



Universiteit
Leiden

The Netherlands

**Child rights jurisprudence without borders:
developments in extraterritorial jurisdiction**

Skelton, A.M.

Citation

Skelton, A. M. (2023). Child rights jurisprudence without borders: developments in extraterritorial jurisdiction. *De Jure Law Journal*, 56, 606-624. Retrieved from <https://hdl.handle.net/1887/3728925>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3728925>

Note: To cite this publication please use the final published version (if applicable).

Child rights jurisprudence without borders: Developments in extraterritorial jurisdiction

Ann Skelton

*Professor of Law at the University of Pretoria, Chair: Education Law in Africa;
Professor of Law at the University of Leiden, Chair: Children's Rights in a
Sustainable World; Chairperson: UN Committee on the Rights of the Child*

SUMMARY

This article elaborates on the development of a global child rights jurisprudence emerging from the United Nations Committee on the Rights of the Child (the CRC Committee), drawing from other treaty bodies and supranational bodies. It also considers whether the CRC Committee is 'pushing the boundaries' of international law on extraterritorial jurisdiction in its recent decisions, one of which concerns the repatriation of the children of foreign fighters in the camps in North East Syria, and the other relates to transboundary harms caused by climate change. The article concludes that these two decisions show evidence of a jurisprudence that crosses the boundaries of different bodies and courts, and which has extended the concept of extraterritorial jurisdiction.

1 Introduction and overview

The purpose of this article is to examine whether the United National Committee on the Rights of the Child can be said to be pushing the boundaries of international law on extraterritorial jurisdiction. Two recent decisions of the Committee, issued under the 3rd Optional Protocol to the CRC on Communications Procedure (the Optional Protocol, OP3 or OPIC), are explored with a view to examining this question. The first case under the spotlight dealt with the question of whether children of foreign fighters experiencing rights violations in camps in North East Syria were within the jurisdiction of France for the purposes of determining liability under the Convention and OP3. The second case concerned a different transboundary jurisdiction question, namely, whether children whose rights are violated due to transboundary damage caused by carbon emissions are under the jurisdiction of the state of the origin of those emissions provided there is a sufficient causal link. The analysis to determine whether the Committee is "pushing the boundaries" operates on two pivots. The first is the extent to which jurisprudence from other treaty bodies and for a have been used within the decisions – an analysis of the "transboundariness" of jurisprudence. The second pivot of the analysis aims to answer the question as to whether the CRC Committee has "pushed the boundaries" of international law on extraterritorial jurisdiction. I examine the decisions, and various academic opinions

relating to them, and I advance arguments in support of an affirmative answer to both of these questions.

It is now over a decade since OP3 was adopted by the UN General Assembly,¹ and it came into operation on 14 April 2014, three months after the 10th state ratified it. Those who lobbied for and were involved in drafting the Optional Protocol saw the opportunity – indeed the obligation – to create a pathway to justice for children to seek remedies for their rights.² But of course, it was not the first such mechanism – several other treaty bodies – notably the Committees for the ICCPR and CEDAW already had such optional protocols and had been receiving communications/complaints – including with regard to some children’s rights matters.³

At the regional level, there were already courts operating that were dealing with children’s rights, at least to a limited extent as provided for in the relevant instruments, notably the European Court of Human Rights,⁴ the Inter-American Court on Human Rights,⁵ and the African Court on Human Rights.⁶ OP3 did not come to life in a vacuum – it was born into an existing broader rights framework in which procedural and substantive jurisprudence had already been developed.

One angle of my analysis in this article explores the extent to which the Committee on the Rights of the Child has drawn from the jurisprudence of other treaty bodies, and to what extent it is charting its own course. Is the jurisprudence crossing the boundaries of particular treaties when it comes to children’s rights? This rather literal

-
- 1 UN Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council, 2011-07-14, A/HRC/RES/17/18, see <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications> (last accessed 2022-04-20).
 - 2 Skelton “International children’s rights law: Complaints and remedies” in Kilkelly and Liefaard (eds) *International human rights of children* (2018) 65–91.
 - 3 See, e.g., de Zayas “The CRC in litigation under the ICCPR and CEDAW” in Liefaard and Doek *Litigating the rights of the Child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 177–191 where the author notes that in the absence of a communications procedure under the CRC until April 2014, treaty body jurisprudence on children’s rights was nonetheless developed through the individual complaints procedure of the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women.
 - 4 Kilkelly “The CRC in litigation under the ECHR” in Liefaard and Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 193–210.
 - 5 Fera-Tinta “The CRC as litigation tool before the Inter-American system of protection of human rights” in Liefaard and Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 231–248.
 - 6 Sloth-Nielsen “Monitoring and implementation of children’s rights” in Kilkelly and Liefaard (eds) *International human rights of children* (2018) 31–64.

interpretative question is also suffused with a more figurative question – Has the Committee on the Rights of the Child been pushing the boundaries of accepted international human rights law? Another angle of my analysis takes a different interpretive route, relating to geographical boundaries. What steps has the Committee taken to stretch or redefine the territorial boundaries of the application of children’s rights?

In undertaking this analysis, I examine two sets of cases that were received under OP3 during 2019. The first set of cases comprises two similar cases that were joined together at the merits stage in *LH v France* (hereafter *LH*).⁷ The cases were brought by grandparents who sought the repatriation to France of their grandchildren who were living with their mothers in refugee camps in North east Syria. The other set of cases, *Sacchi v Argentina and others* (hereafter *Sacchi*),⁸ deal with climate change effects rising from carbon emissions. Both cases raised complex questions regarding transboundary jurisdiction.

2 *LH and others v France*

In *LH*, the petitioners⁹ explain the background of the case. The mothers of the children were among many French women who had fled the Islamic State in Iraq and the Levant (ISIL) and surrendered to the Kurdish Forces in North-East Syria. The women and children were then detained in the Hawl, Ayn Isa and Roj camps. In 2018 Kurdish authorities had indicated that they wanted all foreign nationals in the camps to be repatriated to the states of nationality, and initially, the French Authorities announced that they would repatriate 70 women and children from the camps, but then did a U-turn on this decision, without providing any explanation.¹⁰ In a similar vein, when the grandparents in the *LH* case, via their counsel, initially sent their request to receive their children back in France, they were assured that the children were entitled to protection and would be assisted, no action was taken, and further inquiries were met with silence.¹¹

The dire conditions in the camps in North East Syria were described, presenting an imminent risk to children who were barely surviving in a

7 UN Children’s Rights Committee, *FB v France* CRC/C/86/D/R.77/2019; CRC/C/85/D/79/2019, 2 November 2019, and UN Children’s Rights Committee, *LH v France* CRC/C/85/D/109/2019, 2 November 2019.

8 UN Children’s Rights Committee, *Sacchi et al v Argentina et al* CRC/C/88/104/2019, 11 November 2021. The case was brought by the petitioners against 5 states, but these were separated out into different communications namely CRC/C/88/105/2019 (Brazil); CRC/C/88/106/2019 (France); CRC/C/88/107/2019 (Germany), and CRC/C/88/108/2019 (Turkey).

9 Under OP3, those bringing cases are referred to as authors. I will refer to them as petitioners in this article, in order to avoid the confusion that arises from the fact that the word author is also used for authors of journal articles, and might also be confused with my own views, as the author of this article.

10 *LH* para 2.3.

11 *LH* para 2.4.

context where 29 children had died of hypothermia the previous year, and where they faced ongoing risks from violence within the camps as well as the volatile conflict situation immediately beyond the camps.¹² According to the petitioners, the state party had been made aware of the deplorable conditions in which the children were living, therefore the state party's failure to take any positive action resulted in the violations of several rights in the Convention on the Rights of the Child, namely the right to non-discrimination;¹³ the right to have their best interests considered as a primary consideration;¹⁴ the right to life, survival and development;¹⁵ the right not to be deprived of a family environment;¹⁶ the right to medical treatment;¹⁷ and right not to be treated in a cruel, inhuman and degrading manner.¹⁸

Essentially, the cases sought the repatriation of the children back to France. Due to their complexity, the admissibility of the cases was dealt with separately from the merits.¹⁹ At the admissibility stage, the central issue that the Committee had to deal with was a counter-argument by France that the children were not within the jurisdiction of France, and that the cases were therefore inadmissible. Article 2 of the CRC says that the Convention applies to all children "within the jurisdiction" of the state – but it does not say "within the territory".

The Committee received two Third-Party Interventions in this matter.²⁰ One of these was submitted by a group of 31 academics.²¹ The academics noted that extraterritorial obligations are similar to situations where multiple states share concurrent jurisdiction over a certain

12 UN Special Rapporteur "Extraterritorial jurisdiction of states over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic" 2020 <https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/UNSRsPublicJurisdictionAnalysis2020.pdf> (last accessed 2023-04-13).

13 Art 2 of the CRC.

14 Art 3 of the CRC.

15 Art 6 of the CRC.

16 Art 20 of the CRC.

17 Art 24 of the CRC.

18 Art 37 of the CRC.

19 *Sacchi* para 1.2.

20 The third-party interventions consisted of three experts from the Consortium on Extraterritorial Obligations: Ana María Suárez Franco (FIAN International), Mark Gibney (University of North Carolina at Asheville, United States of America, and Raoul Wallenberg Institute in Lund, Sweden) and Neetu Sharma (Centre for Child and the Law at the National Law School of India University, India), and a group of 31 academics from different universities around the world.

21 31 Academics: Wouter Vandenhoe and Gamze Erdem Türkelli (Law and Development Research Group, University of Antwerp, Belgium), Meda Couzens (Western Sydney University, Australia, and University of KwaZulu-Natal, South Africa) and Ton Liefwaard and Chrisje Sandelowsky-Bosman (Leiden Law School, Leiden University, the Netherlands). Signatories: Karin Arts (International Institute of Social Studies at The Hague, part of Erasmus University Rotterdam, the Netherlands), Warren Binford (Willamette University College of Law, United States), Laura Carpaneto (University of Genoa, Italy), Pablo Ceriani Cernadas (Universidad Nacional de Lanús,

territory.²² Therefore, even if the state party has no effective control in the area, it still has a positive obligation to “take all appropriate measures and to pursue all legal and diplomatic avenues, at its disposal to protect the rights of the children.”²³ Another interesting argument made by the group of 31 academics was on the drafting history of article 2 of the CRC. The academics pointed out that extraterritorial jurisdiction was not excluded from the Convention on the Rights of the Child, but that in the travaux préparatoire (preparatory work) it was expressly indicated that territoriality was excluded from the Convention.²⁴

Moreover, the group of 31 academics point out that an early draft of article 2(1) of the CRC showed that the applicability of the CRC was originally linked to the jurisdiction and the territory of a state. However, the word “territory” was intentionally left out of the final text of article 2, which is why the final version only reflects the concept of jurisdiction. According to the 31 academics, this is indicative that the drafting parties of the Convention did not intend the concept of jurisdiction to be exclusively territorial.²⁵ A particularly pertinent part of the 31 academics’ argument pointed to the concurring opinion on *Al Skeini v United Kingdom*,²⁶ by Judge Bonello which noted that “jurisdiction arises from the mere fact of having assumed [human rights] obligations and from

Argentina), Aoife Daly (European Children’s Rights Unit, University of Liverpool, United Kingdom of Great Britain and Northern Ireland), Bina D’Costa (Department of International Relations, Australian National University, Australia), Ellen Desmet (Ghent University, Belgium), Jaap E. Doek (Vrije Universiteit Amsterdam, the Netherlands), Nicolás Espejo Yaksic (Center for Constitutional Studies of the Supreme Court of Mexico and Exeter College, Oxford University, United Kingdom), Michael Garcia Bochenek (Institute for the Study of Human Rights, Columbia University, United States), Kathryn Hollingsworth (Newcastle University, United Kingdom), Ursula Kilkelly (School of Law, University College Cork, Ireland), Thalia Kruger (University of Antwerp, Belgium), Sara Lembrechts (University of Antwerp, Belgium), Jernej Letnar Čerňič (Faculty of Government and European Studies, New University, Slovenia), Laura Lundy (School of Social Sciences, Education and Social Work, Queen’s University, Belfast, United Kingdom), Nicholas Munn (University of Waikato, New Zealand), Manfred Nowak (Global Campus of Human Rights, Venice, Italy), Noam Peleg (Faculty of Law, University of New South Wales, Australia), Peter R. Rodrigues (Leiden University, the Netherlands), Kirsten Sandberg (Department of Public and International Law, University of Oslo, Norway), Julia Sloth-Nielsen (Leiden University, the Netherlands, University of the Western Cape, South Africa), Helen Stalford (European Children’s Rights Unit, University of Liverpool, United Kingdom), Rebecca Thornburn Stern (University of Uppsala, Sweden), Tara Van Ho (School of Law and Human Rights Centre, University of Essex, United Kingdom) and Jinske Verhellen (Department of Interdisciplinary Study of Law, Private Law and Business Law, Ghent University, Belgium).

22 *LH* para 8.7.

23 As above.

24 *LH* para 8.5.

25 *LH* para 8.5 read with footnote 35 in the *LH* decision.

26 *Al Skeini v United Kingdom*, Application No 55721/07, judgment of 7 July 2011.

having the capability to fulfil them (or not to fulfil them)".²⁷ As will be seen later in this article, this mention of "capability" was picked up by the CRC Committee and included in its findings on the merits.

In international human rights law, it is commonly recognised that the jurisdiction of states is primarily territorial.²⁸ However, case law has developed the recognition of extraterritorial jurisdiction in certain circumstances, although these mostly refer to situations where the state exercises effective control of an area abroad (the European Court of Human Rights judgments in *Banković v Belgium* (2001),²⁹ and *Ilascu v Moldova and Russia* (2004),³⁰ and *Catan v Moldova and Russia* (2012),³¹ being determinative on this issue. The European Court of Human Rights also carved out an exception where the state exercises control over individuals in the cases of *Pad v Turkey* (2007),³² and *Al Skeini v UK* (2011).³³

The problem in the *LH* case, though, was that France does not exercise control over the territory in North East Syria which is currently controlled by the Kurdish Autonomous Administration of North and East Syria.³⁴ The CRC Committee considered the jurisprudence of the European Court, and also made mention of the General Comment of the Human Rights Committee on the right to life.³⁵ Ultimately however, the Committee crossed new boundaries in its extraterritorial jurisprudence by finding, on the basis of specific factors such as the children's vulnerability, the deplorable conditions, the fact that effective control was held by a non-state actor that had said it had neither the means nor the will to look after the children in the camps and expected the detainees' countries of nationality to repatriate them. In these circumstances, the committee found that

the State party, as the State of the children's nationality, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses. These circumstances

27 *Al Skeini* para 13.

28 Altwicker "Transnationalizing rights: International human rights law in cross-border contexts" 2018 *EJIL* 583.

29 *Banković v Belgium* Application No 52207/99 ECHR 2001-XII.

30 *Ilascu v Moldova and Russia*, 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004.

31 *Catan v the Republic of Moldova and Russia* [GC] – 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012 [GC].

32 *Pad v Turkey*, Application No 60167/00, Admissibility Decision, 28 June 2007.

33 Application No 55721/07, judgment of 7 July 2011.

34 The Autonomous Administration of North and East Syria (AANES) was established at the Third Conference of the Syrian Democratic Council (SDC) on 16 July 2018 in the city of Al Tabqa; see further Syrian Democratic Council US Mission "Autonomous Administration of North and East Syria" <https://www.syriandemocraticcouncil.us/1418-2/> (last accessed 2023.04.14).

35 *Al Skeini v United Kingdom* Application No 55721/07, judgment of 7 July 2011. See also CCPR General comment No 36, art 6 (right to life), 3 September 2019, CCPR/C/GC/35.

include the State party's rapport with the Kurdish authorities, the latter's willingness to cooperate and the fact that the State party has already repatriated at least 17 French children from the camps in Syrian Kurdistan since March 2019.³⁶

The decision is not without its critics. Marko Milanovic has criticised the Committee for basing its decision, in part, on nationality.³⁷ He acknowledges that the Committee did so in such a manner that nationality is not the sole ground for the Committee's finding.³⁸ However, he argues that nationality was a "but for" condition in the reasoning of the Committee, in that if the children were not French nationals, France would not have had the duty to repatriate them.³⁹ He lists three reasons why relying on nationality as the basis for France's responsibility towards the children is problematic: first, is the fact that nationality is generally acquired through birth, making it a poor foundation on which to base a state's responsibility towards its citizens. Second, the premise that the children's French nationality can help them is false. This is because France could have also repatriated children who were not French nationals since they were no rules from the Kurdish authorities to oppose this. Third, the fact that nationality is being used to solve a problem which is universal in nature and finally because state laws on the acquisition and deprivation of nationality vary greatly.

He notes that it is unclear what test is being relied on by the Committee, but that it is not one of control over the camps. He points to the fact that the Committee makes is clear that nationality cannot be solely relied upon to trigger jurisdiction under article 2(1) of the CRC. Milanovic argues that the Committee has adopted a "functional" approach which is based on the rationale that France has a duty to repatriate the children because it has the ability to do so.⁴⁰ He expresses concern about the perverse risk of the Committee's reliance on the fact that France had demonstrated its ability through the fact that it had brought certain children home. He poses the question – if it had not done so, would that have worked in its favour? He acknowledges that the benefit of relying on the functional approach to extraterritoriality is that states would owe a duty of protection to citizens when they are factually capable of providing such protection. However, he reasons that the problem with the functional approach is that unless the capability inquiry is very strictly applied, it will become unreasonably burdensome for states.⁴¹

36 *LH* para 9.7.

37 Milanovic "Repatriating the children of foreign terrorist fighters and the extraterritorial application of human rights" <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> (last accessed 2023-04-20).

38 As above.

39 As above.

40 As above.

41 As above.

Milanovic expresses support for the decision to return to the children, he is simply unimpressed with the legal rationale. However, as he himself acknowledges, the Committee does not rely on nationality as a criterion – it is merely one of several facts that, provide the basis for the obligation. Citizenship was relevant because it creates the link between the state and the children, otherwise, the obligation would indeed become unreasonably onerous for states. It was also relevant because the French had a relationship with the Kurdish authorities and was therefore able to organise for the repatriation, as it had previously done – and this was a relevant fact for the capability approach.

Helen Duffy, writing for the Children’s Rights Observatory,⁴² expresses disappointment that the Committee tied its decision so closely to the facts and therefore avoided creating a more replicable set of principles. Duffy argues that although facts and context inform the approach to interpretation, they should not replace the basic standard that the Committee used to determine that France had jurisdiction in the matter. She adds that an understanding of the Committee’s reasoning in coming to the conclusion that France had jurisdiction over the French children in the Kurdish-controlled camps “could have helped locate this case within the trends and developments around jurisdiction, and increased the influence of the Committee’s jurisprudence on international legal development”.⁴³

Nevertheless, the critics consider the developments to be bold, and, one might conclude: pushing the boundaries. As Duffy observes:

Nonetheless one can foresee that the ‘circumstances’ identified by the Committee, and its approach, may be referenced in support of jurisdiction in other cases and contexts. They are certainly not exclusive, or required tests, and should not be taken as such. But they offer another perspective on the issue, drawing on some interesting – and some controversial – elements, and opening up a number of questions for further consideration.⁴⁴

Duffy describes the Committee’s approach as flexible, fact-specific and holistic. On flexibility and fact specificity, she submits that the Committee focuses on the “imminence”, “urgency” and “vulnerability” of the case and this shows the factual aspects of the case which are relevant to the Committee’s decision.⁴⁵ On the holistic aspect, she notes that the decision suggests the need to move from formal and rigid distinctions, as the Committee has done by rejecting the requirement of personal or physical control to determine jurisdiction and accepting

42 Duffy, Communication 79/2019 and 109/2019 et. al., Leiden Children’s Rights Observatory, Case Note 2021/3, 18 February 2021; Leiden Children’s Rights Observatory “French children in Syrian camps: The Committee on the Rights of the Child and the jurisprudential quagmire” <https://www.childrensrightsobservatory.org/contributors/helen-duffy>

43 As above.

44 As above.

45 As above.

sufficient, factual and legal factors to establish a nexus between individuals outside their countries and the state.⁴⁶

In a subsequent judgment on the merits,⁴⁷ the Committee found that France's argument that it did not have the capability to repatriate the children, because it would depend on the consent of the Kurdish authorities did not hold water, because France had previously managed to repatriate 30 children, and because the Kurdish authorities had indicated a general willingness to allow such repatriations. The Committee also found that France had an obligation to adopt positive measures – which was particularly strong given the conditions in the camps and the imminent risk of death facing the children.⁴⁸

The Committee found that France's failure to protect the children had violated their rights to have their best interests considered as a primary consideration (art 3) and not to be subjected to cruel, inhuman and degrading treatment (art 37(a)). The Committee also found that the state's failure to protect the children from an imminent and foreseeable threat to their lives constituted a violation of their right to life in terms of article 6(1) of the Convention.⁴⁹

Reporting to the Committee on the Rights of the Child in its 5th and 6th Reports under the Convention during the 93rd session in May 2023, France recorded that it has repatriated 144 children from camps in Syria.⁵⁰ Most of these children were repatriated after the decision in the *FB v France* decision.

An interesting postscript to all this is the recent decision of the European Court of Human Rights in the case of *HF v France*,⁵¹ handed down after the CRC Committee decisions. The Court found firstly that France cannot be held responsible for the inhumane conditions in the camps, and secondly that there is no general right to repatriation.⁵² The court found France responsible only for a procedural violation of the rights of the children to “enter their own country”.⁵³ It is a disappointing decision but for the purposes of this article, it contains several paragraphs in which the ECtHR cites the views of the CRC Committee:

46 As above.

47 *FB v France* CRC/C/89/D/77/2019 – CRC/C/89/D/79/2019.

48 As above paras 6.1–6.9.

49 During the 91st session of the Committee on the Rights of the Child, held in September 2022, the Committee dealt with a similar case against Finland (*PN et al v Finland* CRC/C/91/D/100/2019, and again made similar findings regarding extraterritorial jurisdiction. As in the earlier case against France, the Committee ordered the States to make all efforts, acting in good faith, to repatriate the children.

50 CRC dialogue with France, 93rd session, May 2023.

51 *HF v France* – 24384/19 and 44234/20, judgment of 14 September 2022 [GC].

52 As above

53 As above.

In paragraph 269, the court relies on the Committee's decision to that there are exceptional circumstances which trigger an obligation to ensure that the decision-making process in the was case was surrounded by appropriate safeguards against arbitrariness.⁵⁴

269 ... the UN Committee on the Rights of the Child has, for its part, stated that France must assume responsibility for the protection of the French children there and that its refusal to repatriate them entails a breach of the right to life and the prohibition of inhuman or degrading treatment (see paragraphs 106 and 107 above). In its decision of 8 February 2022 the Committee emphasised that it was important for France to ensure that the best interests of the child, as guaranteed by Article 3 of the International Convention on the Rights of the Child, was a primary consideration in examining requests for repatriation.

Again, this presents a new frontier – the European Court of Human Rights, for the first time, citing the jurisprudence of the UN Committee on the Rights of the Child. This is a positive development for the harmonisation of approaches.

To sum up with regard to the *LH* case, there is evidence that the CRC Committee has drawn from the jurisprudence of the European Court of Human Rights, and from the UN Human Rights Committee, but it is also clear that the CRC Committee is charting its own unique course. Interestingly, the Committee's jurisprudence has been cited by the European Court of Human Rights, demonstrating that the jurisprudence is crossing the boundaries of different treaties. The critiques of the case also demonstrate that the decision has pushed the boundaries of accepted international human rights law, and at least some of the criticisms view this as a positive advancement. In the next part of the article, I turn to the other group of cases that I intend to analyse.

3 *Chiara Sacchi et al v Argentina*

The purpose of this section of the article is to advance the analysis of another important case received by the UN Committee on the rights of the child, in order to answer the central research questions posed in the introduction to this article. The issue of territorial jurisdiction was also pivotal in the decision by the UN Committee on the Rights of the Child in *Chiara Sacchi et al v Argentina et al*.⁵⁵ Sixteen children brought this case to the UN Committee on the Rights of the Child, claiming violations of their rights by five state parties: Argentina, France, Brazil, Germany and Turkey. According to the petitioners the five countries had violated their

⁵⁴ *FB v France*.

⁵⁵ It must be noted that this case was against five different states parties and therefore, the UN Committee on the Rights of the Child gave five different views which can be found in the following citations: CRC/C/88/D/104/2019 (Argentina), CRC/C/88/D/106/2019 (France), CRC/C/88/D/108/2019 (Turkey), CRC/C/88/D/105/2019 (Brazil), CRC/C/88/D/107/2019 (Germany).

rights in the CRC by causing and perpetuating the climate crisis, which had caused ongoing violations of the children petitioners' rights (right to life, right to health and right to culture).⁵⁶ The central issue in this case was the question of jurisdiction, in that most of the petitioners were not nationals or residents of the state parties against which the complaint was brought.⁵⁷ The case was ultimately held to be inadmissible due to failure to exhaust domestic remedies but the committee made certain findings in relation to jurisdiction.

3 1 Arguments advanced in the *Sacchi* case

It is notable that all five countries have ratified the UNCRC and the Paris Agreement but none of them had kept to the agreement of keeping temperature rise under 2 degrees Celsius. The petitioners argued that the state's parties had the following obligations under the UNCRC:

- i to prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change;
- ii to cooperate internationally in the face of the global climate emergency;
- iii to apply the precautionary principle to prevent deadly consequences even in the face of uncertainty; and
- iv to ensure intergenerational justice for children and posterity.

The petitioners argued that the climate crisis was a future threat to them as children and that the 1.1 degree Celsius increase in the global average temperature has caused heat waves, extreme weather, forest fires, floods, sea-level rise and a range of infectious diseases.⁵⁸ They argued that as children, they will be among those most affected, both mentally and physically.⁵⁹ The issue with jurisdiction in this case was that most of the child petitioners were neither citizens nor residents of the state parties in the case.⁶⁰ However, the petitioners emphasised that some of them were nationals and residents of the state parties and were therefore within their jurisdiction. Moreover, the petitioners submitted further that all of them were within the jurisdiction of the state parties because they were "victims of the foreseeable consequences of the carbon pollution knowingly emitted, permitted or promoted by each respondent from within their respective territory".⁶¹

Wewerinke-Singh submits that by asserting that that they were all within the jurisdiction of the state parties because they were victims of the foreseeable consequences of carbon emissions by the state parties, the petitioners "invited the CRC Committee to conceive of sovereignty as a basis for human rights obligations rather than as a shield for human

56 *Sacchi* paras 2–3.8.

57 *Sacchi* para 4.3.

58 *Sacchi* para 2.3.

59 *Sacchi* para 2.2.

60 *Sacchi* para 4.2.

61 Petitioners' Statements para 241.

rights accountability.”⁶² In a series of five oral hearings, the Committee heard from the children’s legal representatives, the state’s parties representatives and third-party interveners.⁶³

The interveners submitted that children are particularly at risk of the climate crisis for several reasons: firstly, they are more vulnerable to environmental harm than adults, and this can interfere with their rights such as life, health, food, development, housing, water and sanitation. Second, they are vulnerable to health problems which can be worsened due to climate change, including malnutrition, respiratory infections, diarrhoea and water-borne infections. Thirdly, climate change heightens existing social and economic inequalities.⁶⁴ On the issue of admissibility, which is linked to the question of jurisdiction in the present case, the interveners submitted that “State obligations extend beyond the situations of effective control to include obligations to protect those whose rights are affected by a state’s activities in a direct and reasonably foreseeable manner.”⁶⁵

The states parties argued that the case was inadmissible for three reasons: first that the petitioners were not within their jurisdiction, second that the communication was unsubstantiated, and lastly that the petitioners had not exhausted domestic remedies. On jurisdiction, the states parties note that the petitioners were not within their territory and were therefore not within their effective control and the emissions causing the climate change cannot be attributed directly to a specific country.⁶⁶ They argued further that the petitioners had not established a causal link between the acts and omissions and the extreme weather occurring elsewhere. The state parties also claimed that the emission created “does not directly or foreseeably impair the rights of people in other states”⁶⁷ and that “there was no causal link between the alleged harm to petitioners and the states party’s actions or omissions.”⁶⁸ They also argued that the petitioners have failed to show the specific harms they had directly suffered but instead provided generalised claims.

The Committee relied on the jurisprudence of the Inter-American Court of Human Rights where the Inter-American Court had laid the test

62 Wewerinke-Singh, “*Between cross-border obligations and domestic remedies: The Committee on the Rights of the Child’s decision on Sacchi v Argentina*”, *Communication 104/2019 Chiara Sacchi et al v Argentina et al*, Leiden Children’s Rights Observatory, Case Note 2021/10, 28 October 2021 <https://www.childrensrightsobservatory.org/case-notes/casenote2021-10> (last accessed 2023-04-14).

63 The third-party interveners were 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.

64 *Sacchi* para 6.1.

65 *Sacchi* para 6.3.

66 *Sacchi* para 7.4.

67 *Sacchi* para 4.2.

68 *Sacchi* para 7.4.

for determining jurisdiction in an advisory opinion requested by Colombia.⁶⁹ Relying on that advisory opinion, the Committee held that persons whose rights have been violated due to transboundary damage are under the jurisdiction of the state of origin provided 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.”⁷⁰ The Committee’s findings are discussed in the next section.

4 The CRC Committee’s findings

The Committee observed that under article 2 of the CRC, states have the obligation to respect and ensure the rights of “each child within their jurisdiction” but that that “territory” is not mentioned in that article.⁷¹ From here on the Committee took a different approach to jurisdiction from the previous case, because the nature of jurisdiction and transboundary harms is very specific in climate change cases. It should be noted that in this context, the Committee was discussing whether country A could be held liable for acts and omissions that occurred in country A but the effects of which travelled to country B and harmed children there.

The Committee relied on the Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights on the environment and human rights, to find that the exercise of jurisdiction arises from the state’s effective control over the conduct that causes environmental harm. The Committee also noted jurisprudence about jurisdiction coming from the Human Rights Committee and the European Court of Human Rights but indicated that the facts and circumstances in those cases did not deal with the environment, whereas the advisory opinion of the Inter-American Court did.⁷²

So, relying on that Inter-American court advisory opinion, the Committee noted that in case of transboundary harm, jurisdiction is based on the understanding that it is the state *within whose territory the harm originates* that has *effective control* and is in a position to prevent the harm from occurring and causing effects to people outside its territory.⁷³ On the issue of “effective control” the Committee found that as the states have the ability to regulate activities that are the source of

69 See Advisory Opinion Inter-American Court of Human Rights, Advisory Opinion OC-23/17, of 15 November 2017.

70 *Sacchi* para 10.5.

71 *Sacchi* para 9.5.

72 The jurisprudence referred to in the fn is: Human Rights Committee General Comments No 31 (2004) para 10 and No 36 (2018) para 63; *Munaf v Romania* (CCPR/C/96/D/1539/2006) para 14.2; *AS et al v Malta* (CCPR/C/128/D/3043/2017) paras 6.3–6.5; and *AS et al v Italy* (CCPR/C/130/D/3042/2017) paras 7.3–7.5; *Andreou v Turkey* para 25; and *Georgia v Russia (II)* Application No 38263/08 Judgment of 2021 para 81.

73 *Sacchi* para 9.5.

the harm-causing emissions and to enforce such regulations, they do have “effective control” over carbon emissions.⁷⁴

With regard to arguments by the respondent states that the climate harms could not be attributed to them because many states have contributed to such harms, the Committee found, in accordance with the principle of common but differentiated responsibilities under the Paris Agreement 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”.⁷⁵

The Committee then explored the issue of causation, again drawing from the Inter-American Court’s advisory opinion.⁷⁶ The Committee made the link between the state of origin and the transboundary harm: there must be a causal link between the acts or omissions of the state, and the negative impact on the rights of the children outside its territory.⁷⁷ Furthermore, this harm should have been reasonably foreseeable to the state at the time of its acts or omissions. With regard to this point, the petitioners had argued that the states against which the communication was brought are well aware of the harmful effects of their internal and cross-border contributions to climate change – as is evident from signatures of the UN Framework Convention on Climate Change and later, its Kyoto Protocol, as well as the Paris Agreement.⁷⁸ In setting out the test, the Committee indicated that the “required elements to establish [the] responsibility of the state are a matter of merits” and that the potential harm of the state party’s conduct must be reasonably foreseeable at the time of its acts or omissions, even for the purposes of establishing jurisdiction.⁷⁹ The Committee found that petitioners’ arguments regarding harm were uncontested by the state parties, and that the states have known about the harmful effects of their contributions.⁸⁰ Taking into account the fact that the states had signed the UN Framework Convention on Climate Change and the Paris Agreement, as well as the “existing science” of the cumulative effects of carbon emissions,⁸¹ the Committee found that the potential harms of

74 *Sacchi* para 9.9.

75 *Sacchi* para 9.8. The Committee makes reference here to the principle of common but differentiated responsibilities, as reflected in the preamble and arts 2 and 4 of the Paris Agreement.

76 Advisory Opinion Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 of November 2017.

77 *Sacchi* para 9.7.

78 As above.

79 As above.

80 *Sacchi* para 9.11.

81 Here the fn in the decision points to the 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* and “Global warming of 1.5°C: summary for policymakers”, formally approved at the First Joint Session of

their acts and omissions were reasonably foreseeable by the respondent states.⁸²

The Committee noted that it is not every harm that will result in a finding of jurisdiction, the grounds need to justify on the circumstances of the case and harm should be “significant”. The Committee went on to follow the line of reasoning by the Inter-American Court in its advisory opinion (which in turn was based on an interpretation by the International Law Commission on the prevention of transboundary harm from hazardous activities), that “significant” should be understood as more than “detectable” but need not reach the level of “serious” or “substantial”.⁸³ The committee also linked this to whether the petitioners had established that they were victims of transboundary harm. It concluded that the petitioners had established “prima facie” that they had personally experienced real and significant harm, and this was sufficient to establish their victim status.⁸⁴ The Committee found that the petitioners “as children” are particularly affected by climate change both in terms of the way they experience it and its potential to have life-long impacts on them.⁸⁵ Invoking the recognition in the preamble to the CRC that children are entitled to special safeguards, including appropriate legal protection, the Committee concluded that states “have heightened obligations to protect children from foreseeable harm”.⁸⁶

The Committee’s development of jurisdiction in relation to climate harms has been described as breaking new ground in a manner “that is replicable and scalable”⁸⁷ and that it opens the door to future litigation by children.⁸⁸ The Committee’s reliance on the Inter-American Court of Human Rights advisory opinion and the way that this was used to expand the understanding of effective control towards a causality-based test in the context of environmental issues has mostly,⁸⁹ been received

81 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.

82 *Sacchi* para 9.12.

83 As above.

84 *Sacchi* para 9.14.

85 *Sacchi* para 9.13.

86 As above.

87 Wewerinke-Singh (2021). She is critical, however, of the Committee’s findings on exhaustion of domestic remedies, particularly in relation to children living in small island states for whom the effects of climate change are more immediate.

88 Nolan “Children’s Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*” https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2 (last accessed 2023-04-21).

89 An anonymous *Harvard Law Review* case report (“*Sacchi v Argentina*: Committee on the Rights of the Child extends jurisdiction over transboundary harms; enshrines new test” (2022) points out that a shift to a causality-based test is at odds with general justifications in international

positively, and described by Tigre and Lichet as “judicial cross-fertilization” which may impact similar claims worldwide, “providing a framework for national courts to use the CRC’s approach and causal nexus test to protect children’s rights”.⁹⁰

What is unique about this case is that, it is the first to bring a complaint against multiple states parties to an international human rights body, from different regions of the world, at the same time, it is also the first climate case before an international body by people from different regions of the world.

The Committee’s decision in *Sacchi* has received both positive⁹¹ and negative responses.⁹² On the positive side, the case has been hailed as “ground-breaking”⁹³ and “historic”⁹⁴ due to the Committee’s reasoning on jurisdiction and victim status. Most importantly, the Committee has not only expanded on jurisdiction to include state parties’ extraterritorial obligations in the climate crisis, but has also set a precedent for similar cases where the question of jurisdiction and admissibility arise. The Committee has clearly stated that persons whose rights have been violated due to transboundary damage are under the jurisdiction of the state of origin provided 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.”⁹⁵

Wewerinke-Singh submits that the replicability of the Committee’s finding “is hugely significant, as the issue of extraterritoriality needs to be confronted head-on to grapple with the global justice dimension of climate change – a dimension that remains under-addressed in rights-based climate litigation.”⁹⁶ However, she notes that the Committee’s views remain confined to admissibility and await the views of the Committee on foreseeability and causation in the context of a future case that may successfully pass the threshold of admissibility and be decided on the merits.

In summary, the *Sacchi* case demonstrates that the Committee considered the jurisprudence of the European Court on Human Rights and

law, and it could have unforeseen “ripple effects”, available at <https://harvardlawreview.org/print/vol-135/isacchi-v-argentina/> (last accessed 2023-11-24).

90 Tigre and Lichet “The CRC decision in *Sacchi v Argentina*” 2021 *American Society of International Law* <https://www.asil.org/insights/volume/25/issue/26> (last accessed 2022-11-30).

91 *Sacchi* para 10.5.

92 As above.

93 As above.

94 See OPIC “Historic ruling by the UN Committee on the Rights of the Child in the climate change case brought by 16 child petitioners under the OPIC” <https://opic.childrightsconnect.org/historic-ruling-by-the-un-committee-on-the-rights-of-the-child-in-the-climate-change-case-brought-by-16-child-petitioners-under-the-opic-2/> (last accessed 2023-11-24).

95 *Sacchi* para 10.5.

96 Wewerinke-Singh, 2021.

the Human Rights Committee on extraterritorial jurisdiction, but did not find it applicable to the context of climate change, where the carbon emissions are being generated within the jurisdiction of the respondent states parties, although the children were living in other jurisdictions. The committee relied on the advisory opinion of the Inter-American Court, which dealt with environmental harms and was thus more applicable. The decision shows that the Committee is searching beyond the treaty body system for guidance to develop its jurisprudence. With regard to pushing the boundaries of international law on extraterritorial jurisdiction, the Committee was the first UN body to apply the approach adopted by the Inter-American Court – although it is interesting to note that a relevant aspect of that advisory opinion also rested on draft articles of the International Law Commission, which provided a basis for the idea that “significant” harm should be understood as something more than “detectable” but need not be at the level of “serious” or “substantial”.⁹⁷ This draft article was used by the CRC Committee in determining that the children have demonstrated sufficient harm for the purposes of establishing jurisdiction.⁹⁸

5 Conclusion

To conclude, I consider whether I have provided answers to the questions that I set out at the beginning: Is the jurisprudence crossing the boundaries of particular treaties and treaty bodies when it comes to children’s rights? And has as the Committee on the Rights of the Child been pushing the boundaries of accepted international human rights law? In my view, both questions can be answered in the affirmative. Of course, there are ongoing critiques – and indeed, that is what we, in the academy strive for – to keep legal discourse on these important contemporary legal issues in children’s rights alive.

On the first question of whether treaty bodies are using each other’s jurisprudence, and that of other supranational courts and bodies, I have presented several examples that prove that this is occurring. In the *LH* case, the Committee consulted and acknowledged the jurisprudence of the European Court of Human Rights, in the series of judgments dealing with extraterritorial jurisdiction *Bankovic v Belgium*,⁹⁹ and *Ilascu v Moldova and Russia*,¹⁰⁰ and *Catan v Moldova and Russia*,¹⁰¹ *Pad v Turkey*,¹⁰² and *Al Skeini v UK*.¹⁰³ The Committee also made reference to

97 International Law Commission A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap VE2, commentary on draft art 2 of the draft arts on the prevention of transboundary harm from hazardous activities. C/f Inter-American Court advisory opinion OC-23/17 of November 15, 2017, paras 81 and 102.

98 *Sacchi* para 10.14.

99 *Banković v Belgium*, ECHR 2001.

100 *Ilascu v Moldova and Russia*, ECHR 2004.

101 *Catan v the Republic of Moldova and Russia* ECHR 2012 [GC].

102 *Pad v Turkey*, ECHR 2007.

103 *Al Skeini v United Kingdom* ECHR 2011.

the Human Rights Committee's General Comment on the right to life.¹⁰⁴ Ultimately, however, the Committee on the Rights of the Child went a step further added the concepts of "power and capability" to extraterritorial jurisdiction. The word "capability" had previously been used in a concurring judgment written by Justice Bonello in *Al Skeini*.¹⁰⁵ If the Committee had followed a strict and formalistic view of jurisdiction, it would not have been possible to arrive at the conclusion that France had jurisdiction over the children in the Kurdish-controlled camps. Instead, the Committee's view reflects a functional approach that rests on the power and capability of the state party to repatriate the French children.¹⁰⁶ This exhibits a flexible approach where a holistic understanding of the specific facts, coupled with the required normative links brought the Committee to the conclusion that the state in the particular situation had sufficient effective control over the rights of individuals.¹⁰⁷

It is reasonable to conclude then, that the *LH* case demonstrates that the Committee on the Rights of the Child pushed the boundaries in respect of both questions that I posed at the outset. The decisions in these cases clearly do rely on the jurisprudence of other treaty bodies and supranational courts, but also go further than them. The article also showed an interesting development that the European Court of Human Rights has already cited this decision in *HF v France*.¹⁰⁸

In *Sacchi*, the Committee relied pivotally on the jurisprudence of the Inter-American Court of Human Rights where the Inter-American Court had laid the test for determining jurisdiction.¹⁰⁹ Based on the Inter-American case, (Advisory Opinion OC-26) the Committee held that persons whose rights have been violated due to transboundary damage are under the jurisdiction of the state of origin, subject to their being a causal link between the act within its territory and the infringement rights of persons outside its territory.¹¹⁰ On the issue of "effective control" the Committee found that as the states have the ability to regulate activities that cause climate harms, and to enforce such regulations, they do have "effective control" over carbon emissions.¹¹¹

With regard to the issue of causation, again drawing from the Inter-American Court's advisory opinion, the Committee made the link between the State of origin and the transboundary harm: there must be

104 UN CCPR *General comment no. 36, Art 6 (right to life)*, 3 September 2019, CCPR/C/GC/35.

105 *Al Skeini v United Kingdom*, ECHR 2011.

106 Duffy, *Communication 79/2019 and 109/2019 et. al.*, Leiden Children's Rights Observatory, Case Note 2021/3, 18 February 2021 <https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3> (last accessed 2023-04-14).

107 As above.

108 *HF v France* – 24384/19 and 44234/20, judgment of 14 September 2022 [GC].

109 See Advisory Opinion OC-23/17 of 15 November 2017.

110 *Sacchi* para 9.5.

111 *Sacchi* para 9.9.

a causal link between the acts or omissions of the state, and the negative impact on the rights of the children outside its territory. Furthermore, this harm should have been reasonably foreseeable. Finally, the Committee followed the approach of the Inter-American Court in its advisory opinion (which in turn was based on an interpretation by the International Law Commission on the prevention of transboundary harm from hazardous activities), that “significant” should be understood as more than “detectable” but need not reach the level of “serious” or “substantial”.

The Committee’s views in *Sacchi* have expanded the limits of extraterritorial jurisdiction. The Committee’s view in *Sacchi* has been described as “replicable” and “scalable”, and it is possible, therefore that other bodies, both domestic and international, may well rely on this jurisprudence in future matters.¹¹²

In respect of the *Sacchi* matter, I also assert that the Committee’s views can be said to be pushing the boundaries, both in terms of their use of jurisprudence of the Inter-American Court and in the impact of its decision on extraterritorial jurisdiction.

112 Wewerinke-Singh, 2021. “Communication 104/2019 Chiara Sacchi et al v. Argentina et al” Leiden Children’s Rights Observatory, Case Note 2021/10, 28 October 2021. etween Cross-Border Obligations and Domestic Remedies: <https://ohrh.law.ox.ac.uk/between-cross-border-obligations-and-domestic-remedies-the-un-committee-on-the-rights-of-the-childs-decision-on-sacchi-v-argentina-part-1/> ..last