. v. Argentina et al.* (2019), 248.

55 UN CRC (2023) 86.

56 UN CRC (2023) 88, 108.

decision – by establishing the autonomous human right to a clean, healthy and sustainable environment in IHRL both from the substantive and procedural sides. Furthermore, it recognized the role of the principle of intergenerational equity in human rights adjudication and acknowledged that the question of future generations has a place in human rights law. For these reasons, the author believes that the impact of GC26 will extend beyond the Committee's and the UN's system of human rights protection.

3. In Place of a Conclusion: The Potential Impact of GC26 on The Future of Youth-led Climate Litigation

As of September 2023, climate litigation reached nearly all international adjudicatory bodies in various forms: as presented above, UN Treaty Bodies (the Human Rights Committee and the Committee on the Rights of the Child) have already decided on alleged human rights violations resulting from the adverse effects of climate change. In 2022, the ECtHR received its first climate change cases, and – by the time of the conclusion of this study – three of them had made their way to the Grand Chamber of the Court: Verein KlimaSeniorinnen, Carême, and Duarte Agostinho; and several other cases are pending before the Court.[57] In addition to contentious cases, international judicial and quasi-judicial bodies are also asked to develop their understanding of States' responsibility for climate change and the human rights violations arising thereof. There are pending advisory opinions[58] before ITLOS on climate change and international law,[59] the IACtHR on the scope of the State obligations for responding to the climate emergency,[60] and the ICJ on the obligations of States with respect to climate change.[61] There are also developments in the field of future generations' rights in the context of climate change: the Maastricht Principles on the Human Rights of Future Generations was adopted in February 2023,[62] and there are continuous

57 These cases include *Uricchiov v. Italy et al.*, *De Conto v. Italy et al.*, *Müllner v. Austria*, *Greenpeace Nordic and Others v. Norway*, *The Norwegian Grandparents' Climate Campaign et al. v. Norway*, *Soubeste and four other applications v. Austria et al.*, and *Engels v. Germany*. See ECtHR (2023).

58 For an overview on the preliminary questions regarding the three advisory opinions on climate change, see Bodansky (2023).

59 ITLOS (2022).

60 IACtHR (2023).

61 ICJ (2023).

62 See https://www.rightsoffuturegenerations.org/ (29.09.2023.) It should be noted that the Maastricht Principles is a document drafted by experts, including current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the UN

efforts to adopt the UN Declaration for Future Generations.[63] Last, the draft GC on Sustainable Development and the ICESCR is also worth mentioning in this context, as the Committee on Economic, Social and Cultural Rights identified climate change as one of the key themes to explore in the new GC.[64]

All these developments are relevant for children and young people, but one case particularly stands out in this regard: *Duarte Agostinho et. al. v. Portugal and 32 Other States*. In this case, children, arguing that they will be more exposed to the negative impacts of climate change in the future than older generations, brought a claim before the ECtHR seeking to find guarantees against the increasing interference of global warming with their rights. In comparison to other young people's climate cases, where the applicants tended to sue their own countries, the novelty of this case is that the six children brought the claim against 33 countries,[65] including their native country, Portugal. The applicants argue that the 33 Respondent States do not respect their positive obligations undertaken in the Paris Agreement, namely to hold the global average temperature to well below 2° C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5° C above pre-industrial levels,[66] resulting in the States' failure to comply with their positive obligations under Article 2, Article 8, and Article 14 (prohibition of discrimination) of ECHR. The alleged violation of the prohibition of discrimination is founded upon the above-mentioned fact that climate change particularly affects their generation, as their perspective of the future is to live in an ever-warming climate during their whole life, which will affect not only them but the generation they will bring into the earth.[67]

The potential victim status of the applicants is one of the key issues for the success of the application:[68] the claim concerns human rights violations that will take place in the future – even though the applicants have referred to harms related to forest fires in Portugal, the starting point of their argumentation is that

Human Rights Council. Therefore, the document is rather a guidance than a legal source, yet it demonstrates the development in the field of the protection of the rights of future generations.

63 See https://www.un.org/pga/76/2022/09/12/general-assembly-declaration-on-future-generations-pga-letter/ (29.09.2023.)

64 See https://www.ohchr.org/en/treaty-bodies/cescr/general-comment-sustainable-development-and-international-covenant-economic-social-and-cultural (29.09.2023.)

65 The application is filed against the following States: Austria, Belgium, Bulgaria, Switzerland, Cyprus, the Czech Republic, Germany, Denmark, Spain, Estonia, Finland, France, the United Kingdom, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxemburg, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Turkey and Ukraine. See *Duarte Agostinho and others v. Portugal and 32 other States*, Annex II.

66 UNFCCC (2015), Article 2(a).

67 See *Duarte Agostinho et al. v. Portugal et al.*

68 Keller & Heri (2022), pp. 155-157.

such harms will occur in the future due to the inadequacy of the measures taken by high-emitting States.[69] The recognition of potential victimhood in climate cases will be up to the discretion of the Court and could open the path for climate litigation in its jurisdiction. In the light of Article 34,[70] abstract complaints and actiones populares are not allowed before the ECtHR, however, in some specific situations, the Court may accept potential victimhood without practical interference with the applicant's rights.[71] This reasoning might be acceptable for climate cases, owing to the specific nature of its features: the direct effects of climate change are indisputable, moreover, waiting until the harms in question fully manifest – for instance, the irreversible average warming above 2° C or 1.5° C – would lead to disastrous consequences. Therefore, the recognition of the applicants as victims may fall in the category of exceptions under Article 34.[72]

The high number of Respondent States certainly raises the questions of non-exhaustion and extraterritoriality, which were also given particular attention by the Committee on the Rights of the Child in the Sacchi decision as well as in GC26. Similarly to the petitioners in Sacchi, the applicants did not make use of any domestic remedies, claiming that the exhaustion rule is ill-suited to climate claims, especially when children are concerned. The exhaustion issue could be a potential hurdle in the case of Duarte Agostinho as well, although the reasoning according to which the exhaustion of domestic remedies in 33 States would represent an unreasonable impediment to such a time-sensitive issue as climate change, may stand its ground.[73] Article 35 of ECHR requires the exhaustion of domestic remedies "according to the generally recognized rules of international law," which provides a certain leeway for applicants, although there is no consensus in IHRL on non-exhaustion in climate change cases. In this case, the

69 Climate litigation cases heavily rely on the facts that: (a) there is a link between man-induced climate change and its negative consequences, and (b) the negative effects of climate change will continue to increase and will lead to more and more severe environmental degradation. However, litigants often neglect there is no scientific certainty about the future effects of climate change. Therefore, scientific uncertainty could be a key obstacle to efficient climate litigation. See Sulyok, 2021.

70 Article 34 of ECHR: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

71 See, for instance, *Klauss and others v. Germany*, *Kennedy v. the United Kingdom*, *Zakharov v. Russia*. See also: Clark, Liston, & Kalpouzos, 2020.

72 Daly (2022), pp. 19-22.

73 According to the jurisprudence of the ECtHR, there may be special circumstances dispensing the applicant from the obligation to exhaust available domestic remedies, for instance, when remedies are inadequate or ineffective. See *Aksoy v. Turkey*, 52. Considering the above-presented fact that domestic courts all over the world have been involved with climate change litigation, the issue of the effectiveness of such remedies may be questionable. Much will depend, therefore, on the Court's margin of appreciation.

burden of proof will be borne by the State,[74] and therefore, much will depend on the States' approach to what they consider effective remedies for climate-related harms in their domestic regulation. In any case, the fact that the case made its way to the Grand Chamber by passing the initial admissibility test may be promising for the applicants.[75]

In case the Grand Chamber will consider the case as an exception from the exhaustion rule, the core substantive issue of the Duarte case would be the extraterritorial jurisdiction, in which GC26 could provide guidance, together with Advisory Opinion OC-23/17 of the IACtHR. Notwithstanding the ECtHR's well-established case law in environmental matters, the Court has never ruled on transboundary environmental harms. The Court's approach to extraterritorial jurisdiction is based on *Banković et al. v. Belgium et al.*, in which the Court established relatively restrictive criteria for what could be understood as effective control over the territory necessary for finding extraterritorial responsibility.[76] In the author's view, the question of extraterritoriality cannot and should not be based on the Court's previous findings but a different approach is needed in order to assess the merits of climate cases. The main reason for this is that climate litigation is intertwined and strongly dependent on science. Scientists do recognize the extraterritorial impact of global warming,[77] and it also has legal support from the IACtHR in the above-mentioned Advisory Opinion, and the Committee on the Rights of the Child in GC26. Therefore, the pending case – or future cases – give(s) the ECtHR the opportunity to establish its own interpretation of transboundary environmental harms.[78]

As presented above, GC26 addresses several issues that are not settled in human rights law concerning climate change, such as the exhaustion of domestic remedies and extraterritorial jurisdiction. These are also challenging for the ECtHR, and presumably for other jurisdictions in the future. Therefore, the contribution of GC26 to tackling these challenges is inevitable, as it engages in the dialogue of climate change litigation with valuable findings: the recognition of the right to a clean, healthy and sustainable environment is one of the most significant results of the GC, which conveys the message that the protection of the environment should no longer be dependent on the interpretation of other human rights, and that this right has particular implications for children and young people. In the author's opinion, the fact that the Committee on the Rights of the

74 See, e.g., *Molla Sali v. Greece*, 89; *Mocanu et al. v. Romania*, 225.

75 Keller & Heri (2022), pp. 158-159.

76 *Banković et al. v. Belgium et al.*, 70-71.

77 See IPCC (2021).

78 Altwicker (2018), pp. 586-587. See also Feria-Tinta (2021), pp. 54-55.

Child was the first UN Treaty Body to recognize this right also has a symbolic meaning, and it certainly reflects the intergenerational character of environmental rights. The question of how other supranational bodies, including the ECtHR, the IACtHR, the ICJ, the ITLOS, and other UN Treaty Bodies will build on the conclusions of GC26 and develop them further, remains one of the most fascinating questions in International Human Rights Law.

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