5

Admissibility

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5.1 INTRODUCTION

Admissibility could be broadly defined as the group of conditions that render a lawsuit or petition worthy of being reviewed by a judicial or quasi-judicial body, either at the national or international level. Admissibility requirements vary according to jurisdiction and type of legal action but generally relate to procedural requirements. The conflation of the term 'admissibility' with similar ones such as 'jurisdiction' and 'standing' tends to be common. However, some tribunals (including arbitral tribunals) and academics make a distinction by which:

> jurisdiction pertains to the ability or power of a [...] tribunal to hear a claim, whereas admissibility relates to the characteristics of a particular claim. Accordingly, a tribunal would have to decide, as a primary issue, whether it has jurisdiction, before determining whether a particular claim is admissible. It thus follows that, once a tribunal has upheld a jurisdictional objection, it would dismiss the case and consequently not decide upon objections to admissibility.[1]

Therefore, if jurisdiction reflects a court's power to adjudicate a dispute, then admissibility pertains to the terms permitting a court to exercise (or decline to exercise) its legal powers. The authorisation to decide whether to adjudicate a dispute which falls under a court's jurisdiction may be explicitly stated in the court's constitutive instruments or implicitly derived from them.[2] Some international legal instruments will also explicitly spell out criteria for admissibility and stress whether the claim before the court constitutes an abuse of legal process

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[1] Tejas Shiroor, 'Admissibility (Procedure)' (*Jus Mundi*, 27 September 2021) <https://jusmundi.com/en/document/wiki/en-admissibility-procedure> accessed 24 February 2024.

[2] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press 2016) 47.

or whether it is well founded.[3] In that sense, courts often find themselves in a position to manage what cases they should or should not dismiss, considering their permanent cautious approach not to arrogate other branches of power's functions and potentially opening the floodgates to complex climate cases that might be better dealt with in the law-making sphere.[4]

The issue of admissibility is highly relevant to climate litigation because it represents one of the first procedural hurdles for plaintiffs seeking climate-related relief. Accordingly, if the case is dismissed at such an early stage of the legal process, then alleged victims of climate change will, at worst, be left without proper access to justice and, at best, be deprived of discussing the merits of their case. For this reason, broadly speaking, a good emerging practice across different jurisdictions is to balance procedural rigour and consideration of applicants' particular circumstances in the context of the climate crisis. This chapter focuses mainly on admissibility issues before international and regional human rights courts and bodies, such as the requirement to exhaust domestic remedies, because the legal discussion is more noticeable in those spheres. Additionally, very few national-level cases have addressed the issue of admissibility in detail.

As of May 2021, the climate litigation databases from the Grantham Institute at the London School of Economics and the Sabin Center at Columbia University reported 1,841 ongoing or concluded climate change litigation cases from around the world.[5] Of these, 1,387 were filed before courts in the United States (US), while the remaining 454 were filed before courts in thirty-nine other countries and thirteen international or regional courts and tribunals (including the courts of the European Union).[6] About 20 per cent of all the cases (369) reached an outcome, of which 58 per cent (215) were favourable to climate change action, 32 per cent (118) had unfavourable outcomes, and 10 per cent (36) had no discernible likely impact on climate policy.[7] We can infer from this empirical evidence that at least 68 per cent of settled cases (favourable and no discernible likely impact outcomes) were not precluded by admissibility barriers because they were decided on the merits. Admissibility may have been a factor in the remaining 32 per cent of cases. However, this hypothesis cannot be empirically assessed due to unavailable specific data. Despite this, it is clear from the available evidence that most courts and tribunals worldwide permit cases to proceed to the merits stage of litigation, where substantial aspects are discussed instead of stalling and rejecting the case altogether based on admissibility grounds.[8]

[3] ibid 48.

[4] Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 TEL 55, 58.

[5] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (*LSE Grantham Research Institute on Climate Change and the Environment*, July 2021) 10 <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> accessed 24 February 2024.

[6] ibid.

[7] ibid 19.

[8] It is worth noting that cases dismissed at the admissibility stage may, however, be underrepresented in the databases (especially outside the US, where the database coverage is quite patchy).

From the point of view of attaining proactive and protective climate action, this trend suggests that, overall, judges are not interpreting procedural admissibility aspects of a legal case as an immediate barrier but rather are adopting a flexible approach to admissibility. Therefore, emerging best practices in the context of admissibility requirements in climate litigation reflect a careful balancing between a rigorous understanding of procedural rules with a sensitivity to the issues at stake in the climate emergency and an understanding of the role of the judiciary in clarifying existing laws that could further climate ambition and protection.

5.2 STATE OF AFFAIRS

Despite the empirical evidence showing that most climate litigation cases succeeded at the admissibility stage, earlier and recent cases have raised important questions about admissibility requirements. These questions, which could play an influential role in the cross-fertilisation of interpretive norms, have been highlighted mainly by international judicial and quasi-judicial bodies specialised in international human rights law. In these cases, the main hurdle has been some established concerns of admissibility requirements, namely the failure of applicants to exhaust domestic remedies, the failure to establish how the alleged facts would characterise a violation of rights, and the failure to clarify the victim's status. This section will, therefore, explore some of these points in case law.

However, before delving directly into the minutiae of case law, it is important to recall some general aspects of admissibility requirements at the international level, which, to some extent, are also present in many domestic jurisdictions. Comparing the number of cases in the three regional human rights systems, it is conspicuously evident that the European human rights system fares better than its African and Inter-American counterparts regarding the number of petitions admitted and eventually resolved.[9] This is, however, the result of barriers to access to formal institutionalised justice at the domestic level in Africa and Latin America, mainly due to racial and socioeconomic inequalities, lack of information on the scope of their rights, language barriers, cumbersome lawyer costs and court fees, excessive formalism, procedural delays, and geographical location of tribunals.[10] After these structural barriers are factored in, admissibility in the regional human rights systems also shows some numeric disparities. In 2014, the European system declared 97 per cent of petitions to be inadmissible; the Inter-American system declared 8 per cent inadmissible; and in the African system, 27 per cent of the cases under consideration were declared inadmissible.[11] This overview demonstrates that a case's likelihood of overcoming admissibility barriers will depend on the regional human rights system in which it is adjudicated.

[9] Françoise Hampson and others, 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa' (2018) 16 IJCL 161, 164.

[10] ibid 166.

[11] ibid 171.

In all international human rights bodies, admissibility is determined through a set of criteria that must be fulfilled cumulatively.[12] The admissibility criteria applied by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) include criteria related to *ratione personae*,[13] *loci*,[14] *materiae*,[15] and *temporis*;[16] characterisations of the claim; exhaustion of domestic remedies; and non-duplication of procedures.[17] Admissibility criteria for the European Court of Human Rights (ECtHR) are enumerated in Articles 34–35 of the European Convention on Human Rights (ECHR). They are concerned with jurisdictional matters (compatibility of the application or a complaint with the provisions of the ECHR *ratione materiae, personae, temporis, and loci*), procedural matters (six-month rule and exhaustion of domestic remedies), requirements concerned with the substantive elements of the complaint (manifestly ill-founded and no significant disadvantage criteria), and hybrid criteria that consist both of procedural and substantive elements (requirement of non-repetition and prohibition of the abuse of the right of application), or procedural and jurisdictional criteria (prohibition of anonymous applications).[18]

A notable and early example of how admissibility manifests as a relevant issue in climate litigation can be found in the pioneering petition filed by several Inuit Peoples of the Arctic against the United States before the IACHR in 2005.[19] In this petition, the Inuit requested the IACHR to recommend that the United States adopt mandatory measures to limit its greenhouse gas (GHG) emissions, consider the impacts of GHG emissions on the Arctic in environmental impact assessments,

[12] Vidan Hadzi-Vidanovic, 'Admissibility: European Court of Human Rights (ECtHR)', *Max Planck Encyclopaedias of International Law* (Oxford University Press 2018) [1].

[13] The *Ratione Persona* criterion is related to what the American Convention on Human Rights says about who can lodge a petition before the Inter-American Commission; every human being (art 1(2)), group of persons, or any NGO (art 44) may lodge petitions with the Commission containing denunciations or complaints. See Inter-American Commission on Human Rights, 'Digest of the Inter-American Commission on Human Rights on Its Admissibility and Competence Criteria' (Inter-American Commission on Human Rights 2020) OEA/Ser.L/V/II.175 [43–45].

[14] The *Ratione Loci* criterion refers to art 1(1) of the American Convention concerning the obligation of States to respect the rights and freedoms of all persons subject to their jurisdiction. See ibid [58]–[61].

[15] The *Ratione Materiae* criterion refers to art 33(a) of the American Convention concerning the competence of both the Commission and the Court to review matters relating to the fulfilment of the commitments made by States to the American Convention and other Inter-American human rights instruments. See ibid [68]–[79].

[16] The *Ratione Temporis* criterion refers to the applicability of the American Convention, the American Declaration, and other Inter-American instruments, over facts that took place when the applicable instrument was in force for the respondent State; or when the events began prior to its entry into force and continued after its entry into force. See ibid [62]–[67].

[17] James Cavallaro and others, *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System* (Oxford University Press 2019).

[18] Hadzi-Vidanovic (n 12) [6].

[19] Petition To the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States [2005] Inter-American Commission on Human Rights 1413–05.

establish and implement a plan to protect Inuit culture and resources, and provide assistance necessary for Inuit to adapt to the impacts of climate change that cannot be avoided.

Applicants addressed a potential dismissal of their claim based on admissibility requirements in their petition. They stressed that Article 31.1 of the IACHR's rules of procedure specifies that the IACHR, to admit the case, 'shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognised principles of international law'.[20] They also cited the exemptions to the general rule of admissibility, namely that the exhaustion requirement shall not apply when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.[21] In that vein, the applicants argued that in the US, there are no remedies suitable to address the infringement of their rights, and therefore, the requirement that domestic remedies be exhausted does not apply in their case, meaning consequently that the petition is admissible under the IACHR's rules of procedure.[22]

A year later, the Assistant Executive Secretary of the IACHR answered the applicants in a letter stating that after having completed the study outlined in Article 26 of the IACHR's Rules of Procedure, the IACHR determined that it would not be possible to process the petition because the information it contains 'does not satisfy the requirements set forth in those Rules and the other applicable instruments'.[23] Specifically, the information provided did not 'enable the IACHR to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration on the Rights and Duties of Man'.[24]

Article 26 of the IACHR's Rules of Procedure concerns the initial review of a petition by the Executive Secretariat of the Commission, who shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfil all the requirements. According to the Executive Secretariat, which served as the first filter of a petition, the applicants did not fulfil the requirements and thus declared it unadmitted.

More recently, on October 12, the United Nations Committee on the Rights of the Child (CRC) found the communication submitted by sixteen children inadmissible for failure to exhaust domestic remedies under Article 7 (e) of the Optional Protocol to the Convention on the Rights of the Child. This case began in September 2019, when sixteen children from different countries filed a claim

[20] ibid [111], [112].
[21] ibid [112].
[22] ibid.
[23] Response by the Inter-American Commission on Human Rights Executive Secretary, *Petition To the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* [2005] Inter-American Commission on Human Rights 1413-05.
[24] ibid.

alleging that Argentina, Brazil, France, Germany, and Turkey violated their rights under the UN Convention on the Rights of the Child because they had not been ambitious enough in reducing their GHG emissions. Specifically, the claimants argued that the countries had failed to take necessary preventive and precautionary measures to respect, protect, and fulfil the claimants' rights to life, health, and culture, as guaranteed by the Convention.[25] As a general remark, the CRC recalled that authors must use all judicial or administrative avenues that may offer them a reasonable prospect of redress and that domestic remedies need not be exhausted if they objectively have no prospect of success. For example, in cases where, under applicable domestic laws, the claim would inevitably be dismissed or where established jurisprudence of the highest domestic tribunals would preclude a positive result. However, the CRC noted that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.[26]

In light of this, the CRC found the petitions inadmissible because the authors did not attempt to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged violation of their rights under the Convention and that they did not sufficiently substantiate their arguments on the exception under Article 7 (e) of the Optional Protocol that the application of the remedies is unlikely to bring effective relief.[27]

Another impediment to admissibility in climate litigation relates to the status of victim or the jurisdiction *rationae personae*. Here, courts are clear about them not being appropriate fora for the institution of an *actio popularis* and that their task is not usually to review the relevant law and practice *in abstracto* or without a concrete victim but to determine whether how they were applied to or affected the applicant gave rise to a violation of the relevant treaty.[28] Therefore, the notion of 'victim' broadly denotes the person or persons directly or indirectly affected by the alleged violation. Hence, it is not just the direct victim or victims of the alleged violation who are concerned but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end. It was precisely this impediment that arose in the *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, in which ten families, including children, from Portugal, Germany, France, Italy, Romania, Kenya, Fiji, and the Swedish Sami Youth Association Sáminuorra, brought an action in the EU General Court seeking to compel the EU to take more stringent GHG emissions reductions.

[25] UN 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 104/2019', UN Doc CRC/C/88/D/104/2019 (*Sacchi*).

[26] ibid [10.16].

[27] ibid [10.18].

[28] 'Practical Guide on Admissibility Criteria' (*European Court of Human Rights, Council of Europe*, 1 August 2021) <www.echr.coe.int/documents/admissibility_guide_eng.pdf> [17][18] accessed 24 February 2024.

The plaintiffs alleged that the EU's target to reduce domestic GHG emissions by 40 per cent by 2030, compared to 1990 levels, is insufficient to avoid dangerous climate change and threatens plaintiffs' fundamental rights of life, health, occupation, and property. The applicants' inference did not convince the Court that they were individually concerned, given that although all persons may, in principle, each enjoy the same right (such as the right to life or the right to work), the effects of climate change and, by extension, the infringement of fundamental rights is unique to and different for each individual. The Court stressed that the claim that such an act infringes those rules or rights is not sufficient in itself to establish that the action brought by an individual is admissible without running the risk of rendering procedural requirements meaningless, insofar as the alleged infringement does not distinguish the applicant individually, just as in the case of the addressee.[29]

The grounds for annulling a legally binding piece of EU legislation, such as the 'climate package' plaintiffs sought to annul, arise under certain conditions, such as a lack of competence and an infringement of an essential procedural requirement. However, the admissibility requirements for such actions are very strict and include a requisite that an EU act is of 'direct and individual concern' to the person bringing the case. According to EU case law, the notion of direct concern presupposes that the impugned EU legislative act affects the legal situation of the person concerned directly and leaves no discretion to those responsible for its implementation.[30] Furthermore, an EU legislative act will only be of individual concern to a person bringing the action if it meets the criteria of what has become known as the '*Plaumann* test'.[31] This test assesses if the EU law affects a person because of specific attributes that are peculiar to them or because of circumstances in which they are differentiated from all other persons and, under these factors, distinguish them individually. In other words, the threshold to meet these admissibility requirements is relatively high, which explains why plaintiffs failed to convince the Court.

At the national level, some climate litigation cases have also been dismissed due to a lack of admissibility requirements, including the impossibility of drawing the status of victims. For instance, in the Colombian case of *Germán Espinosa Mejía v Colombia* – arguably the first attempt to integrate climate change and human rights arguments in a Latin American court – a narrow approach to legal interpretation and application on admissibility was adopted. The plaintiff filed a constitutional injunction alleging the violation of the right to a dignified life due to a lack of suitable environmental and climate protection policies. The Supreme Court of Colombia dismissed the legal action because the plaintiff could not represent

[29] Case T-330/18 *Carvalho and Others v Parliament and Council* [2018] 2018/C 285/51 (ECJ, 8 May 2019).

[30] Marc Willers, 'Climate Change Litigation in European Regional Courts: Jumping Procedural Hurdles to Hold States to Account?' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 298.

[31] Case 25/62 *Plaumann & Co v Commission of the European Economic Community* [1963] ECR 95, 107.

an imprecise group of present and future generations.[32] In this case, the outcome demonstrates that no uniform criteria exist across chambers and judges vis-à-vis the requirements to accept or dismiss *tutelas* or constitutional injunctions.

The examples covered in this section are rulings that have ripple effects across the climate law community, who have expressed their views on the possible impacts these precedents might have on interpreting admissibility requirements in other courts.[33] However, as was shown earlier, these instances in which cases are dismissed purely based on admissibility claims are not most cases, which means that most courts are adopting a relatively lenient approach against rigid procedural formalism by extending the interpretation to a systematic integration according to Article 31 of the Vienna Convention on the Law of Treaties.[34] In that vein, in *VZW Klimaatzaak v Kingdom of Belgium and Others*, the Brussels Court of First Instance referred to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to interpret admissibility requirements under domestic law – which was confirmed on appeal.[35] Through this reading, the Court admitted the lawsuit and analysed the petition's merits, an approach that could be replicable in other jurisdictions, as will be discussed in subsequent sections.

5.3 EMERGING BEST PRACTICE

As evinced in the case law, a best practice approach to admissibility includes a transparent discussion of admissibility criteria; provides effective balancing and in-depth reasons as to why a petition is not admitted; accommodates a fast-tracking procedure; and takes into consideration contextual aspects in the rationale of why the legal action is admitted or not. For instance, in *Shrestha v Office of the Prime Minister et al*, the Supreme Court of Nepal transparently discusses admissibility criteria and engages in a balancing exercise considering the context. Specifically, it did not explicitly disaggregate standing, jurisdiction, and admissibility issues. However, it recognised that, because the claim invoked constitutional rights and, further, the 'threat to present and future generations posed by climate change affects every citizen, hence, the matters raised in the current petition are of public concern', there was 'a meaningful relation between the issues and the petitioners', and it accordingly accepted the case for consideration on the merits.[36] In the case of *Milieudefensie*

[32] *Germán Espinosa Mejía v Government of Colombia* [2014] STP13863-2014 (Supreme Court of Justice of Colombia) [333].

[33] Setzer and Higham (n 5).

[34] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[35] *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile) (*VZW Klimaatzaak First Instance*) [47]; *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023] 2022/AR/891(Cour d'appel de Bruxelles) (*VZW Klimaatzaak Appeal*).

[36] *Advocate Padam Bahadur Shrestha v Prime Minister and Office of Council of Ministers and Others* [2018] Order No 074-WO-0283 (2075/09/10 BS) (Supreme Court of Nepal) (*Shrestha v Office of Council of Ministers*).

et al v Royal Dutch Shell plc, the 2021 decision from the Hague District Court stressed that the interests of current and future generations of the world's population, as served with the class actions, are not suitable for bundling because, given the difference in effects of climate change across the globe, they fail to properly constitute a 'similar interest'. However, the interests of current and future generations of Dutch residents and the inhabitants of the Wadden Sea area are suitable for bundling because they are sufficiently similar. The claim, therefore, is deemed admissible concerning Dutch residents and the inhabitants of the Wadden region.[37] This could be argued as an example of best practice because the Court considers the context in which the case takes place and is transparent in doing so.

Another example of best practice can be retrieved from the *Teitiota v New Zealand* communication before the UN Human Rights Committee. In 2015, Ioane Teitiota, a citizen of Kiribati, filed a communication with the UN Human Rights Committee claiming that New Zealand had violated his right to life by denying him asylum despite his assertions that climate change made Kiribati uninhabitable.[38] The Committee, in analysing the grounds of admissibility, noted that the author did exhaust all available domestic remedies and confirmed that the matter was not being examined under another international adjudicative procedure, following the Rules of Procedure of the Optional Protocol, thus justifying the Committee's competence to examine the communication.[39] Furthermore, the Committee stated that admissibility of the communication requires that the author justifies not only the victim status, which in cases of deportation or extradition means the imminent decision to remove the individual, but also an imminent harm in the receiving State. The Committee discussed the imminence requirement by accepting the author's argument that climate change leads to impacts in Kiribati, namely lack of potable water, employment possibilities, and a threat of serious violence caused by land disputes.[40] Notwithstanding the Committee's rejection of the communication on the merits, it did justify its position on the admissibility requirements by having considered the precarious environmental reality the author faces in his country of origin due to climate change.

In April 2018, Colombia's Supreme Court of Justice handed down the *Future Generations v Colombia tutela* brought by twenty-five young people who were advised by the national NGO Dejusticia. This case recognised the correlation between deforestation, climate change, and the infringement of human rights of present and future generations.[41] The Supreme Court of Colombia discussed

[37] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA:2021:5339 (District Court of the Hague).

[38] UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2728/2016', 24 October 2019, UN Doc CCPR/C/127/D/2728/2016 *(Teitiota)* [2.1]–[2.10].

[39] ibid [8.3].

[40] ibid [8.5].

[41] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia) (*Demanda Futuras Generaciones*).

procedural details regarding the *tutela* process. In the first ruling, the District Court determined that the *tutela* was not an appropriate mechanism to file this particular action because of the collective nature of the problem. However, a *tutela* can be filed if (i) it shows the connection between the violation of collective and fundamental or individual rights, (ii) the person filing the *tutela* is the person directly affected, (iii) the violation of a fundamental right is not hypothetical but fully proved, and (iv) the judicial order being sought is oriented towards restoring individual rights and not collective ones.[42] The Supreme Court found that the fundamental rights to life, health, minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will be unable to survive, much less protect those rights for our children or future generations. Therefore, the Court added that the exceptional proceeding of the *tutela* is sufficiently demonstrated to resolve in depth the problems raised because the jurisprudential assumptions for the lawsuit are met, given the connection of the environment with fundamental rights.[43]

In the Inter-American Human Rights System, the Court and the Commission have considered the particular cultural characteristics of the applicants and tailored admissibility requirements accordingly. For example, in the case of Indigenous peoples, the IACHR has consistently stated that these communities must exhaust only those remedies that contemplate the particular characteristics, either economic or social, of these groups as well as their particular situation of vulnerability, their customary law, values, uses and customs.[44] The African Commission on Human and Peoples' Rights (ACHPR) has given an even more purposive and generous interpretation than other regional systems.[45] Hampson, Martin, and Viljoen have noted the following:

> The ACHPR has consistently held that the requirement that 'domestic remedies, if any' need to be exhausted means that only remedies that are 'available' (which can be pursued without impediment), 'sufficient' (capable of providing the required remedy), and 'effective' (offering a real prospect of success) need

[42] ibid [17].

[43] ibid.

[44] *Diaguita Agricultural Communities of the Huasco-Altinos and the members thereof v Chile, Admissibility* [2009] Report No 141/09, Petition 415-07, Inter-American Commission on Human Rights (30 December 2009) [45]; *Oparia Lemoth Morris et al (Miskitu Divers) v Honduras, Admissibility* [2009] Report No 121/09, Petition 1186-04, Inter-American Commission on Human Rights (12 November 2009) [34]; *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and their Members v Panama, Admissibility* [2009] Report No 58/09, Petition 12-354, Inter-American Commission on Human Rights (21 April 2009) [37].

[45] Nsongurua J. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 AJIL 1; Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 323–329.

> to be exhausted.[46] The ACHPR has even gone as far as exempting complainants from this requirement in respect of systemic, widespread, and well-publicized violations, on the basis that the purpose of the requirement (namely, that a state should have notice and thus an opportunity to rectify the situation) had been served.[47]

Another best practice adopted by the ECtHR and IACHR is to expedite priority cases where urgent or systemic rights violations are alleged. This allows admissibility to be assessed promptly. On 30 November 2020, the European Court of Human Rights fast-tracked a climate case brought against thirty-three defendant countries, requiring them to respond by the end of February 2021. On 4 February 2021, the Court rejected a motion by the defendant's government asking the Court to overturn its fast-tracking decision. The governments had asked the court to overturn priority treatment of the case and to hear arguments only on the admissibility of the case. The Court sent a letter to the parties rejecting these motions and gave the defendants until 27 May 2021 to submit a defence on admissibility and the case's merits.[48] However, it should be noted that according to the Global Legal Action Network, who are supporting the case, only a tiny minority of cases before the Court are fast-tracked and communicated.[49]

In the Inter-American system, a new rule authorises expediting consideration of a petition due to the age or health condition of the victim, the potential application of the death penalty, the relationship between the petition and precautionary measures already adopted in that case, whether the victim is deprived of liberty, that there is an express intention of the State to enter into a friendly settlement, or when the petition addresses a structural situation. The IACHR had already implemented these rules in practice before they were included in its Rules of Procedure.[50]

5.4 REPLICABILITY

The creation of exceptions to ordinary rules of standing is a practice that could be replicated across jurisdictions. These exceptions arguably allow some room for manoeuvre for interpretive purposes in which judges could factor in some best practices mentioned earlier, such as flexibility and sensibility towards the context in which the case is grounded. For instance, in the case of the exhaustion of domestic remedies requirement, judges could employ a more thorough analysis of why

[46] *Sir Dawda K Jawara v The Gambia* [2000] Communication Nos 147/95 and 149/96, African Commission on Human and Peoples' Rights (11 May 2000) [32].

[47] Hampson and others (n 9) 172.

[48] ibid.

[49] 'Duarte Agostinho and Others v Portugal and 32 Other States' (*Sabin Center for Climate Change Law*, 2020) <https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 24 February 2024.

[50] Hampson and others (n 9) 169.

domestic litigation may not be the most optimal avenue for a complex case such as climate change, especially if there are some extraterritorial elements. For instance, some commentators have argued that in the *Sacchi et al v Argentina et al* case, the Committee on the Rights of the Child could have avoided the dismissal of at least certain applicants if it had duly considered the applicant's argument that under 'domestic laws their claims would inevitably be dismissed or that the established jurisprudence of the highest domestic courts would clearly preclude a positive result, then these arguments have to be assessed under the "no prospect of success" test'.[51]

Another factor that enables replicability is the prevalence of interpretation of the law through the principle of systemic integration. According to the Vienna Convention on the Law of the Treaties, systemic integration refers to the importance of contextual elements that should be considered, such as subsequent practice and international law applicable to the treaty parties, when interpreting the normative content of the primary rule.[52] At the domestic level, the essence of systemic integration can also be applied *mutandis mutandi*. In the context of climate litigation and overcoming admissibility hurdles, interpreting the law systematically and integrally implies resorting to those obligations provided by law that facilitate access to justice for environmental issues. In Europe, for instance, the burden of persuasion for victimhood could be lessened if courts seriously apply the provisions of the Aarhus Convention in light of domestic legislation (as in *Milieudefensie* and *VZW Klimaatzaak v Kingdom of Belgium and Others*). The same is true in Latin America, where judges could enable access to justice for applicants if they integrate the Escazu Agreement on Procedural Environmental Rights content. Article 8 of the Agreement affirms that States shall have, considering their circumstances, broad active legal standing (as a proxy to admissibility) in defence of the environment under domestic legislation.[53] Systematic interpretation could also be guided by *amici curiae*, which showcases the opinion of experts in certain areas of law or other disciplines to guide the courts in their decisions. This institution has been used in the context of climate litigation, and expressly, some experts have commented on specific admissibility aspects, as in the *Sacchi* case.[54]

[51] Başak Çali, 'A Handy Illusion? Interpretation of the "Unlikely to Bring Effective Relief" Limb of Article 7(e) OPIC by the CRC in Saachi et al' (*EJIL: Talk!*, 1 November 2021) <www.ejiltalk.org/a-handy-illusion-interpretation-of-the-unlikely-to-bring-effective-relief-limb-of-article-7e-opic-by-the-crc-in-saachi-et-al/> accessed 24 February 2024.

[52] VCLT (n 34).

[53] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (entered into force 22 April 2021) 3397 UNTC 195 (Escazú Agreement).

[54] 'Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment on Admissibility', <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210901_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_na-2.pdf> accessed 24 February 2024.

Another practice that could be replicated irrespective of jurisdiction is for higher courts to take a more flexible approach to admissibility in reviewing lower court decisions. For example, in the *Urgenda Foundation v The Netherlands* case, the District Court of the Hague accepted the government's argument that neither the Urgenda Foundation nor the individual plaintiffs were entitled to invoke the human rights provisions of the ECHR because they did not fulfil the admissibility criteria of Article 34 of that Convention. In particular, the Court found that the individual plaintiffs had not provided evidence that they were actual or potential victims of the alleged violations of their human rights.[55] This conclusion was later reversed by the Court of Appeal, which upheld the State's obligations derived from the ECHR as the principal legal basis for its own judgment.[56]

Similarly, it is also replicable for some courts to vocally unfollow the interpretation of admissibility requirements of other courts. For example, the Brussels Court of First Instance expressly stressed that the fact 'that other Belgian citizens may also suffer their own damage, in whole or in part comparable to that of the plaintiffs as individuals, is not sufficient to reclassify the personal interest of each of them as a general interest'.[57] Insofar as necessary, the Court continued, the teaching of the CJEU's *Carvalho et al* judgment is not relevant, insofar as in that judgment the Court, and the European Union Court before it, ruled on the admissibility of an action for annulment brought by private persons. This difference results from the autonomous interpretation of the admissibility conditions by courts acting within their own spheres of competence.[58]

5.5 CONCLUSION

The empirical evidence from the primary databases on climate litigation worldwide shows that climate cases are growing in number and that most cases are successful. This indicates that admissibility requirements, as a procedural aspect, are not commonly deployed by judges to dismiss these cases. The tendency is that judges interpret admissibility criteria in a way that allows the case to move towards the merits stage of litigation, a contentious phase that allows the discussion of substantive matters that enable the clarification of certain climate law lacuna.

Despite the general trend, some courts and tribunals worldwide are still interpreting admissibility requirements in a fashion that impedes climate cases from reaching the merits stage. These precedents, although far from representing a majority practice, could play a role in influencing the criteria of courts with a

[55] *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague).
[56] ibid.
[57] *VZW Klimaatzaak First Instance* (n 35) [51]. The appeal court agreed with this finding.
[58] ibid.

common procedural architecture, especially in terms of admissibility requirements. As an example, the fact that the CRC dismissed the children's petition based on lack of exhaustion of domestic remedies could influence the interpretation of the ECtHR vis-à-vis the climate cases that are pending before it, specifically the *Duarte Agostinho and Others v Portugal and 32 Other States* case.

It is nevertheless important to emphasise that best practice across jurisdictions is emerging to counteract specific trends of interpretation of admissibility requirements that might impede the progress of a climate case from reaching the merits stage. If proactive climate action is a moral imperative, and under the premise that a deeper discussion on the merits within the context of climate litigation could fulfil such a moral imperative, then using a rigid and overly formalistic approach to admissibility could obstruct said goal. As a response, judges worldwide use some interpretive techniques that the law provides to overcome a relatively narrow reading of procedural requirements. This approach allows judges to be mindful of not only the contextual elements in which a case is grounded but also the urgency of the challenge of the climate crisis, thereby unveiling the necessity of prioritising justice over forms in a substantiated and rigorous fashion. The legal tools that allow these approaches are replicable across jurisdictions, including transparency of rationale, exceptional provisions to lessen the burden of specific requirements, systemic interpretation, and reinterpretation of the law, which distances itself from other courts in favour of admissibility flexibility.