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Convention on the Rights of the Child

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Committee on the Rights of the Child

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. 105/2019**, ***

Communication submitted by:	Chiara Sacchi et al. (represented by counsel, Scott Gilmore et al., of Hausfeld L.L.P., and Ramin Pejan et al., of Earthjustice)
Alleged victims:	The authors
State party:	Brazil
Date of communication:	23 September 2019 (initial submission)
Date of adoption of decision:	22 September 2021
Subject matter:	Failure to prevent and mitigate the consequences of climate change
Procedural issues:	Jurisdiction; victim status; failure to exhaust domestic remedies; substantiation of claims; inadmissibility *ratione temporis*
Substantive issues:	Right to life; right of the child to the enjoyment of the highest attainable standard of health; right of the child to enjoy his or her own culture; best interests of the child
Articles of the Convention:	6, 24 and 30, read in conjunction with article 3
Articles of the Optional Protocol:	5 (1) and 7 (e)–(g)

1.1 The authors of the communication are Chiara Sacchi, a national of Argentina; Catarina Lorenzo, a national of Brazil; Iris Duquesne, a national of France; Raina Ivanova, a national of Germany; Ridhima Pandey, a national of India; David Ackley III, Ranton Anjain and Litokne Kabua, nationals of the Marshall Islands; Deborah Adegbile, a national of Nigeria; Carlos Manuel, a national of Palau; Ayakha Melithafa, a national of South Africa; Greta Thunberg and Ellen-Anne, nationals of Sweden; Raslen Jbeili, a national of Tunisia; and Carl Smith and Alexandria Villaseñor, nationals of the United States of America. At the time of the submission of the complaint, the authors were all under the age of 18 years. They claim

* Reissued for technical reasons on 6 December 2021.

** Adopted by the Committee at its eighty-eighth session (6–24 September 2021).

*** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, José Ángel Rodríguez Reyes, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck.

that, by failing to prevent and mitigate the consequences of climate change, the State party has violated their rights under articles 6, 24 and 30, read in conjunction with article 3, of the Convention.[1] They are represented by counsel. The Optional Protocol entered into force for the State party on 29 December 2017.

1.2 On 20 November 2019, pursuant to article 8 of the Optional Protocol and rule 18 (4) of the Committee's rules of procedure, the working group on communications, acting on behalf of the Committee, requested the State party to submit its observations on the admissibility of the communication separately from its observations on the merits.

Facts as submitted by the authors

2. The authors claim that, by causing and perpetuating climate change, the State party has failed to take the necessary preventive and precautionary measures to respect, protect and fulfil the authors' rights to life, health and culture. They also claim that the climate crisis is not an abstract future threat. The 1.1°C rise in global average temperature is currently causing devastating heatwaves, forest fires, extreme weather patterns, floods and sea level rise and fostering the spread of infectious diseases, infringing on the human rights of millions of people globally. Given that children are among the most vulnerable, physiologically and mentally, to these life-threatening impacts, they will bear a far heavier burden and for far longer than adults.[2]

Complaint

3.1 The authors argue that every day of delay in taking the necessary measures depletes the remaining "carbon budget", the amount of carbon that can still be emitted before the climate reaches unstoppable and irreversible ecological and human health tipping points. They argue that the State party, among other States, is creating an imminent risk as it will be impossible to recover lost mitigation opportunities and it will be impossible to ensure the sustainable and safe livelihood of future generations.

3.2 The authors contend that the climate crisis is a children's rights crisis. The States parties to the Convention are obliged to respect, protect and fulfil children's inalienable right to life, from which all other rights flow. Mitigating climate change is a human rights imperative. In the context of the climate crisis, obligations under international human rights law are informed by the rules and principles of international environmental law. The authors argue that the State party has failed to uphold its obligations under the Convention to: (a) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (b) cooperate internationally in the face of the global climate emergency; (c) apply the precautionary principle to protect life in the face of uncertainty; and (d) ensure intergenerational justice for children and posterity.

Article 6

3.3 The authors claim that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhoods to the foreseeable, life-threatening risks of climate change caused by humans, be they in the forms of heat, floods, storms, droughts, disease or polluted air. A scientific consensus shows that the life-threatening risks confronting them will increase throughout their lives as the world heats up by 1.5°C above the pre-industrial era and beyond.

Article 24

3.4 The authors claim that the State party's acts and omissions perpetuating the climate crisis have already harmed their mental and physical health, with effects ranging from asthma to emotional trauma. The harm violates their right to health under article 24 of the Convention and will worsen as the world continues to warm up. Smoke from the wildfires in Paradise,

[1] The authors have submitted the same complaint against Argentina, Brazil, France, Germany and Turkey. The five complaints are registered as communications No. 104/2019 to No. 108/2019.

[2] For additional information on the facts as presented by the authors, see *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019), paras. 2.1–2.6.

California, in the United States caused Alexandria Villaseñor's asthma to flare up dangerously, sending her to the hospital. Heat-related pollution in Lagos, Nigeria, has led to Deborah Adegbile being hospitalized regularly due to asthma attacks. The spread and intensification of vector-borne diseases has also affected the authors. In Lagos, Deborah now suffers from malaria multiple times a year. In the Marshall Islands, Ranton Anjain contracted dengue in 2019. David Ackley III contracted chikungunya, a disease new to the Marshall Islands since 2015. Extreme heatwaves, which have increased in frequency because of climate change, have been a serious threat to the health of many of the authors. High temperatures are not only deadly; they can cause a wide range of health impacts, including heat cramps, heatstroke, hyperthermia and exhaustion, and can also quickly worsen existing health conditions. Drought is also threatening water security for many petitioners, such as Raslen Jbeili, Catarina Lorenzo and Ayakha Melithafa.

Article 30

3.5 The authors claim that the State party's contributions to the climate crisis have already jeopardized the millenniums-old subsistence practices of the indigenous authors from Alaska in the United States, the Marshall Islands and the Sapmi areas of Sweden. Those subsistence practices are not just the main source of their livelihoods, but directly relate to a specific way of being, seeing and acting in the world that is essential to their cultural identity.

Article 3

3.6 By supporting climate policies that delay decarbonization, the State party is shifting the enormous burden and costs of climate change onto children and future generations. In doing so, it has breached its duty to ensure the enjoyment of children's rights for posterity and has failed to act in accordance with the principle of intergenerational equity. The authors note that, while their complaint documents the violation of their rights under the Convention, the scope of the climate crisis should not be reduced to the harm suffered by a small number of children. Ultimately, at stake are the rights of every child, everywhere. If the State party, acting alone and in concert with other States, does not immediately take the measures available to stop the climate crisis, the devastating effects of climate change will nullify the ability of the Convention to protect the rights of any child, anywhere. No State acting rationally in the best interests of the child would ever impose this burden on any child by choosing to delay taking such measures. The only cost-benefit analysis that would justify any of the respondents' policies is one that discounts children's lives and prioritizes short-term economic interests over the rights of the child. Placing a lesser value on the best interests of the authors and other children in the climate actions of the State party is in direct violation of article 3 of the Convention.

3.7 The authors request that the Committee find: (a) that climate change is a children's rights crisis; (b) that the State party, along with other States, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change; and (c) that by perpetuating life-threatening climate change, the State party is violating the authors' rights to life, health and the prioritization of the best interests of the child, as well as the cultural rights of the authors from indigenous communities.

3.8 The authors further request that the Committee recommend: (a) that the State party review and, where necessary, amend its laws and policies to ensure that mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to protect the authors' rights and make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaption; (b) that the State party initiate cooperative international action – and increase its efforts with respect to existing cooperative initiatives – to establish binding and enforceable measures to mitigate the climate crisis, prevent further harm to the authors and other children, and secure their inalienable rights; and (c) that, pursuant to article 12, the State party ensure the child's right to be heard and to express his or her views freely, in all international, national and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to the present communication.

State party's observations on admissibility

4.1 On 20 January 2020, the State party submitted its observations on the admissibility of the complaint. It submits that the communication should be found to be inadmissible for lack of jurisdiction, failure to substantiate the claims for the purposes of admissibility and failure to exhaust domestic remedies.

4.2 The State party provides information on its domestic legislation. It notes that, under article 3 of the Child and Adolescent Statute, children should enjoy all the fundamental rights inherent to every person and should have every opportunity to guarantee their own physical, mental, moral, spiritual and social development in conditions of freedom and dignity. The Statute enshrines fundamental rights such as the right to life, health, education and culture. Article 141 of the Statute guarantees access for every child to the Public Defender's Office, the Office of the Attorney General and the judiciary, through any of its organs. Civil actions aiming at the protection and promotion of children's collective rights can be filed under article 210 of the Statute by the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations. The State party argues that, as such, there are suitable mechanisms in place within its jurisdictional system to guarantee justice and redress for children. The Constitution also provides for procedural measures that can be taken to defend the right to a healthy environment, among other collective rights. Under article 5 of the Constitution, any citizen may file legal action with a view to nullifying an act injurious to the environment. Plaintiffs may take action in their own name in defence of a collective good and shall, unless demonstrably acting in bad faith, be exempt from judicial costs. Additionally, public civil suits for the protection of the environment can be initiated under Law No. 7,347/85. Certain legal entities – such as the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations – have the right to file a suit. The State party argues that, in the present case, the authors should have contacted one of these entities, which could have filed a public suit in the defence of their interests. It submits that the communication should therefore be found to be inadmissible for failure to exhaust domestic remedies. It notes the authors' claims that the domestic judicial system would be unlikely to bring effective relief and that the procedures would be unreasonably prolonged. The State party argues that, as the authors have not attempted to initiate any judicial proceedings in Brazil, this is a hypothetical argument that has not been substantiated.

4.3 The State party argues that the authors have failed to demonstrate the responsibility of Brazil for an internationally wrongful act. It notes that the International Law Commission has adopted draft articles on that subject and that those articles focus on the general conditions that must prevail under international law for the State to be considered responsible for wrongful acts or omissions, and the legal consequences that flow therefrom. In order to hold a State responsible for international wrongful acts, the alleged violation must be ascribed to the State, in other words, damage must have been demonstrated to be attributable to the State. The State party argues that, in the case at hand, the authors have not demonstrated the extent to which the alleged violations are attributable to Brazil. It argues that Brazil cannot be held responsible for acts or omissions that may have been committed by other States. It also argues that the authors have not specified the alleged harm they have suffered or connected this harm to acts or omissions of the State party. This is particularly relevant given that the effect of climate change cannot be attributed solely to the five States against which the authors have filed their complaint. The State party argues that the attempt to attribute responsibility for the overall consequences of an issue as complex as climate change to these five States is clearly unfounded. This is particularly true in the case of Brazil, which is not among the main emitters of carbon dioxide, not now and not in the past. It submits that the communication should therefore be found inadmissible for failure to substantiate the claims for the purpose of admissibility as the authors have failed to demonstrate the nexus between the alleged damages described in their complaint and any acts or omissions of the State party. Furthermore, the State party submits that it has been complying with its international obligations and that, even if its adherence to environmental commitments could be challenged, the Committee does not have competence to monitor international instruments related to climate change.

4.4 On 27 March 2020, the State party provided additional observations on the domestic remedies available in the State party. It notes that, according to article 15 of the Statute of the Child and Adolescent (the law that enforces the provisions of the Convention domestically), children are rights holders. In accordance with article 4 of the Statute, it is the duty of the family, the community, society in general and the public authority to ensure, with absolute priority, effective implementation of the fundamental rights of children and adolescents. The system for the protection and promotion of the rights of the child established by the Statute is structured along three main axes: the promotion of rights, the defence of rights and social accountability.

4.5 The Child and Adolescent Statute includes a chapter that deals specifically with access to justice. Article 141 guarantees access for children and adolescents to the Public Defender's Office, the Office of the Attorney General and the judiciary and free legal assistance to those who need it, either through a public defender or a designated lawyer. Article 145 allows for specialized courts to be created in order to address cases related to children and youth. Corresponding lawsuits will be exempt from costs and fees.

4.6 The collective interests of the child are also given special judicial protection. Thus, civil actions aiming at the protection and promotion of children's collective rights can be filed, for instance, by the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations. The State party notes that its legal system offers public civil suits, writs of habeas corpus, writs of injunction and writs of mandamus as legal remedies that can be used for safeguarding, among other things, the rights and interests of children and adolescents. Public civil suits, which are regulated by Law No 7,347/85 and are set out in article 201 of the Child and Adolescent Statute, can be initiated by the Office of the Attorney General or another legitimate authority. Writs of habeas corpus are granted whenever a person suffers or is in danger of suffering violence or coercion in violation of his or her right to freedom of movement, on account of illegal actions or abuse of power. Writs of injunction are granted whenever the absence of a regulatory provision is deemed to harm the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship (art. 5 of the Constitution). Writs of mandamus are issued to protect a right not covered by habeas corpus or habeas data, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising the duties of the Government (art. 5 of the Constitution).

Authors' comments on the State party's observations on admissibility

5.1 On 4 May 2020, the authors provided their comments on the State party's observations on the admissibility of the communication. They maintain that the communication is admissible.

5.2 The authors argue that the State party has effective regulatory control over emissions originating in its territory. Only the State party can reduce those emissions, through its sovereign power to regulate, license, fine and tax. Because the State party exclusively controls these sources of harm, the foreseeable victims of their downstream effects, including the authors, are within their jurisdiction. As concerns the State party's argument that climate change is a global issue for which it cannot be held responsible, the authors argue that customary international law recognizes that when two or more States contribute to a harmful outcome, each State is responsible for its own acts, notwithstanding the participation of other States.[3] In article 47 of the articles on the responsibility of States for internationally wrongful acts, the International Law Commission provides that: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

[3] The authors refer to Andre Nollkaemper and Dov Jacobs, "Shared responsibility in international law: a conceptual framework", *Michigan Journal of International Law*, vol. 34, No. 2 (2013), pp. 359 and 379–381.

5.3 The authors reiterate that they have established that each of them has been injured and exposed to a risk of further irreparable harm as a result of climate change caused in substantial part by the State party's failure to reduce emissions. The consequences of the State party's acts and omissions in relation to combating climate change directly and personally harm the authors and expose them to foreseeable risks. Their assertions of harms from climate change do not constitute an *actio popularis*, even if children around the world may share their experiences or be exposed to similar risks.

5.4 The authors further reiterate that pursuing domestic remedies would be futile as they would have no real prospect of success. They argue that domestic courts cannot adjudicate their claims implicating the obligation of international cooperation and they cannot review whether the State party has failed to use legal, economic and diplomatic means to persuade other States members of the Group of 20 and fossil fuel industries to reduce their emissions. The State party cannot provide a domestic forum for the claims raised in the communication and remedies sought, which involve transboundary human rights violations caused by multiple States across multiple borders. State immunity vitiates any possible remedy for transboundary harm caused by other States. Claims against Argentina, France, Germany and Turkey would be barred in Brazil because they relate to the sovereign acts of the four other States.[4] Brazilian courts have long recognized the immunity of foreign States with respect to sovereign acts (*acta iure imperii*), which would include the climate policies of foreign States. The authors argue that the remedies they seek are non-justiciable or very unlikely to be granted by courts. Domestic courts would be unlikely or unable to order the legislative and executive branches to comply with their international climate obligations by reducing their emissions. The remedies here also implicate political decisions in international relations. Domestic courts could not enjoin the Government to cooperate internationally in the fight against climate change. In summary, no court would impel the Government to take effective precautionary measures to prevent further harm to the authors.

5.5 Regarding the remedies referred to by the State party, the authors argue that they would have no standing to file suit because children lack standing under Brazilian law to seek the remedies referred to by the State party. The "people's legal action" option is limited to citizens of Brazil who are over the age of 16, so is not even available to Catarina Lorenzo, who is 13 years old. A public civil suit cannot be brought by individuals, only by specific entities. Although the Office of the Attorney General and the Public Defender's Office could agree, at their discretion, to pursue such a case, neither office would act as the authors' legal representative but as a party to the case. A children's rights association could file a public civil suit, but only on subject matters within its registered mission. Again, the authors would not be parties, and the association would act at its own discretion.

5.6 The authors further argue that the unique circumstances of their case would make domestic proceedings unreasonably prolonged as they would have to pursue five separate cases, in each respondent State party, each of which would take years. The State party could not ensure that a remedy would be obtained within the necessary time frame, since any delay in reducing emissions depletes the remaining carbon budget and places the 1.5°C limit on warming further out of reach. Excessive delays are a notorious problem in the Brazilian judicial system, a fact recognized by a survey of Brazilian judges,[5] by the Human Rights Committee[6] and by the Special Rapporteur on the independence of judges and lawyers.[7] The expected delay would be exacerbated in this case, which would raise novel climate policy issues. No climate change case of a comparable scale and global scope has been litigated in Brazil.

[4] The authors refer to Appendix C to their comments, Expert Report of Dr. Helena de Souza Rocha and Dr. Melina Girardi Fachin.

[5] Report of the National Council of Justice of Brazil on themes, actors and challenges of collective protection, available from www.cnj.gov.br.

[6] CCPR/C/BRA/CO/2, para. 17.

[7] E/CN.4/2005/60/Add.3 and Corr.1, p. 2.

Third-party intervention

6. On 1 May 2020, a third-party intervention was submitted before the Committee by David R. Boyd and John H. Knox, the current and former holders of the mandate of Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[8]

State party's observations on the third-party intervention

7.1 On 29 July 2020, the State party provided its observations on the intervention. It reiterates its argument that the communication is inadmissible because domestic remedies have not been exhausted; the communication is manifestly ill-founded and the facts occurred before the Optional Protocol entered into force for the State party on 29 December 2017.

7.2 The State party reiterates its argument that the authors have failed to substantiate their claims for the purposes of admissibility by failing to identify the actual harm suffered by them and by failing to link said harm to the identifiable actions of the five respondent States parties. It argues that the effects of climate change on the world cannot be attributed to five countries randomly selected by the petitioners. It also argues that, taking into account the principle of common but differentiated responsibilities, it has been complying with its commitments to reduce greenhouse gas emission under the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

7.3 The State party notes that the International Law Commission, in its articles on the responsibility of States for internationally wrongful acts has stated that a State commits an internationally wrongful act when its conduct consists of an action or omission that is attributable to that State under international law and when such conduct constitutes a breach of an international obligation of the State. The State party also notes that the Inter-American Court of Human Rights has concluded that, even in relation to transboundary environmental harm, there needs to be a causal link that allows the attribution of the harm to a conduct of the State.[9] The State party submits that, without a minimum basis for the attribution of the harm to a conduct of the State, the international responsibility of States cannot be analysed. Absent the indispensable demonstration of a minimum causal link that could support a legitimate attribution of responsibility for the global issue of climate change, the communication is inadmissible.

Oral hearing

8.1 Following an invitation by the Committee and pursuant to rule 19 of its rules of procedure under the Optional Protocol, legal representatives of both parties appeared before the Committee on 27 May 2021 by way of videoconference, answered questions from Committee members on their submission and provided further clarifications.

Authors' oral comments

8.2 The authors reiterate that the State party has failed to take all necessary and appropriate measures to keep global temperatures from warming by 1.5°C above the pre-industrial era, thereby contributing to climate change, in violation of their rights. They argue that, if the Convention is to protect children from the climate emergency, then the concepts of harm, jurisdiction, causation and exhaustion must be adapted to a new reality. They reiterate their arguments that the harms the authors have experienced, and will continue to experience, were foreseeable in 1990, when the Intergovernmental Panel on Climate Change predicted that global warming of just 1°C could cause the water shortages, vector-borne

[8] For additional information, see *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019), paras. 6.1–6.5.

[9] In paragraph 104 (g)–(h) of its Advisory Opinion OC-23/17 of 15 November 2017, the Court noted that "States are obliged to take all necessary measures to avoid activities implemented in their territory or under their control affecting the rights of persons within or outside their territory." Moreover, "When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation."

diseases and sea level rise the authors now face. They argue that, if the respondent States parties do not take immediate action to vastly reduce their greenhouse gas emissions, the authors will continue to suffer greatly in their lifetime. They insist that there is a direct and foreseeable causal link between the harms to which they have been exposed and the respondent States parties' emissions, arguing that there is no dispute that the harms suffered by them are attributable to climate change and that the respondent States parties' ongoing emissions contribute to worsening climate change.

8.3 Regarding the issue of exhaustion of domestic remedies, the authors reiterate that the remedies indicated by the State party would not provide them with effective relief. As an example, the authors refer to the Belo Monte dam litigation case, noting that, while the case was pending in court for 19 years, the dam was built in the heart of the State of Amazonas. The authors argue that, as their complaint concerns a complex global environmental problem, their case would face the same, if not a worse, delay than the Belo Monte case. The authors reiterate that it is unlikely that the courts would even agree to take up their case as foreign sovereign immunity precludes any domestic remedies from being enforced against Argentina, France, Germany and Turkey. With respect to the authors' claims related to international cooperation, the highest federal court has held that it is legally impossible for domestic courts to review the actions of the President. The authors argue that children cannot file a civil action or a public civil suit on their own in the State party. Only the Office of the Attorney General, the Public Defender's Office, the Government itself or associations can file them, and these entities have no obligation to do so. They argue that remedies that rely on another's discretion and do not allow the authors to complain directly to the court[10] are not effective remedies. In addition, the authors argue that the three remedies involving writs referred to by the State party would fail because they are ill-suited to the types of claims and remedies at issue in the present complaint. First, the writ of habeas corpus is only applicable if the victim has suffered violence or coercion in violation of his or her right to freedom of movement, which is irrelevant in the authors' case. Second, the writ of mandamus is a discreet and abridged action that can be used only to compel a public authority to take specific action as required by a specific provision of the law or the Constitution. For example, this writ can be used to require a public authority to undertake an environmental impact assessment for a potentially polluting project. There is no specific requirement in Brazilian law to take climate mitigation action. Third, a writ of injunction must be based on a constitutional provision that explicitly requires the issuance of implementing legislation, and the court will not address the content of such legislation. There is no constitutional provision that the authors could rely on to support their climate mitigation claims. The authors argue that, as none of the remedies identified by the State party would be effective, they have no obligation to exhaust them before submitting their complaint before the Committee.

State party's oral comments

8.4 The State party reiterates that the communication should be found inadmissible for lack of jurisdiction. It argues that, as it is not possible to conclude that the State party's polluting activities would have a direct and foreseeable impact on the rights of children within or outside its territory, none of the authors are under the State party's effective control for the purposes of jurisdiction. It also reiterates that there is no causal link between the alleged acts or omissions of the respondent States parties and the alleged harm suffered by the authors. It notes that the Inter-American Court of Human Rights has found that the exercise of jurisdiction takes place when "the State of origin exercises effective control over the activities that caused the harm and consequent violation of human rights".[11] The State party argues more precisely that "a link must be established between an act or an omission of a State, environmental degradation, and serious and direct harm to an individual".[12] When it comes to extraterritorial human rights obligations, there needs to be "a sufficient connection, or a connecting factor, between the acts or omissions of a State and environment related harm

[10] European Court of Human Rights, *Tănase v. Moldova*, Application No. 7/08, Judgment of 27 April 2010, para. 112.

[11] Advisory Opinion OC 23-2017 of 15 November 2017, para. 102.

[12] Jorge E. Viñuales, "A human rights approach to extraterritorial environmental protection?: an assessment" in *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (Oxford University Press, 2016), pp. 177–221.

suffered by individuals located abroad".[13] The State party argues that these specific requirements have not been established in the authors' case as it is not possible to, for example, conclude that the water shortages some of the authors are facing in their hometowns derive from conduct attributable to the State party.

8.5 The State party insists that there are available effective remedies in the State party that the authors have not attempted to pursue. It argues that the authors of the communication have presented no proof that domestic remedies would be ineffective or unduly prolonged. Unfoundedly claiming that an eventual domestic ruling in the State party would not bring immediate relief or that the procedure would be unreasonably prolonged, without even initiating internal judicial measures, constitutes a hypothetical argument that does not fit the exception provided for in article 7 (e) of the Optional Protocol.

8.6 The State party argues that the domestic remedy of a public civil suit regulated by Law No. 7,347/85 would have been available to the authors. Through public civil suits, it is possible to access the judiciary in order to hold a person or a private or public legal entity liable for both pecuniary and non-pecuniary environmental damages. According to article 3 of the Child and Adolescent Statute, public civil suits might result not only in the imposition of monetary compensation but also in the ordering of specific actions or abstentions by the liable parties. A public civil suit can be filed by the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations. Article 129 (III) of the Constitution stipulates that the institutional functions of the Office of the Attorney General include the duty "to institute civil investigation and public civil suits to protect public and social property, the environment and other diffuse and collective interests". Pursuant to article 6 of Law No. 7,347/85, any person can, and civil servants must, communicate information to the Office of the Attorney General on facts that may give rise to a public civil suit. The filing of a public civil suit does not require advance payment for judicial or other expenses. Associations filing a public civil suit are exempt from incurring expenses, unless it is proved that they have acted in bad faith. Hundreds of public civil suits are presented every year by associations with the objective of defending the social interests and rights set out in Law No. 7,347/85, including the environment. For example, the State party refers to a suit filed by the Office of the Attorney General in 2019 to guarantee the protection and cleaning of coastal areas following an oil spill that same year.[14] Provisional measures were granted by the judiciary in October 2019, ordering the federal Government and the Institute of the Environment and Renewable Natural Resources to adopt all measures necessary to contain the damage and clean affected areas in order to protect the ecosystems of Pernambuco. The order was combined with daily fines of 50,000 reais to guarantee enforcement. In another public civil suit, also filed in 2019, provisional measures were granted ordering the federal Government and the Institute of the Environment and Renewable Natural Resources to construct protection barriers and adopt all measures necessary to clean up the pollution affecting mangrove and sea turtle spawn areas in Alagoas.[15] In May 2020, as part of the third phase of the Protect the Amazon project, the Office of the Attorney General filed 1,023 public civil suits against 2,262 defendants for the illegal deforestation of the Amazon. Overall, the prosecution is requesting over 3.7 billion reais in damages and the reforestation of 231,456 hectares of forest. The authors of the communication at hand should therefore have contacted the relevant domestic entities and associations and, especially, the Office of the Attorney General in order to properly exhaust available domestic remedies before initiating international proceedings. The State party emphasizes that public civil suits are possible domestic remedies for challenging public policies.

8.7 The State party notes that, under article 5 of the Constitution, any citizen may file legal action with a view to nullifying an act injurious to the environment. Plaintiffs can file such suits in their own name in defence of a collective or diffuse interest. According to article 6 of Law No. 4,417/65, such suits may be brought against public or private entities, authorities, administrators, public servants or employees that have authorized, participated in, benefited from or omitted to act to avoid injury to a protected public interest. A child can file such a suit through a legal representative. The State party notes that a civil suit was recently filed by six Brazilian nationals demanding the nullification of the plan on the nationally determined contributions to the global response to climate change submitted by

[13] Ibid.

[14] Public civil suit No. 0820173-98.2019.4.05.8300.

[15] Public civil suit No. 0808516-89.2019.4.05.8000.

Brazil in December 2020 under the Paris Agreement. The plaintiffs requested the judiciary to order the federal Government to elaborate nationally determined contributions that, in their view, would better comply with the international commitment to make progress over time. On 27 May 2021, the judiciary declared that it could exercise jurisdiction over the matter pursuant to article 109 (III) of the Constitution and requested the federal Government to present its defence.

8.8 The State party reiterates its argument that the authors could have filed a writ of mandamus, which is a remedy against illegal actions or abuse of power by public officials or agents of a legal entity exercising governmental powers. A child, whether a citizen or not, even if located outside Brazil, can file such a suit through representatives, provided he or she is represented by legal counsel qualified to petition before the Brazilian judiciary. Alternatively, the authors could have filed a general civil suit, which is a domestic remedy, broad in scope, that allows access to justice whenever a constitutional and legal right is threatened or violated. Threats and violations of environmental rights can be the object of general civil suits either in pursuit of a declaration of their violation, of damages or even of direct judicial orders to act or abstain from acting in such a way as to protect the environment. General civil suits may contain preliminary requests for the judge to grant measures with the practical effects of the remedy pursued, provided that there is a prima facie probability that the alleged damage or risk of damage exists or that the measure maintains the useful effect of the remedy. Judicial orders to act in protection of rights at risk or to cease harmful actions may be combined with daily fines to guarantee enforcement. To file a general civil suit, it is necessary to hire private counsel or to qualify for legal aid. A child, whether a citizen or not, even if located outside Brazil, can file such a suit through representatives, provided he or she is represented by legal counsel qualified to petition before the Brazilian judiciary.

8.9 The State party notes that legal aid is available in Brazil and that the Constitution establishes that legal aid shall be provided by the State, through the Public Defender's Office, for those who lack the financial resources to hire private counsel, in the defence of both individual and collective rights, in judicial and non-judicial proceedings. The Public Defender's Office is accessible to non-resident foreigners, provided that certain conditions are met and that the proper proceedings for international cooperation are followed.

Oral hearing with the authors

9. Following an invitation by the Committee and pursuant to rule 19 of its rules of procedure under the Optional Protocol, 11 of the authors appeared before the Committee on 28 May 2021 by way of videoconference in a closed meeting, without the presence of State representatives. They explained to the Committee how climate change had affected their daily lives and expressed their views about what the respondent States parties should do about climate change, and why the Committee should consider their complaints.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether or not the claim is admissible under the Optional Protocol.

Jurisdiction

10.2 The Committee notes the State party's submission that the authors have failed to demonstrate the responsibility of the State party for an internationally wrongful act and its argument that, in order to hold a State responsible for international wrongful acts, conduct connected with the alleged violation must be ascribed to the State and damage must be demonstrated to be attributable to the State. The Committee also notes the State party's argument that it cannot be held responsible for acts or omissions that may have been committed by other States and that the communication should be found inadmissible because the authors have failed to demonstrate the nexus between the alleged damages described in their complaint and any act or omission by the State party. The Committee further notes the authors' argument that they are within the State party's jurisdiction as victims of the foreseeable consequences of the State party's domestic and cross-border contributions to

climate change and the carbon pollution knowingly emitted, permitted or promoted by the State party from within its territory. The Committee notes the authors' claims that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhoods to the foreseeable, life-threatening risks of climate change caused by humans.

10.3 Under article 2 (1) of the Convention, States parties have the obligation to respect and ensure the rights of each child within their jurisdiction. Under article 5 (1) of the Optional Protocol, the Committee may receive and consider communications 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 the Convention. The Committee observes that, while neither the Convention nor the Optional Protocol make any reference to the term "territory" in its application of jurisdiction, extraterritorial jurisdiction should be interpreted restrictively.[16]

10.4 The Committee notes the relevant jurisprudence of the Human Rights Committee and the European Court of Human Rights referring to extraterritorial jurisdiction.[17] Nevertheless, that jurisprudence was developed and applied to factual situations that are very different to the facts and circumstances of this case. The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change.

10.5 The Committee also notes Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights on the environment and human rights, which is of particular relevance to the issue of jurisdiction in the present case as it clarifies the scope of extraterritorial jurisdiction in relation to environmental protection. In that opinion, the Court noted that, when transboundary damage occurs that affects treaty-based rights, it is understood that the 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 of the human rights of persons outside its territory (para. 101). The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and consequent human rights violation (para. 104 (h)). 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. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage (para. 102). The Court further noted that accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority (para. 103).

10.6 The Committee recalls that, in the joint statement on human rights and climate change that it issued with four other treaty bodies, it noted that the Intergovernmental Panel on Climate Change had confirmed in a report released in 2018 that climate change posed significant risks to the enjoyment of the human rights protected by the Convention, such as the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights (para. 3). Failure to take measures to prevent foreseeable

[16] See, inter alia, Inter-American Court of Human Rights Advisory Opinion OC 23-2017, para. 81; and European Court of Human Rights, *Catan and others v. Moldova and Russia*, Applications No. 43370/04, No. 8252/05 and No. 18454/06, Judgment of 19 October 2012.

[17] See, inter alia, Human Rights Committee, general comments No. 31 (2004) and No. 36 (2018), para. 63, *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2, *A.S. et al. v. Malta* (CCPR/C/128/D/3043/2017), paras. 6.3–6.5, and *A.S. et al. v. Italy* (CCPR/C/130/D/3042/2017), paras. 7.3–7.5; European Court of Human Rights, *Andreou v. Turkey*, Application No. 45653/99, Judgment of 27 October 2009, para. 25, and *Georgia v. Russia (II)*, Application No. 38263/08, Judgment of 21 January 2021, para. 81. See also Committee on the Rights of the Child, general comment No. 16 (2013), para. 39, and CRC/C/NOR/CO/5-6, para. 27.

harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations (para. 10).

10.7 Having considered the above, the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights. This implies that, when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction. [18]

10.8 The Committee notes the authors' claims that, while climate change and the subsequent environmental damage and impact on human rights it causes are a global collective issue that requires a global response, States parties still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it. The Committee also notes the authors' argument that the State party has effective control over the source of carbon emissions within its territory, which have a transboundary effect.

10.9 The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party. The Committee considers that, given its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.

10.10 In accordance with the principle of common but differentiated responsibilities, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.[19]

10.11 Regarding the issue of foreseeability, the Committee notes the authors' uncontested argument that the State party has known about the harmful effects of its contributions to climate change for decades and that it signed the United Nations Framework Convention on Climate Change in 1992 and the Paris Agreement in 2016. In light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention,[20] the Committee considers that the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.

10.12 Having concluded that the State party has effective control over the sources of emissions that contribute to causing reasonably foreseeable harm to children outside its territory, the Committee must now determine whether there is a sufficient causal link between the harm alleged by the authors and the State party's actions or omissions for the purposes of

[18] Inter-American Court of Human Rights Advisory Opinion, para. 136. See also paras 175–180 on the precautionary principle. It is also worth noting the textual similarity between article 1 of the Inter-American Convention on Human Rights and article 2 of the Convention in respect of jurisdiction.

[19] See the preamble to the Convention, article 3 of the United Nations Framework Convention on Climate Change and the preamble and articles 2 and 4 of the Paris Agreement. See also A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap. IV.E.2, commentary on draft article 47 of the draft articles on the responsibility of States for internationally wrongful acts.

[20] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013) and "Global warming of 1.5°C: summary for policymakers", formally approved at the First Joint Session of Working Groups I, II and III of the Intergovernmental Panel on Climate Change and accepted by the Panel at its forty-eighth session, held in Incheon, Republic of Korea, on 6 October 2018.

establishing jurisdiction. In this regard, the Committee observes, in line with the position of the Inter-American Court of Human Rights, that not every negative impact in cases of transboundary damage gives rise to the responsibility of the State in whose territory the activities causing transboundary harm took place, that the possible grounds for jurisdiction must be justified based on the particular circumstances of the specific case and that the harm needs to be "significant".[21] In this regard, the Committee notes that the Inter-American Court of Human Rights observed that, in the articles on prevention of transboundary harm from hazardous activities, the International Law Commission referred only to those activities that may involve significant transboundary harm and that "significant" harm should be understood as something more than "detectable" but need not be at the level of "serious" or "substantial". The Court further noted that harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States and that such detrimental effects must be susceptible of being measured by factual and objective standards.[22]

Victim status

10.13 In the specific circumstances of the present case, the Committee notes the authors' claims that their rights under the Convention have been violated by the respondent States parties' acts and omissions contributing to climate change and their claims that said harm will worsen as the world continues to warm up. It notes the authors' claims: that smoke from wildfires and heat-related pollution has caused some of the authors' asthma to worsen, requiring hospitalizations; that the spread and intensification of vector-borne diseases has also affected the authors, resulting in some of them contracting malaria multiple times a year or contracting dengue or chikungunya; that the authors have been exposed to extreme heatwaves causing serious threat to the health of many of them; that drought is threatening water security for some of the authors; that some of the authors have been exposed to extreme storms and flooding; that life at subsistence level is at risk for the indigenous authors; that, due to the rising sea level, the Marshall Islands and Palau are at risk of becoming uninhabitable within decades; and that climate change has affected the mental health of the authors, some of whom claim to suffer from climate anxiety. The Committee considers that, as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to affect them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm.[23]

10.14 Taking the above-mentioned factors into account, the Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status. Consequently, the Committee finds that it is not precluded by article 5 (1) of the Optional Protocol from considering the present communication.

Exhaustion of domestic remedies

10.15 The Committee notes the State party's argument that the communication should be found inadmissible for failure to exhaust domestic remedies. It also notes the State party's argument that article 141 of the Child and Adolescent Statute guarantees children access to the Public Defender's Office, the Office of the Attorney General and the judiciary. It also

[21] Advisory Opinion OC-23/17, paras. 81 and 102.

[22] Ibid., para. 136, and A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap. V.E.2, commentary on draft article 2 of the draft articles on the prevention of transboundary harm from hazardous activities.

[23] See the preamble to the Convention on the Rights of the Child; A/HRC/31/52, para. 81; and Committee on the Rights of the Child, "Report of the 2016 day of general discussion: children's rights and the environment", p. 23. Available from https://www.ohchr.org/en/hrbodies/crc/pages/discussion2016.aspx.

notes the State party's submission that public civil suits can be initiated under Law No. 7,347/85 for the protection of the environment following information received from a complainant, who could be a child who is not a national of the State party, and that such suits can be filed by entities such as the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations. It further notes the State party's submission that other domestic remedies are also available. For example, plaintiffs may file a general civil suit, which allows access to justice whenever constitutional and legal rights, including environmental rights, are threatened or violated. It notes the State party's submission that remedies that can be sought in general civil suits may include a declaration of a violation or of damages incurred or judicial orders to act or abstain from acting in protection of the environment. It also notes the State party's submission that a child, whether a citizen or not, even if located outside Brazil, can file such a general suit through representatives, provided he or she is represented by legal counsel qualified to petition before the Brazilian judiciary. In conclusion, the Committee notes the State party's submission that legal aid is available in Brazil, including, under certain conditions, for persons who are not citizens of and do not reside in Brazil.

10.16 The Committee notes the authors' argument that, although entities such as the Office of the Attorney General, the Public Defender's Office and children's rights associations could agree, at their discretion, to pursue their case, none would act as the authors' legal representatives but as a party to the case. The Committee also notes the authors' argument that remedies that do not allow the authors to complain directly to a court are not effective. In conclusion, the Committee notes the authors' claims that excessive delays are a notorious problem in the State party's judicial system.

10.17 The Committee recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress. The Committee considers that domestic remedies need not be exhausted if, objectively, they 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. Nevertheless, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.[24]

10.18 In the present case, the Committee notes that the authors have not attempted to initiate any domestic proceeding in the State party. The Committee also notes the authors' argument that they would face unique obstacles in exhausting domestic remedies as it would be unduly burdensome for them, unreasonably prolonged and unlikely to bring effective relief. It further notes their argument that domestic courts would most likely dismiss their claims, which implicate a State's obligation to engage in international cooperation, because of the non-justiciability of foreign policy and foreign sovereign immunity. Nevertheless, the Committee considers that the State party's alleged failure to engage in international cooperation is raised in connection with the specific form of remedy that the authors are seeking, and that they have not sufficiently established that such remedy is necessary to bring effective relief. Furthermore, the Committee notes the State party's argument that legal avenues were available to the authors, for example under Law No. 7,347/85, and that it would have been possible for the authors to engage the assistance of entities such as the Public Defender's Office, the Office of the Attorney General, the federated states, the Federal District, municipalities and associations in filing a public civil suit aimed at the protection and promotion of children's collective rights, including environmental rights. The Committee also notes that the authors did not make any attempt to engage with these entities in filing a suit on their behalf, nor did they attempt to pursue any other remedy in the State party, such as filing a general suit through a legal representative. It further notes the authors' argument that public civil suits would be filed at the discretion of the authorized entities in question and that the authors would not have direct standing as parties before the domestic courts in such proceedings. The Committee nevertheless considers that this does not in itself exempt the authors from attempting to engage with these entities in pursuing a suit, especially in the absence of any information demonstrating that this remedy has no prospect of success and

[24] *D.C. v. Germany* (CRC/C/83/D/60/2018), para. 6.5.

given the existing suits filed on the issue of environmental degradation in the State party. While noting the authors' argument that their claims regarding the remedy of international cooperation would not be admissible in the State party, the Committee notes, however, the State party's submission that a public civil suit can be filed in the interest of the protection of public and social property, the environment and other collective and diffuse interests. In the absence of further reasoning from the authors as to why they did not attempt to pursue these remedies, other than generally expressing doubts about the prospects of success of any remedy, the Committee considers that the authors have failed to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged violation of their rights under the Convention.

10.19 The Committee notes that the alleged State party's failure to engage in international cooperation is raised in connection to the remedy that the authors are seeking. Regarding the authors' argument that foreign sovereign immunity would prevent them from exhausting domestic remedies in the State party, the Committee notes that the issue of foreign sovereign immunity may arise only in relation to the particular remedy that the authors would have aimed to achieve by filing a case against other respondent States parties together with the State party in its domestic court. In this case, the Committee considers that the authors have not sufficiently substantiated their arguments concerning the exception under article 7 (e) of the Optional Protocol that the application of the remedies is unlikely to bring effective relief.

10.20 The Committee also notes the authors' argument that pursing remedies in the State party would be unreasonably prolonged. It notes that, while the authors cite some cases in other States in respect of which it took several years to reach a decision and one case in the State party that was only resolved after 19 years, it considers that they have failed to establish the connection between the remedies available within the State party and their specific claims or to otherwise indicate how the deciding periods would be unreasonably prolonged or unlikely to bring relief within the meaning of article 7 (e) of the Optional Protocol. The Committee concludes that, in the absence of any specific information from the authors that would justify that domestic remedies would be ineffective or unavailable, and in the absence of any attempt by them to initiate domestic proceedings in the State party, the authors have failed to exhaust domestic remedies.

10.21 Consequently, the Committee finds the communication inadmissible for failure to exhaust domestic remedies under article 7 (e) of the Optional Protocol.

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 7 (e) of the Optional Protocol;

(b) That the present decision shall be transmitted to the authors of the communication and, for information, to the State party.