

To: Luis Ernesto Pedernera Reyna, President of the Committee on the Rights of the Child  
From: Yasmeen Nekoo, Legal Analyst for the Office of the High Commissioner for Human Rights  
Re: Validity of the 2019 petition of 16 children against CRC member states  
Date: November 23, 2021

### ***Question Presented***

The question presented is whether the UN Committee on the Rights of the Child should grant the 2019 petition of 16 children which argues that Argentina, Brazil, France, Germany and Turkey– all of which are signed members of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC)– violated their rights under the UN Convention on Rights of the Child (CRC) by making insufficient cuts to greenhouse gases. This is in accordance with articles 3, 6, 24 (1-2) and 30 under the CRC, articles 5, 7 (e) and (f) under OPIC, and in relation to the international governance powers provided under the Office of the United Nations High Commissioner for Human Rights.

### ***Brief Answer***

The Committee on the Rights of the Child was correct in its decision not to grant the petition of the children against respondent States due to Articles 7(e) and (f) under OPIC stating that the communication is inadmissible when “all available domestic remedies have not been exhausted” or it is “manifestly ill-founded or not sufficiently substantiated.”<sup>1</sup> The plaintiffs failed to show substantial evidence supporting the fact that exhausting domestic remedies would be unsuccessful. The petition is also inadmissible given that under OPIC Article 5, communications must be submitted by individuals within the jurisdiction of the State party, claiming to be victims of a violation by that specific State party.

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<sup>1</sup> Optional Protocol to the Convention on the Rights of the Child on the communications procedure, art.7, *opened for signature Dec. 19, 2011*, 2983 U.N.T.S., (entered into force April 14, 2014).

### ***Background/Statement of the Facts***

The CRC is an international treaty (separate from the CRC Committee) that was adopted in November 1989 and imposes obligations on State parties to respect the rights of the child.<sup>2</sup> The obligations are set out in articles 1 to 41 of the Convention, and under article 49, the Convention was set to enter into force on the thirtieth day following the date of deposit with the Secretary-General of the UN for terms of ratification and accession. It is now the most widely ratified human rights treaty in the world.<sup>3</sup> The appeals system for the Convention in terms of whether a communication is admissible or not, is contained in the Optional Protocol on a Communications Procedure (OPIC), which was adopted in December of 2011. OPIC is a separate treaty open to State parties to the Convention and the five member States in question in this scenario are all signatories.<sup>4</sup> Thus, they agreed to recognize the competence of the CRC and its 18 member expert Committee to receive complaints by individual children regarding specific violations of their rights.<sup>5</sup>

In September of 2019, 16 children from various countries around the world presented the first climate-related petition to the United Nations CRC Committee. The petition called for a fundamental change in the economic and behavioral actions of Argentina, Brazil, Germany, France and Turkey so as to reduce their effects on global climate change. The children, all between the ages of 8 to 17 years old, argued that by causing and perpetuating climate change, the State parties have undermined their commitments under OPIC and have “failed to take

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<sup>2</sup> Convention on the Rights of a Child, *opened for signature Nov. 20, 1989*, 1577 U.N.T.S. 3, (entered into force Sep. 2, 1990).

<sup>3</sup> *Id.*

<sup>4</sup> Optional Protocol to the Convention on the Rights of the Child on the communications procedure, art.7, *opened for signature Dec. 19, 2011*, 2983 U.N.T.S., (entered into force April 14, 2014).

<sup>5</sup> Convention on the Rights of a Child, *opened for signature Nov. 20, 1989*, 1577 U.N.T.S. 3, (entered into force Sep. 2, 1990).

necessary preventive and precautionary measures to respect, protect, and fulfil the authors' rights to life, health, and culture."<sup>6</sup> Each child stated specific injuries they bore due to the actions of these States, noting that the climate crisis is a real and present danger. They even classify it as a security threat, seeing as a 1.1°C rise in global average temperature is already causing devastating forest fires, heat waves, extreme weather patterns, and more. The significance of this case lies in the fact that children are among the most vulnerable populations to climate threats as they will have to endure the effects for a much longer time period than older generations. Thus, it seems they bear the responsibility in having to fight for their rights as is such with this case.

The petitioners' request for relief is not monetary, but rather they ask that the Committee recognize climate change as a "children's rights crisis" and find that the respondents have and continue to knowingly perpetuate climate change, thereby violating petitioners' rights to life, health, and their best interests.<sup>7</sup> They also want the Committee to make proper recommendations to violating States regarding policy change and accelerated efforts to mitigate climate change.<sup>8</sup> The issue at hand is whether the petitioners followed the rules under the OPIC articles, specifically 7(e) and (f), to validate their claims.

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<sup>6</sup> Chiarra Sacchi, et al. v. Argentina, et al., *Petitioner's Communication to the Committee on the Rights of the Child* (23 Sep. 2019).

<sup>7</sup> Lauren Walson, Notes and Comment: *Petitioning the United Nations Convention on the Rights of the Child for Relief from Climate Change*, 38 *Wis. Int'l L.J.* 651, (2021).

<sup>8</sup> *Id.*

## ***Applicable Statutes and Regulations***

Articles 3, 6, 24 (1-2) and 30 under the CRC<sup>9</sup>

### **PART I**

#### **(3)**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

#### **(6)**

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

#### **(24)**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality...

#### **(30)**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

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<sup>9</sup>Convention on the Rights of a Child, *opened for signature Nov. 20, 1989*, 1577 U.N.T.S. 3, (entered into force Sep. 2, 1990).

Articles 5, 7 (e) and (f) under OPIC<sup>10</sup>

**(5) INDIVIDUAL COMMUNICATIONS**

1. Communications must be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of the State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party [of the Convention]...

**(7) ADMISSIBILITY**

The Committee shall consider a communication inadmissible when:

**E.** All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;...

**F.** The communication is manifestly ill-founded or not sufficiently substantiated;

***Analysis and Discussion***

The facts as submitted by the 16 plaintiffs all proclaim specific violations by each of the five countries under the CRC treaty in accordance with articles 6, 24 (1-2) and 30. The overall complaint is that these countries are not looking out for the health and best interest of the children by failing to tackle climate change or recognize this as a children's rights crisis.<sup>11</sup> In relations to article 6(1-2), the plaintiffs claim that the State party's perpetuance of the climate crisis has already exposed them to "foreseeable, life threatening risks of human-caused climate change, be it heat, floods, storms, droughts, disease, or polluted air."<sup>12</sup> Under article 24, the plaintiffs claim that the State party's violated their right to health and have already caused

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<sup>10</sup> Optional Protocol to the Convention on the Rights of the Child on the communications procedure, art.7, *opened for signature Dec. 19, 2011*, 2983 U.N.T.S., (entered into force April 14, 2014).

<sup>11</sup> Christine Bakker, *Baptism of fire? The First Climate Case Before the UN Committee on the Rights of the Child* Questions of International Law (2021), [http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#\\_ftn13](http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#_ftn13).

<sup>12</sup> Chiarra Sacchi, et al. v. Argentina, et al., *Petitioner's Communication to the Committee on the Rights of the Child* (23 Sep. 2019).

injuries to their physical and mental state, from asthma to emotional trauma.<sup>13</sup> In relation to article 30, the plaintiffs claim that the State party's contributions to the climate crisis have already jeopardized subsistence practices of the indigenous plaintiffs from Alaska, the Marshall Islands, and Sapmi.<sup>14</sup>

*Argentina-*

Argentina shares many of the children's aforementioned concerns but one of the reasons they deem the communication inadmissible is because many of the plaintiffs' arguments are derived from events that happened prior to July 14 2015, when the Optional Protocol entered into force for the State party. Argentina claims the use of fossil fuels and the consequent carbon emissions are not ongoing violations. However, as a counter-argument, the plaintiffs found that in 2018, an estimated 93% of total public energy investments in Argentina went to coal, oil and gas projects while virtually no money went to renewable energy projects.<sup>15</sup> Argentina also has no plan to decarbonize its economy by 2050. Instead, the government intends to further develop the natural gas industry making it the main energy source in the country.<sup>16</sup> Finally, the State party submits that the communication is inadmissible for failure to exhaust domestic remedies— article 7(e) under OPIC. The communication expressly recognizes that the children could challenge the State party's climate change policy in Argentina's domestic courts, but they have chosen not to do so.<sup>17</sup> The reason, as asserted by the children, is that the remedies would be “futile” and cause

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> United Nations, General Assembly, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, CRC/C/88/D/104/2019 (23 Sep. 2019) [hereinafter *Argentina Communication*]

<sup>16</sup> Id.

<sup>17</sup> Id.

extreme delays as they would have no real prospect of success.<sup>18</sup> They argue that the State party has failed to demonstrate that requiring exhaustion of remedies would be fair to the authors residing outside its borders.

*Brazil-*

In the petition against Brazil, the children once more claimed a violation under the CRC articles 3,6 and 24 pointing to State party actions that harm the “health” and well-being of the children by emitting an excess of carbon emissions and not doing enough to slow the climate crisis.<sup>19</sup> In January 2020, the State deemed the complaint inadmissible for lack of jurisdiction (article 5 of OPIC), failure to substantiate the claims for purposes of admissibility (article 7(f)), and failure to exhaust domestic remedies (7(e)). In terms of jurisdiction, Brazil argues that it is wrong to conclude that the State party’s polluting activities would be “directly and foreseeably” impacting the rights of children within or outside its territory.<sup>20</sup> Brazil then specifically notes that under article 3 of the country’s “Child and Adolescent Statute,” children shall have every opportunity needed to guarantee their “physical, mental, moral, spiritual and social development in conditions of freedom and dignity.”<sup>21</sup> In addition, article 141 of their Statute guarantees access of every child to the Public Defender’s Office, the Public Prosecution and the Judiciary Branch, through any of its bodies.<sup>22</sup> Seeing as there are suitable mechanisms for domestic redress, the State party argues the plaintiff’s have not exhausted any of the domestic remedies. Even Brazil’s Constitution provides for procedural measures that can be taken to defend the right to a healthy

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<sup>18</sup> Id.

<sup>19</sup> United Nations, General Assembly, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 105/2019*, CRC/C/88/D/105/2019 (23 Sep. 2019) [hereinafter Brazil Communication]

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

environment.<sup>23</sup> Because of these reasons, their argument is also seen as “hypothetical” and unsubstantiated, thus violating 7(e) and (f) of OPIC. Nonetheless, the children further counter by claiming they are within jurisdiction and that domestic courts cannot adjudicate their claims since it would implicate the obligation of international cooperation.<sup>24</sup>

*France and Germany-*

The plaintiffs’ complaints and both France and Germany’s counterclaims are identical to the petition against Brazil with regards to issues surrounding jurisdiction, domestic remedies, and substantive claims. France first highlights that they have no jurisdiction regarding Iris Duquesne—a French national who claims having experienced the 2003 heat wave during adolescence— since as of 2019, she no longer resides in France but in the United States. The other children do not reside in French territory nor do they come under the extraterritorial jurisdiction of France.<sup>25</sup> Furthermore, France’s Administrative Court of Paris, Administrative Court of Lyon and the Administrative Court of Lille, have already examined cases of State’s responsibility so the children should have brought their case there first.<sup>26</sup> Germany also claims they have domestic courts that could have first addressed the needs of the plaintiffs and they also argue that children who do not reside in Germany are not within its jurisdiction.<sup>27</sup> Germany further maintains that the declaration that climate change is a “children’s rights crisis” is not admissible as neither the

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<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> United Nations, General Assembly, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 106/2019*, CRC/C/88/D/106/2019 (23 Sep. 2019) [hereinafter France Communication]

<sup>26</sup> Id.

<sup>27</sup> United Nations, General Assembly, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 107/2019*, CRC/C/88/D/107/2019 (23 Sep. 2019) [hereinafter Germany Communication]



CRC nor OPIC recognise that terms in their language<sup>28</sup> Still, the children once again counter that they are within jurisdiction, seeing as climate change is a global and interconnected issue and that exhausting domestic remedies would be unreasonably prolonged and “futile” in accordance with the exceptions under article 7(e) of OPIC.<sup>29</sup>

*Turkey-*

While many of the plaintiffs are citizens of these specific countries, it is important to note that there was no petitioner from Turkey.<sup>30</sup> The standing and jurisdictional requisites in this case deteriorates since Turkey is maintained as one of the five States in violation, yet no petitioner resides in that country and therefore the argument for a direct injury specific to that member State is inadequate. Similar to the other countries, Turkey also notes that exhausting domestic remedies may cause unreasonable delay, but regardless, the children have neglected to put forward evidence to support this allegation or even to bring forward a substantial claim in relation to Turkey, finding the argument unsubstantiated.<sup>31</sup> Once again, the OPIC articles were violated. Other than arguing that pursuing domestic remedies would be futile, the children also counter the jurisdictional and substantive claims of inadmissibility. They allege that a state has extraterritorial obligations that arise when a state controls activities in its territory that cause

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Christine Bakker, *Baptism of fire? The First Climate Case Before the UN Committee on the Rights of the Child* Questions of International Law (2021), [http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#\\_ftn13](http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#_ftn13).

<sup>31</sup> United Nations, General Assembly, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 108/2019*, CRC/C/88/D/108/2019 (23 Sep. 2019) [hereinafter *Turkey Communication*]

“direct and foreseeable transboundary harm” and so it is indisputable that the State party has the ability to regulate GHG emissions in its territory and therefore should.<sup>32</sup>

### ***Conclusion***

Although the five defendant countries and the 16 children engaged in meaningful discussions pertaining to the validity of claims under OPIC and CRC guidelines, it is clear that the decision to not grant the petition to the children was not only correct but should be held as precedent for similar cases to come. OPIC is a straight-forward outline of what criteria must be met in order to grant admissibility for a communication and in each country-specific case it was clear that the children did not exhaust domestic remedies, were arguably not within their jurisdiction, and lacked substantive claims regarding direct injury from said States. According to Article 7(e) of OPIC, the Committee shall consider a communication inadmissible when all available domestic remedies have not been exhausted.<sup>33</sup> The children argued their case using the exception under this provision stating that “this shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.”<sup>34</sup> However, they did not provide sufficient evidence pointing as to how domestic remedies would be unlikely to provide them relief and thus the mere doubts or assumptions about the success or effectiveness of remedies, such as claiming them to be “futile,” do not absolve the plaintiffs from exhausting them.<sup>35</sup> Irrespective of the fact that the children were able to communicate their claims

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<sup>32</sup> *Id.*

<sup>33</sup> Optional Protocol to the Convention on the Rights of the Child on the communications procedure, art.7, *opened for signature Dec. 19, 2011*, 2983 U.N.T.S., (entered into force April 14, 2014).

<sup>34</sup> Christine Bakker, *Baptism of fire? The First Climate Case Before the UN Committee on the Rights of the Child* Questions of International Law (2021), [http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#\\_ftn13](http://www.qil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/#_ftn13).

<sup>35</sup> *Id.*

sufficiently using articles 3, 6, 24 (1-2) and 30 under the CRC by speaking of direct harms to their life and health, the communication is ultimately inadmissible under article 7(e) and (f) of OPIC. Moving forward, the best option for these children and those bringing similar cases to the UN would be to first argue their case in the local courts of the member States before bringing them to international jurisprudence.