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Growing Up in a World on Fire

Children Take Centre-Stage in the Strategic Climate Litigation Movement

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Abstract

The climate crisis is an existential threat to humanity, the greatest human rights issue of our time, and a glaring intergenerational injustice. Faced with the urgent need to take action, political leaders around the world have largely fallen short. Strategic litigation has thus gained prominence as a valuable tool for realizing human rights and inciting governmental action in the fight against climate change. Children in particular have proven to be powerful actors in advocating for climate justice in the streets and, increasingly, in the courtroom. Children and youth are especially motivated to address climate change, as it is a phenomenon that disproportionately impacts them and will continue to have grave and long-lasting consequences for their futures. Consequently, a new trend has emerged wherein strategic litigation is being used to protect and uphold the rights of children in the climate crisis. However, this occurs in a context where children experience important obstacles in accessing justice and obtaining effective remedies for human rights violations. This work therefore aims to understand how strategic litigation at different levels, aimed at protecting the rights of children in the context of the climate crisis, can uphold equality rights and ensure access to justice. By analyzing case studies at the international (UN Committee on the Rights of the Child), regional (European Court of Human Rights), and domestic (Canada) levels, this piece identifies and critically examines some of the challenges and opportunities faced by young climate litigants.

Key words: children's rights; climate change; strategic litigation; access to justice.

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Finally, I would be remiss not to mention the young climate activists around the world who are fighting for our future. You inspire hope every day.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Canadian Charter	Canadian Charter of Rights and Freedoms
CESCR	UN Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EnJeu	Environnement Jeunesse
EU	European Union
GHG	Greenhouse gas
GLAN	Global Legal Action Network
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-governmental organization
OCT	Our Children's Trust
OHCHR	UN Office of the High Commissioner for Human Rights
Quebec Charter	Quebec Charter of Rights and Freedoms
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UN HRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund

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1-INTRODUCTION

The grave existential threat posed by climate change for the future of humanity cannot be overstated. While scientists have long warned of the dangers of anthropogenic climate change, the international community has thus far clearly failed in its endeavours to effectively address the problem. The lntergovernmental Panel on Climate Change (IPCC), the United Nations (UN) body and foremost authoritative group of scientific experts responsible for advancing knowledge on climate change, has been raising alarm bells in its periodic assessment reports about the action necessary to avert the most extreme consequences of global warming.[1] And yet, the response of states and global political leaders to such dire warnings has been inexplicably lacking, exhibiting reckless disregard for the IPCC's conclusions. The reaction of the UN Secretary-General António Guterres to the 2022 IPCC Assessment Report and to the inaction of UN member states has been justifiably merciless:[2]

> The jury has reached a verdict. And it is damning. This report of the [IPCC] is a litany of broken climate promises. It is a file of shame, cataloguing the empty pledges that put us firmly on track towards an unliveable world.
>
> We are on a fast track to climate disaster. Major cities under water. Unprecedented heatwaves. Terrifying storms. Widespread water shortages. The extinction of a million species of plants and animals. This is not fiction or exaggeration. It is what science tells us will result from our current energy policies.
>
> We are on a pathway to global warming of more than double the 1.5°C limit agreed in Paris. Some Government and business leaders are saying one thing, but doing another. Simply put, they are lying. And the results will be catastrophic. This is a climate emergency.
>
> Climate scientists warn that we are already perilously close to tipping points that could lead to cascading and irreversible climate impacts. But, high-emitting Governments and corporations are not just turning a blind eye, they are adding fuel to the flames. […]
>
> Leaders must lead. But, all of us can do our part. We owe a debt to young people, civil society and indigenous communities for sounding the alarm and holding leaders

[1] Intergovernmental Panel on Climate Change, 'The evidence is clear: the time for action is now. We can halve emissions by 2030' <www.ipcc.ch/report/ar6/wg3/resources/press/press-release/> (4 April 2022).
[2] United Nations, 'Secretary-General Warns of Climate Emergency, Calling Intergovernmental Panel's Report 'a File of Shame', While Saying Leaders 'Are Lying', Fuelling Flames' (4 April 2022) <www.un.org/press/en/2022/sgsm21228.doc.htm>.

> accountable. We need to build on their work to create a grass-roots movement that cannot be ignored.

Guterres' words remind us that in light of the pressing issues presented by the climate crisis, the imperative to take meaningful and transformative action at all levels of society has never been stronger.

A crucial aspect of the climate crisis that goes beyond the pure environmental issues is the threat that it poses to the human rights of populations around the world. In the past years, the connection between human rights and climate change, and the corresponding legal obligations that are incumbent upon states, have been brought to the forefront as various actors, including the UN Office of the High Commissioner for Human Rights (OHCHR),[3] the UN Environment Programme,[4] the UN Human Rights Council (UN HRC),[5] different UN human rights treaty bodies,[6] and several UN Special Rapporteurs on human rights issues,[7] have stressed the human rights implications of climate change. In addition, the nexus between human rights and climate change has been recognized by two of the core international environmental law treaties: the UN Framework Convention on Climate Change (UNFCCC)[8] and the Paris Agreement.[9]

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[3] OHCHR, 'OHCHR and Climate Change' <www.ohchr.org/en/climate-change>accessed 11 May 2022; OHCHR, 'Report of the OHCHR on Relationship between Climate Change and Human Rights' (2009) UN Doc:A/HRC/10/61; OHCHR, 'Understanding Human Rights and Climate Change' (2015).

[4] UN Environment Programme, 'Climate Change and Human Rights' (2015).

[5] See eg, UN HRC, 'Human rights and climate change' (2019), UN Doc: A/HRC/RES/41/21; UN HRC, 'Human Rights and Climate Change', (2018) UN Doc: A/HRC/RES/38/4; UN HRC, 'Human Rights and Climate Change', (2016) UN Doc: A/HRC/RES/32/33.

[6] Committee on Economic, Social and Cultural Rights (CESCR), 'Climate change and the International Covenant on Economic, Social and Cultural Rights' (8 October 2018) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E.> accessed 15 May 2022; Human Rights Committee, 'General Comment No. 36 - Article 6: right to life' (2018) UN Doc: CCPR/C/GC/36, para 62; UN, 'Five UN human rights treaty bodies issue a joint statement on human rights and climate change' (16 September 2019) <www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998> accessed 17 May 2022.

[7] See for example: UN Special Rapporteur on climate change, 'Report on initial planning and vision for the mandate' (2022) UN Doc: A/HRC/50/39; UN Special Rapporteur on the right to development, 'Climate action at the national level' (2021) UN Doc: A/HRC/48/56; UN Independent Expert on human rights and international solidarity, 'International solidarity and climate change' (2020) UN Doc: A/HRC/44/44; UN Special Rapporteur on human rights and the environment, 'A Safe Climate: Human Rights and Climate Change' (2019) UN Doc: A/74/161; UN Special Rapporteur on extreme poverty and human rights, 'Climate change and poverty' (2019) UN Doc: A/HRC/41/39; UN Special Rapporteur on human rights and the environment, 'Climate change' (2016) UN Doc: A/HRC/31/52.

[8] UNFCCC (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107. State parties to the UNFCCC affirmed at the 2010 Cancún Climate Change Conference that 'parties should, in all climate change related actions, fully respect human rights'.

With political leaders displaying frustrating inertia in the face of the greatest emergency of our time, climate action has increasingly been moving towards the court system, as activists, lawyers, and environmental organizations pursue litigation to seek remedies and compel both state and non-state actors to take action. Though litigation is not necessarily known for bringing about justice in a timely manner, it presents an opportunity to achieve progress that might otherwise be impossible where political will is lacking. As a result, the global phenomenon of 'climate litigation' has gained traction as litigants have tested a range of approaches and arguments before the courts in their attempts to address the climate crisis.[10] Naturally, given the increasingly recognized link between climate change and human rights, many instances of climate litigation have invoked human rights-based arguments.[11] One such approach has involved advancing the argument that the rights of a specific group of individuals are, or are at risk of, being violated as a result of a given act or omission in relation with the climate crisis. While climate change is a global problem that will impact the entire world, the reality is that certain people are disproportionately affected due to both inherent personal characteristics and societal structures and dynamics, which leave them particularly vulnerable.[12]

In recent years, children have gained prominence as actors leading climate justice activism and advocacy. Youth-led climate action has included the Fridays for Future movement,[13] some of the largest climate protests in history,[14] as well as participation by youth activists in high-level

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[9] Paris Agreement under the UNFCCC (adopted 12 December 2015) UN Doc: FCCC/CP/2015/10/Add.1. Paragraph 11 of the Preamble calls on states, "when taking action to address climate change" to "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

[10] Kumaravadivel Guruparan and Harriet Moynihan, 'Climate change and human rights-based strategic litigation' (Chatham House, 11 November 2021) <https://www.chathamhouse.org/2021/11/climate-change-and-human-rights-based-strategic-litigation> 2; Joana Setzer and Catherine Higham, 'Global trends in climate change litigation' (Grantham Research Institute on Climate Change and the Environment, 30 June 2022).

[11] Ibid Guruparan and Moynihan; Annalisa Savaresi, 'Human rights and the impacts of climate change: Revisiting the assumptions' (2021) 11 Oñati Socio-Legal Series 231, 236; Annalisa Savaresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (18 February 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787963>.

[12] UN Secretary-General, 'The impacts of climate change on the human rights of people in vulnerable situations' (2022) UN Doc: A/HRC/50/57.

[13] Fridays for Future, 'Who we are' <https://fridaysforfuture.org/what-we-do/who-we-are/>accessed 11 June 2022.

[14] Somini Sengupta, 'Protesting Climate Change, Young People Take to Streets in a Global Strike' (New York Times, 20 September 2019) <www.nytimes.com/2019/09/20/climate/global-climate-strike.html> accessed 12 June 2022.

global forums.[15] Few people have come to embody the youth climate justice movement as much as Swedish teenager Greta Thunberg. Since initiating the Fridays for Future movement in Stockholm back in 2018, Thunberg's captivating speeches, full of disarming wisdom, frankness, and righteous anger, have caught the world's attention. The impact of Thunberg's advocacy is demonstrative of the agency of children and the importance of their participation, involvement, and engagement in climate justice. Thunberg of course is not alone in this battle, as many other young leaders have joined her across the world, vocalizing a common sense of frustration with the inaction of political leaders, and expressing their exasperation with the fundamental injustice that is robbing them and other children of a future. In so doing, youth activists have been able to put a spotlight on children as victims of climate change whose interests are overlooked by political decision-makers. Furthermore, young advocates have been emboldened to channel their emotions into principled action, harnessing their capacities to be powerful agents of change in the climate fight.

Consequently, a small, yet growing, subset of climate litigation has focused on children and their rights.[16] Children have joined the climate litigation fray in many ways, including as individual plaintiffs, through youth coalitions, and with the help of non-governmental organizations (NGOs). Children have argued violations of their right to life, their right to equality, their right to health, their right to an adequate standard of living, and their right to a clean environment, among others. Children have taken different approaches to hold governments accountable, by suing to block natural resource exploitation projects, impugning the unconstitutionality of climate action plans, and calling out the failure to adequately implement climate mitigation and adaptation policies. This article will therefore explore how youth have utilized strategic climate litigation as a means of protecting their rights and advancing their cause.

While the rise in children's rights climate litigation is still a recent trend, it is already apparent that this type of climate litigation raises crucial questions. For instance, these cases challenge our understandings of the notion of rights holders and what it means to be legally qualified as a

[15] Harriet Thew, 'Youth participation in UN climate change conferences: challenges and opportunities' (2021) <https://pcancities.org.uk/sites/default/files/COP26%20Youth%20Participation%20Policy%20Brief.pdf>.
[16] Over 30 climate cases involve or have involved children and youth around the world. Larissa Parker and others, 'When the kids put climate change on trial: youth-focused rights-based climate litigation around the world' (2022) 13 Journal of Human Rights and the Environment 64, 66.

'victim' of a rights violation for the purpose of legal standing. Moreover, children's rights climate litigation faces a conundrum when it comes to guaranteeing children the right to an effective remedy for *future* human rights violations that have yet to materialize, but whose occurrence is scientifically inevitable. Cases of this nature also raise challenging dilemmas surrounding the role of courts in addressing climate change, as judges find themselves balancing the need for innovative interpretations that adequately respond to the urgency and gravity of the crisis and the need for intellectually coherent argumentation that respects the rule of law.

This work will deal with many of these questions and will endeavour to provide paths of reflection and potential solutions. More specifically, the objective of this research is to use case studies to dissect the emerging trend of children's rights strategic litigation in the climate sphere. First, this work will examine the broader context surrounding these cases, unpacking the concept of strategic litigation, the notion of intergenerational equity, and the impact of climate change on children's rights. Case studies at the international, regional, and domestic levels will then be analyzed in both their substantive and procedural dimensions. Using a variety of cases will illustrate the diversity of experiences, challenges, and opportunities involved in children's rights climate litigation. Substantively, particular attention will be paid to arguments advanced by youth litigants concerning equality rights and non-discrimination. Meanwhile, the procedural analysis will address some of the barriers inherent in children's climate litigation and will focus specifically on access to justice and the right to an effective remedy. Finally, through-lines between the different case studies will be identified and recommendations to the attention of litigants will be formulated.

Ultimately, this work will seek to understand how strategic litigation at different levels, aimed at protecting the rights of children in the context of the climate crisis, can uphold equality rights and ensure access to justice.

2-CONTEXT

Before embarking on an analysis of different examples of children's rights climate litigation, it is first necessary to define and delineate some of the core concepts that will inform this article. More specifically, it is worthwhile to expand upon the notion of 'strategic litigation', as well as the broader context that helps explain why this research is specifically concerned with children's rights climate litigation, namely the concept of intergenerational equity and the link between children's rights and climate change.

2.1-STRATEGIC LITIGATION

The use of the terminology 'strategic litigation' is helpful in conceptualizing the various ways in which stakeholders attempt to use the law and the judicial sphere in the advancement of human rights. Strategic litigation commonly refers to the use of legal action, often in conjunction with a host of other strategies, as a tool to help raise awareness about an issue, promote a given objective, and seek legal, policy, and social change.[17] In other words, it is litigation motivated by concerns that go beyond individual litigants and aim to achieve broader outcomes. The Open Society Justice Initiative describes strategic litigation as being "rooted in a deliberate process of collaborating with affected people to identify advocacy goals and the legal means to accomplish them, of which in-court action is but one method".[18] The use of strategic litigation as a means of advancing human rights causes and achieving systemic change has become increasingly prevalent in the past few decades. For instance, strategic litigation has been used to great effect in the enforcement of socio-economic rights in South Africa[19] and at the European level to advance LGBTQ+ rights.[20]

Strategic litigation – both generally and specifically in the context of the climate crisis – can take many different forms, including impugning the constitutionality of a specific legislative act, contesting governmental action or inaction, or challenging a law for lacking conformity with a

[17] Jacqueline Peel, 'Recipe for success ? Lessons for Succesful Strategic Climate Claims' (UCL Conference on Climate Change and the Rule of Law, 1 April 2022).
[18] Open Society Justice Initiative,'Global Human Rights Litigation Report' (2021) 4.
[19] Jason Brickhill, 'Strategic litigation in a perfect storm – South Africa' (Open Global Rights, 2 April 2019) <www.openglobalrights.org/strategic-litigation-in-a-perfect-storm-south-africa/> accessed 22 June 2022.
[20] Stephen Matthews, 'Strategic Litigation at the European Court of Human Rights: Q&A with Professor Robert Wintemute' (KCL, 4 March 2022) <www.kcl.ac.uk/strategic-litigation-qa-with-professor-robert-wintemute-same-sex-equality> accessed 22 June 2022.

state's international human rights obligations.[21] A diverse range of stakeholders can act as plaintiffs in strategic litigation, though these cases are often piloted by NGOs. Likewise, a variety of actors can be named as defendants, but such cases will often be against state entities. Moreover, strategic litigation at the domestic level can occur in many legal forums, including administrative tribunals and district, provincial, federal, or constitutional courts. Strategic litigation can also be initiated at the supranational level before regional courts and international adjudicative bodies – although such legal avenues often require litigants to first exhaust domestic remedies. The range of options available to proponents of strategic litigation is one of its strengths. Creative litigants can adapt their action to their specific interests and objectives, to the most receptive legal forum, and to the substantive and procedural legal frameworks in their home jurisdiction.

In essence, strategic litigation seeks to utilize certain strengths of the law in pursuing social change, such as the formally binding and enforceable nature of judicial decisions, the potential for cases to influence social views and have impacts outside of the courtroom, and the possibility to enforce constraints on governmental decision-makers.[22] What has made strategic litigation particularly attractive in the climate sphere is that it affords plaintiffs a forum in which they can incite action when political leaders have not been taking the necessary legislative or policy measures to deal with the crisis. Strategic litigation can also be a key tool for countering majoritarianism and protecting the rights of vulnerable groups, like children, who may not have access to the social capital necessary to assert their interests in the political sphere.

However, there are certain limitations inherent to the law and the judicial sphere which do not always lend themselves to the achievement of human rights progress through strategic litigation, including an emphasis on rigid formalism, conservative legal culture, steep financial cots, and delays which often undermine the speedy pursuit of justice.[23] Additionally, it remains challenging to assess a case's impact beyond the courtroom, and lawyers and NGOs who engage in strategic litigation rarely have an 'empirically grounded framework' that allows them to

[21] Guruparan and Moynihan (n 10).
[22] Open Society Justice Initiative (n 18).
[23] Advocates for International Development, 'Strategic litigation and its role in promoting and protecting human rights' (2012) <www.a4id.org/wp-content/uploads/2016/04/Strategic-Litigation-Short-Guide-2.pdf>.

evaluate after the fact whether a case can be considered a 'success'.[24] Furthermore, it remains a point of contention whether the gains that can be achieved through litigation and the courts may suffer from a lack of democratic legitimacy, particularly when it comes to complex societal problems like climate change. The potential wide-ranging impacts of strategic litigation can also be a liability when a case does not go in favour of the plaintiffs. An unfavorable judicial decision can set a negative precedent that can set a social movement back, or have unforeseen adverse consequences for other groups of individuals.

2.2-CHILDREN AS THE "IDEAL" PLAINTIFFS IN CLIMATE LITIGATION

Climate change is a problem that is global in nature and indiscriminate in its consequences – it is an issue that truly affects *everyone*. Climate change also goes hand in hand with inequality, as certain groups will face differentiated impacts as a result of a host of personal factors,[25] including where they live (eg urban or rural areas, Global North or Global South),[26] gender (women tend to face greater challenges due to pre-existing social inequalities),[27] race or indigeneity (racial minorities and Indigenous peoples may face graver consequences due to systemic racism or cultural specificities),[28] disability (people with disabilities may be prone to more serious health issues and face obstacles linked to adaptation),[29] and age (climate change can have disproportionately negative impacts for both the elderly and the young).[30]

2.2.1-Intergenerational equity

When compared with basically every other social group, children and youth face particular challenges that are compounded by the inherent injustice that comes from having least

[24] Jasper Teulings and Shishusri Pradhan, 'Assessing the impact of climate litigation' (Alliance, 3 March 2021) <www.alliancemagazine.org/blog/assessing-the-impact-of-climate-litigation/> accessed 4 June 2022; Joana Setzer and Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigant in climate governance' (2019) 10 Wiley interdisciplinary reviews: Climate Change 12.
[25] OHCHR 2009 (n 3) para 42.
[26] Special Rapporteur environment (n 7) 21, 24.
[27] Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change' (2018) UN Doc:CEDAW/C/GC/37.
[28] Rachel Baird, 'The Impact of Climate Change on Minorities and Indigenous Peoples' (Minority Rights Group, 2008).
[29] OHCHR, 'Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change' (2020) UN Doc:A/HRC/44/30.
[30] Special Rapporteur environment (n 7) 9.

contributed to the climate crisis in comparison to other generations.[31] Children will be left to take on a disproportionate share of environmental burdens in the future, despite having little personal responsibility for the climate crisis, with their capacity to address the problem being undermined by shortsighted decision-making in the present.[32] A similar injustice has been highlighted with respect to Global South nations and small island states who have least contributed to climate change historically but who in many cases will face the earliest and gravest consequences of the climate crisis.[33]

The plight of children in the context of the climate crisis is one that can fairly be characterized as an issue of 'intergenerational equity', a term which was first popularized in the field of international environmental law by Edith Brown Weiss.[34] Weiss described intergenerational equity as the idea that fairness and justice can be owed between generations, particularly when it comes to the equitable distribution and maintenance of environmental and economic resources.[35] Intergenerational equity is deeply linked to the foundational concept of 'sustainable development' and the notion that decisions about economic and societal development should be based on long-term thinking, paying particular attention to the rights, interests and environmental needs of future generations.[36] In this paradigm, the climate crisis poses an intergenerational equity problem, in that older generations have taken actions, particularly with regard to greenhouse gas (GHG) emissions, that will leave younger generations with a world that is less conducive to the enjoyment of basic human rights.[37] Faced with such a predicament, children have few avenues of recourse, given that they lack the political agency, social status, and capital necessary to influence governmental decision-making. Intergenerational equity has therefore become a catalyst for much of the strategic litigation involving children's rights. These cases have generally framed their legal arguments around the idea that the rights of children will be

[31] Bridget Lewis, 'Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights' (2021) 39 Nordic Journal of Human Rights 180.
[32] Bridget Lewis, 'Human rights and intergenerational climate justice' [2020] Strategic Studies 79, 80.
[33] Ibid 79.
[34] Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 Vermont Journal of Environmental Law 615, 616.
[35] Ibid.
[36] World Commission on Environment and Development, 'Our Common Future' (1987) UN Doc: A/42/427; UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (1992) UN Doc:A/CONF.151/26, Principle 3.
[37] Lewis (n 32) 80.

disproportionately impacted by inadequate governmental efforts to mitigate climate change, and that this differential treatment is unjust and constitutes a form of intergenerational discrimination.[38]

Scholars have pointed out that the injustices faced by children as a result of the climate crisis are also applicable to another category of individuals: 'future generations'.[39] While on a moral level it is certainly worthwhile to invoke the rights and needs of future generations as a motivation to take climate action, on a strictly legal level the rights of future generations are less persuasive. Of the hundreds of strategic climate litigation cases over the past several years, very few have attempted to make legal arguments based on enforceable rights for future generations, and even fewer have succeeded.[40] As indeterminate classes of people who have yet to come into existence, future generations generally lack the legal personality to establish that states owe them legally enforceable human rights obligations in the context of the climate crisis.[41] Besides, several legal cases brought in the name of children's rights have demonstrated that concrete harms stemming from the climate crisis are already being felt by youth today. Therefore, it is not necessary to wait for those impacts to be felt by future generations to make a strong legal case that governments must act now.

2.2.2-Impact of climate change on children

When compared with other categories of individuals who face grave consequences due to climate change, children have intrinsic and inherent developmental characteristics that may subject them to specific mental, physical, social, political, and legal vulnerabilities.[42] A growing trend of scholarship and research,[43] including from UNICEF,[44] the OHCHR,[45] the UN Special

[38] Parker (n 16) 67; Nathan Brett, 'Climate Inaction as Discrimination Against Young People' (2021) 5 Canadian Journal of Practical Philosophy 1, 5-8.
[39] Bridget Lewis, 'The rights of future generations within the post-Paris climate regime' (2018) 7 Transnational Environmental Law 69.
[40] Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' [2022] Transnational Environmental Law 1, 11.
[41] OHCHR, 'Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child' (2017) UN Doc:A/HRC/35/13, para 46; Lewis (n 32) 83.
[42] UNICEF, 'The climate crisis is a child rights crisis' (2021) 57-71; UN Special Rapporteur on human rights and the environment, 'Report to the Human Rights Council on the rights of children and the environment' (2018) UN Doc: A/HRC/37/58, 7-8.
[43] Lewis (n 31) 183-184; Save the Children, 'Born Into the Climate Crisis' (2021) <https://www.savethechildren.net/born-climate-crisis> ; Marina Romanello and others, 'Countdown on health and climate change: code red for a healthy future' (2021) 398 The Lancet 1619.

Rapporteur on human rights and the environment,[46] and the UN Committee on the Rights of the Child (CRC Committee),[47] have shed light on the specific consequences of climate change on the rights of children and youth, including to their right to life, health, education, development, food, water, housing, and culture, to name a few.[48] Children are disproportionately impacted by many consequences of climate change, including water scarcity, droughts and floods, food insecurity, air pollution, various diseases, heatwaves, tropical storms, and forced displacement.[49] Moreover, the manifestations of climate change will worsen over time, as extreme weather events will become more frequent and intense, leading to aggravated long-term impacts on current generations of young people.[50] Faced with this reality and notwithstanding their exclusion from traditional spheres of climate policy-making, youth have found a renewed sense of agency and empowerment from their involvement in climate activism and strategic litigation. Ultimately, these contextual factors have naturally culminated in an increase in strategic climate litigation cases that specifically concern the rights of children.

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[44] UNICEF (n 42); UNICEF, 'Unless we act now: The impact of climate change on children' (2015).
[45] OHCHR (n 41).
[46] Special Rapporteur environment (n 42) 5-8, 18.
[47] Center for International Environmental Law, 'Children's Rights Obligations of States in the Context of Climate Change' (2022).
[48] Susana Sanz-Caballero, 'Children's rights in a changing climate: a perspective from the United Nations Convention on the Rights of the Child' (2013) 13 Ethics in Science and Environmental Politics 1.
[49] Save the Children (n 43) 12-21; UNICEF (n 42) 27-54; Wim Thiery and others, 'Intergenerational inequities in exposure to climate extremes' (2021) 374 Science 158.
[50] Ibid Save the Children 6-8.

3-METHODOLOGY

This article will examine the phenomenon of children's rights climate litigation through the use of case studies and a comparative law methodology. Engagement with real-life examples will be key to outlining and illustrating the various human rights and legal issues that arise in different jurisdictions. The use of a comparative law methodology will help identify similarities and key distinctions between legal systems and serve to highlight the advantages and limits that come when pursuing strategic litigation in these different contexts.

At a basic level, it is common to differentiate between norms of human rights protection originating at the domestic, regional, and international levels. Each level of human rights protection has its own corresponding types of enforcement mechanisms, which oversee state respect of human rights obligations. Generally speaking, this will mean courts or tribunals at the domestic level, supranational courts at the regional level, and organs known as human rights treaty bodies at the international level. This piece will examine cases from each level of jurisdiction to illustrate the different forms of human rights protection that are available to young litigants in the context of the climate crisis, as well as the differences in substantive law, procedures, and remedies at each level.

The cases selected for this article have certain elements in common. They all involve children and/or youth as litigants. Each case advances a substantive legal argument which is based on human rights and which focuses on specific dimensions of children's rights. All the cases include an argument that is either implicitly or explicitly founded on a claim that children are being discriminated against as a result of the climate crisis. Each case identifies state authorities as the defendants responsible for the alleged rights violations. Conversely, the choice of cases is not limited by the specific legal vehicle used or the type of legal remedy sought. Nor have the chosen cases been limited based on whether the litigation is intended to increase climate change mitigation efforts, obtain commitments with respect to adaptation efforts, or whether the case aims to compensate harms and damage caused by climate change.

The hope is that the diversity of cases examined in this article will be useful in analyzing a range of important legal and human rights issues that arise in children's rights climate litigation. The analysis of each case will follow roughly the same structure: an outline of the facts and the legal

arguments being made by the parties, followed by an overview of the status of the proceedings and any decisions that have been rendered, before finally engaging with the most significant substantive and procedural legal issues that are raised.

The choice of a case study at the international level was made easy by the fact that only one such example meets the aforementioned selection criteria: the *Sacchi et al. v. Argentina et al.* petition brought before the CRC Committee in 2019. Regionally, the chosen case study is a high-profile piece of ongoing litigation before the European Court of Human Rights (ECtHR): *Duarte Agostinho and others v. Portugal and others*. Finally, several cases have been initiated against state authorities in domestic courts around the world, invoking children's rights in the context of the climate crisis and making arguments related to equality rights and discrimination. The choice was made to select a trio of cases from Canada that were initiated between 2018 and 2020, all of which deal with these issues in a markedly distinct fashion. The cases are *Environnement Jeunesse v. Canada* before the Quebec Superior Court, *La Rose v. Canada* before the Federal Court of Canada, and *Mathur v. Ontario* before the Ontario Superior Court. The Canadian legal system has certain particularities which make it especially interesting to examine in this context – namely a federal legal and political structure, a 'bijural' legal tradition (the province of Quebec uses civil law whereas the rest of the country is a common law jurisdiction), and a constitutionally entrenched bill of rights. This variety of cases from a single country will help illustrate the options, challenges and opportunities available to climate litigants domestically.

This article aims to fill a gap that exists in the current academic literature pertaining to strategic litigation and the climate crisis. While much has been written about the concept of climate litigation more broadly,[51] including specifically human rights-based climate litigation,[52] much less has been written about the more recent phenomenon of children's rights-based climate litigation.[53] Ultimately, the present research aims to contribute to the academic discussion surrounding these issues by focusing its analysis on access to justice, children's rights, and non-discrimination.

[51] Myanna Dellinger, 'See You in Court: Around the World in Eight Climate Change Lawsuits' (2018) 42 William & Mary Environmental Law and Policy Review 525; Setzer and Vanhala (n 24).
[52] Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37; Savaresi and Setzer (n 11).
[53] Three recent articles have begun tackling the issue: Parker (n 16), Lewis (n 31), and Donger (n 40).

4-STATE OF THE LAW

4.1-SUBSTANTIVE LAW – EQUALITY RIGHTS

The basic premise that guides this research is that the action or inaction of governmental authorities concerning the climate crisis is having disproportionately negative impacts on the rights of children and young people. Consequently, the adverse impacts that stem from such governmental failings can arguably be characterized as a form of discrimination against young people, or as discrimination between generations, for which state authorities can and should be held responsible. The following case studies also highlight that the climate crisis can have differentiated impacts amounting to multiple discrimination for certain categories of young people, including girls, children with disabilities, or Indigenous children.[54] In essence, these instances of climate litigation aim to uphold the equality rights of children, or in other words, their right to non-discrimination.

4.1.1-International human rights law

The right to equality and non-discrimination is a foundational principle in international human rights law that is enshrined in a number of binding and non-binding legal instruments. The Universal Declaration of Human Rights (UDHR) affirmed this legal principle in its article 1, which states, "All human beings are born free and ***equal*** in dignity and rights".[55] The UDHR further protects equality and non-discrimination in article 2 with respect to the enjoyment of all other rights and freedoms guaranteed by the Declaration, and in article 7 with respect to the equal protection of the law. Equality and non-discrimination later earned a prominent place in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR in particular mirrors the UDHR's provisions in its own articles 2 and 26, and promotes equality and non-discrimination in several other contexts as well.[56] Importantly, article 26 of the ICCPR guarantees a freestanding right to equality which is not limited to the enjoyment of the other

[54] Save the Children (n 43) 22-24
[55] UDHR (adopted 10 December 1948 UNGA Res 217 A(III).
[56] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. See articles 3 (gender equality), 14 (justice system), 25 (public life), and 27 (protections for ethnic, religious and linguistic minorities).

rights and freedoms enshrined in the ICCPR.[57] In turn, the ICESCR maintains a general guarantee of non-discrimination in its article 2, as well certain specific guarantees of equality.[58] In addition, protections against discrimination form the cornerstone of two other core human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination[59] and the Convention on the Elimination of Discrimination Against Women.[60] Likewise, the Convention on the Rights of the Child (CRC) is a core international human rights treaty specifically aimed at protecting the rights of children, a vulnerable group that is prone to suffering from discrimination.[61] Furthermore, the UN human rights treaty bodies responsible for monitoring the implementation of international human rights treaties have been instrumental in clarifying the exact content of the right to equality and non-discrimination.[62] In light of the many actors at the international level who have pronounced themselves on the interpretation of these rights, it is difficult to come to any concrete, definitive and exhaustive definition of the right to equality and non-discrimination. Any interpretation will depend on the specific factual circumstances of each particular case involved.

4.1.2-Regional human rights law

At the regional level, the right to equality and non-discrimination are a part of all major multilateral human rights instruments, including the African Charter on Human and Peoples' Rights (ACHPR),[63] the American Convention on Human Rights (ACHR),[64] and the European Convention on Human Rights (ECHR).[65] Additionally, several issue-specific treaties have been concluded at the regional level to combat discrimination and to protect the rights of vulnerable

[57] OHCHR, 'The Right to Equality and Non-Discrimination in the Administration of Justice' (2003) <www.un.org/ruleoflaw/files/training9chapter13en.pdf>, 638.
[58] ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. See articles 3 (gender equality), 7(a)(i) (equal remuneration), and 7c (equal opportunity in the workplace).
[59] CERD (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195. See articles 1(1), 5.
[60] CEDAW (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. See article 1.
[61] CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. See articles 2, 29, 30.
[62] See for example: Human Rights Committee, 'General Comment No. 18: Non-discrimination' (1989) UN Doc:HRI/GEN/1/Rev.5; CRC Committee, 'General Comment No. 5: General measures of implementation of the CRC' (2003) UN Doc:CRC/GC/2003/5, 4.
[63] ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. See articles 2, 3, 18, 19.
[64] ACHR (adopted 22 November 1969, entered into force 18 July 1978) Organization of American States Treaty Series No. 36. See articles 1, 8(2), 24.
[65] ECHR (adopted 4 November 1950, entered into force 3 September 1953) ETS 5. See article 14.

groups, like children.[66] Naturally, these regional norms have in turn been fleshed out by the case law of the respective regional human rights courts. While certain common principles of legal interpretation remain, the exact nature of the right to equality and non-discrimination protected in each regional system may vary. One notable example is the fact that the equality rights protected under article 14 of the ECHR only prohibit discrimination that is linked to the exercise of another right or freedom protected under the Convention, whereas both the ACHPR and ACHR contain a similar provision as well as an additional provision which acts as an independent and free-standing prohibition of discrimination.[67] Protocol no. 12 to the ECHR has since come into force, providing for an expanded and autonomous prohibition against discrimination in relation to "any right set forth by law" and with regard to the actions of "any public authority".[68]

4.1.3-Domestic human rights law

At the national level, protections against discrimination can take many forms, including through statutory, constitutional, or jurisprudential bases. Anti-discrimination law can also stem from different orders of government, depending on a country's political and legal structure. For instance, in European Union (EU) member states, equality law is heavily influenced by the domestic transposition and implementation of EU legislation,[69] as well as by the EU Charter of Fundamental Rights.[70] As a result, while certain concepts related to discrimination are shared across jurisdictions, equality norms can vary significantly by country based on domestic legal culture and the way in which this area of law has developed and evolved over the years. Therefore, the viability of climate litigation founded on an argument of intergenerational discrimination will be heavily contingent on the legal framework surrounding equality rights and non-discrimination in the jurisdiction in question.

4.1.4-Content of the right

While discrimination is often colloquially invoked to refer to any distinction based on personal

[66] Eg African Charter on the Rights and Welfare of the Child (1990), Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994), and the Framework Convention for the Protection of National Minorities (1994).
[67] OHCHR (n 57) 646.
[68] As of July 2022, only 20 out of 46 Council of Europe member states have ratified the Protocol.
[69] European Commission, 'A comparative analysis of non-discrimination law in Europe' (2021).
[70] EU Charter of Fundamental Rights, (2000) C 364/1. See articles 20 and 21, generally, and article 24 on the rights of the child.

characteristics, the term has a specific legal meaning. As the UN Human Rights Committee puts it, discrimination "should be understood to imply any distinction, exclusion, restriction or preference which is based on any [protected] ground […], and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[71] Generally speaking, discrimination will arise if like cases are treated differently, where that disparity in treatment has no objective or reasonable justification, and where there is no proportionality between the aim sought and the means employed.[72] What constitutes a legitimate form of differential treatment may differ by jurisdiction and depend on a judicial interpretation of whether a given justification is "objective" and "reasonable" and whether it meets the proportionality requirement. Likewise, the steps of analysis, the applicable burden of proof, and the legal inferences that may arise in a case pertaining to equality and discrimination will depend heavily on the applicable legal framework in the jurisdiction in question.

Crucially, international human rights law recognizes that the guarantee of equality does not necessarily equate to a guarantee of identical treatment in all circumstances. In some cases, individuals may need to receive differential treatment to account for structural inequities that may otherwise hinder them from achieving equal outcomes.[73] This understanding of equality is often described as the opposition between 'formal equality' and 'substantive equality' or between discrimination in fact (de facto) and discrimination in law (de jure). The notion of substantive equality is in turn linked to the existence of affirmative obligations that are incumbent on states to enact measures to combat discrimination in practice.[74] This can lead to the adoption of 'affirmative action' or 'positive discrimination' initiatives, which aim to bridge social inequalities through policies and practices that serve to improve the situation of marginalized groups.[75] These measures are considered to be legitimate forms of differentiation under international human rights law. There is also a growing recognition that discrimination

[71] Human Rights Committee (n 62) para 7.
[72] Iceland Human Rights Centre, 'The Right to Equality and Non-Discrimination' <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>accessed 12 June 2022.
[73] Human Rights Committee (n 62) para 8, 10.
[74] Ibid para 10.
[75] Celina Romany and Joon-Beom Chu, 'Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions' (2004) 36 Connecticut Law Review 831, 833.

may be both direct, where differential treatment explicitly relies on distinction based on protected grounds, and indirect, where laws, policies or practices do not appear prima facie discriminatory but have discriminatory impacts when implemented.[76]

Ultimately, an exhaustive examination of the intricacies of equality and non-discrimination law is beyond the scope of this article. Suffice it to say that many of the aforementioned principles are relevant to the forthcoming case studies, though they may manifest themselves differently in light of the applicable legal frameworks for each jurisdiction.

4.2-PROCEDURAL LAW – ACCESS TO JUSTICE

From a procedural standpoint, children face significant obstacles when it comes to accessing justice and securing effective remedies for human rights violations related to the climate crisis.

4.2.1-International and regional human rights law

It is a basic principle under international human rights law that all individuals have a right to an effective remedy when their rights are violated. The right to an effective remedy is explicitly enshrined in several international texts, notably in the UDHR (article 8) and the ICCPR (article 2(3)), and its meaning has been clarified by human rights treaty bodies.[77] At the regional level, this right is enshrined in the ACPHR (article 7), ACHR (article 25), and ECHR (article 13).

The Human Rights Committee has explained that state parties to the ICCPR are required to ensure that individuals "have accessible and effective remedies to vindicate [their ICCPR rights]" and that such remedies be "appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children".[78] The Committee has also noted the importance of 'reparation' as a key component of an effective remedy, for individuals whose Covenant rights have been violated.[79] Moreover, for remedies to be meaningful they must be "adequate, effective, promptly attributed, holistic and proportional to

[76] CESCR, 'General Comment No.16: The equal right of men and women to the enjoyment of all economic, social and cultural rights' (2005) UN Doc: E/C.12/2005/4, para 12-13.
[77] Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligations imposed on State Parties to the Covenant' (2004) UN Doc: CCPR/C/21/Rev.1/Add.13; CESCR, 'General Comment No. 9: The domestic application of the Covenant' (1998) UN Doc: E/C.12/1998/24.
[78] Human Rights Committee (n 77) para 15.
[79] Ibid para 16.

the gravity of the harm suffered".[80] As well, the International Commission of Jurists has identified several prerequisites for an effective remedy under international and regional human rights law, including promptness,[81] effectiveness,[82] accessibility,[83] and enforceability.[84]

Given the emphasis that is placed on judicial remedies under international human rights law, the right to an effective remedy is often used somewhat interchangeably with the notion of 'access to justice'.[85] Access to justice generally refers to "the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards".[86]

4.2.2-Children's access to justice

Independently of their parents or guardians, children are rights-holders who are entitled to effective remedies when their rights are violated.[87] This assertion is supported by the CRC Committee, which has recognized that the right to an effective remedy is implicitly included in the CRC.[88] As one author puts it, "access to justice for children should be understood both as a fundamental right and as a means to safeguard the enjoyment of just and timely remedies in relation to the protection of substantive rights of the child".[89] In its own report on access to justice for children, the OHCHR noted that "the concept of access to justice for children requires the legal empowerment of all children", which involves enabling them to access relevant information and effective remedies to claim their rights.[90]

However, children face specific barriers that make obtaining access to justice particularly challenging, due to a lack of legal standing, knowledge of remedy mechanisms, financial

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[80] CEDAW Committee, 'General recommendation on women's access to justice' (2015) UN Doc: CEDAW/C/GC/33, para 19.
[81] International Comission of Jurists, 'The Right to a Remedy and Reparation for Gross Human Rights Violations' (2018), 65-68.
[82] Ibid. Effectiveness is understood as providing "meaningful access to justice for a potential victim of a human rights violation" and ensuring that a remedy not be "theoretical and illusory".
[83] Ibid 69-71.
[84] Ibid 81. An effective remedy requires its enforceability against other public authorities. If the judicial power lacks the means to carry out its judgments, the remedy cannot be considered to be effective.
[85] Ton Liefaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 International Journal of Children's Rights 195, 199.
[86] OHCHR, 'Access to justice for children' (2013) UN Doc: A/HRC/25/35, para 4.
[87] Liefaard (n 85) 196.
[88] CRC Committee (n 62) para 24.
[89] Liefaard (n 85) 198.
[90] OHCHR (n 86) para 5.

resources, or adequate legal representation.[91] Likewise, a UN HRC resolution adopted in 2014 reiterated the many obstacles to children's access to justice, including "lack of awareness of the rights of the child, restrictions on the initiation of or participation in proceedings, the diversity and complexity of procedures, lack of trust in the justice system, lack of training of relevant officials, de jure and de facto discrimination, certain cultural and social norms, the stigma on the children associated with certain crimes, and physical barriers".[92]

The CRC Committee has called on states to "focus their attention on removing social, economic, and juridical barriers so that children can in practice have access to effective judicial mechanism without discrimination of any kind".[93] Notably, the Committee recommends that states introduce the possibility of collective complaints procedures, such as class actions and public interest litigation, as mechanisms to increase accessibility to courts for large groups of children who have suffered the same harm.[94]

4.2.3-Access to justice and climate change

There is a growing body of soft law instruments,[95] regional treaties,[96] and reports of international bodies,[97] focusing on the specific relationship between the environment and the right to an effective remedy,[98] as well as on children's rights to effective remedies in that context.

The OHCHR has analyzed the relationship between climate change and children's rights, coming to the conclusion that states are obligated to provide children with effective and timely remedies for climate change related harms.[99] The OHCHR highlighted the many obstacles faced by children in accessing remedies, including their "special and dependent status, their frequent

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[91] CRC Committee, 'General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights' (2013) UN Doc: CRC/C/GC/16, para 4.
[92] UN HRC, 'Rights of the child: access to justice for children' (2014) UN Doc:A/HRC/RES/25/6.
[93] CRC Committee (n 91) para 68.
[94] Ibid.
[95] Rio Declaration (n 36) Principle 10.
[96] See Article 8 of the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2019), and Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998).
[97] Special Rapporteur environment (n 42) para 51.
[98] Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 16 Climate Law 224.
[99] OHCHR (n 41) para 38.

absence of legal standing, power imbalance and lack of knowledge, including with regard to climate change", and underlined the obligation for states "to take appropriate steps to empower children and ensure their access to child-sensitive judicial and administrative processes".[100] Child-sensitive judicial processes in particular require justice that is "accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity".[101] The UN Special Rapporteur on human rights and the environment has also addressed the issue of children's access to justice for environmental harm, echoing the obstacles that children may meet in such cases, including a lack of information about the effects of such harms, the delay between exposure to climate harm and the manifestation of consequences, issues pertaining to standing, applicable limitation periods, and burdens of proof.[102] As well, the Special Rapporteur concluded that states should take measures to mitigate common barriers to justice, such as allowing class actions lawsuits on behalf of children and ensuring that reparation be prompt and timely enough to limit any ongoing or future damage to affected children.

4.3-PROCEDURAL LAW - CHILDREN'S RIGHTS PRINCIPLES

Four core children's rights principles guide the interpretation of the CRC: non-discrimination; the best interests of the child; the right to survival and development; and child participation. Each of these guiding principles is specifically implicated when it comes to children's rights climate litigation.

4.3.1-Non-discrimination (Article 2)

The principle of non-discrimination has been described as a "central driving force in the history of the development of the rights of the child".[103] The international adoption of the CRC served clear notice that children were capable rights-holders whose interests were as equally legitimate and fundamental as those of adults, and that their particular vulnerabilities made them even more

[100] Ibid.
[101] Liefaard (n 86) 214.
[102] Special Rapporteur environment (n 42) para 53.
[103] Samantha Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) 13 International Journal of Children's Rights 433, 444-445.

deserving of protection.[104] Non-discrimination guaranteed under the CRC is concerned with ensuring that states do not discriminate against children in their enjoyment of CRC rights. In light of the recognition that the right to an effective remedy is implicitly included in the CRC, it follows that this right must be guaranteed to all children in a non-discriminatory fashion.[105]

4.3.2-Best interests of the child (Article 3)

Article 3(1) of the CRC mandates that the "best interests of the child shall be a primary consideration" in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". This principle acts as a procedural safeguard that decision-makers must consider and which aims to guarantee children the full and effective enjoyment of all CRC rights.[106] In other words, taking into account the best interests of the child as the primary consideration in all actions concerning them is intended to ensure the full and effective enjoyment of all the rights recognized in the CRC. This principle is fundamental in adopting a child-centred approach to human rights, particularly when it comes to tackling environmental issues and countering foreseeable harms caused by climate change.[107] Furthermore, if properly utilized in the context of climate change mitigation, the best interests of the child should arguably impose obligations on states to exercise their legislative and administrative powers in a manner that advances children's right to a dignified life, for example by reducing GHG emissions.[108]

4.3.3-Right to survival and development (Article 6)

The right to survival and development, which is a key overarching principle of the CRC, is contained in article 6, whose first aim is to recognize the inherent right to life of every child. The CRC Committee has defined the notion of development in this context as needing to be understood "in its broadest sense as a holistic concept embracing the child's physical, mental,

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[104] Ibid 445.
[105] Liefaard (n 85) 213.
[106] CRC Committee, 'General Comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration' (2013) UN Doc: CRC/C/GC/14.
[107] Francesca Ippolito, 'The best interests of the child: Another string to the environmental and climate protection bow?' (Questions of International Law, 28 February 2022) <www.qil-qdi.org/the-best-interests-of-the-child-another-string-to-the-environmental-and-climate-protection-bow/>accessed 14 June 2022.
[108] Ibid.

spiritual, moral and psychological development".[109] States are obliged to introduce all appropriate measures to promote children's survival and development, which in practice is necessarily linked to upholding the best interests of the child and respecting substantive rights under the CRC, including the right to health, education, and an adequate standard of living. Children's right to survival and development is particularly implicated when it comes to the life-threatening consequences of climate change. Essentially, the climate crisis directly threatens the life of children and imperils their survival and development, whether it is through increased water scarcity, food insecurity, extreme weather events and natural disasters, spread of disease, or forced displacement.

4.3.4-Child participation (Article 12)

Finally, the child's right to participate, also referred to as the right of the child to be heard or to express their views, is a key guiding principle of the CRC that is especially relevant in the context of climate litigation. The CRC Committee has detailed the various procedural obligations that are imposed on states under article 12, as well as the various inter-linkages with other CRC articles.[110] Evidently, the expression of a child's views and the weight that will be attributed to them will depend in large part on the 'evolving capacities of the child' (article 5), and on their age, level of understanding, and maturity.[111] In some cases, it might not be feasible or appropriate to hear a child directly, in which case this right may be exercised through the intermediary of a "representative or an appropriate body".[112] Regrettably, the views of children are largely discounted in climate policy-making forums, despite the fact that children will be most impacted by the social, economic, and environmental consequences of climate change.[113] Consequently, allowing for children's participation in climate litigation represents a meaningful way of ensuring respect for the right to be heard, which is crucial in guaranteeing access to justice.[114]

[109] CRC Committee (n 62) para 12.
[110] CRC Committee, 'General Comment no. 12 - The right of the child to be heard' (2009) UN Doc: CRC/C/GC/12.
[111] CRC Committee (n 106) para 44
[112] Liefaard (n 85) 219.
[113] Ziba Vaghri, 'Climate Change, An Unwelcome Legacy: The Need to Support Children's Rights to Participate in Global Conversations' (2018) 28 Children, Youth and Environments 104, 107.
[114] Liefaard (n 85) 215-218.

4.4-CONCLUSION

In sum, children face disproportionate impacts to their human rights due to climate change, which require them to be empowered to obtain effective remedies and access justice. Access to justice means that children must be able to use and trust the legal system to protect their needs and interests. This requires states to provide quick, effective and fair options so that children can defend their human rights, while minimizing the inequities and abuses of power they may face in the process. In this regard, the CRC's four core children's rights principles are valuable interpretative tools that can help children obtain redress for human rights violations caused by the climate crisis.

5-SACCHI ET AL V. ARGENTINA ET AL – UN COMMITTEE ON THE RIGHTS OF THE CHILD

5.1-CONTEXT

The fall of 2019 was a high point for the youth climate action movement, with millions of demonstrators marching worldwide in the September climate strikes and Greta Thunberg giving one of her most iconic speeches at the UN Climate Action Summit in New York City, where she called out world leaders:[115]

> This is all wrong. I shouldn't be up here. I should be back in school on the other side of the ocean. Yet you all come to us young people for hope. How dare you!
>
> You have stolen my dreams and my childhood with your empty words. And yet I'm one of the lucky ones. People are suffering. People are dying. Entire ecosystems are collapsing. We are in the beginning of a mass extinction, and all you can talk about is money and fairy tales of eternal economic growth. How dare you! […]
>
> You are failing us. But the young people are starting to understand your betrayal. The eyes of all future generations are upon you. And if you choose to fail us, I say: We will never forgive you.
>
> We will not let you get away with this. Right here, right now is where we draw the line. The world is waking up. And change is coming, whether you like it or not.

Shortly after this speech, Thunberg joined a group of children from around the world to announce the filing of a communication ("*Sacchi et al. v. Argentina et al*") with the CRC Committee against five states (Argentina, Brazil, France, Germany, and Turkey)[116] to hold them accountable for human rights violations engendered by the climate crisis.[117] The 16 child

[115] NPR, 'Transcript: Greta Thunberg's Speech At The U.N. Climate Action Summit' (23 September 2019) <www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit?t=1654860895616> accessed 10 June 2022.

[116] The defendants had each accepted the CRC Committee's jurisdiction to hear communications, were major GHG emitters, and had a poor track record in acting to mitigate risks of climate change. Ingrid Gubbay and Claus Wenzler, 'Intergenerational Climate Change Litigation: The First Climate Communication to the UN Committee on the Rights of the Child' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021), 355.

[117] Case documents can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/> accessed 10 June 2022.

petitioners, aged 8 to 17, called their movement #ChildrenVsClimateCrisis and were supported by environmental NGO EarthJustice and Hausfeld LLP law firm in their action.[118]

The petition was the highest profile case brought under the new communications procedure of the CRC, which had entered into force in 2014 after the adoption of an Optional Protocol on the matter in 2011.[119] State parties who have ratified the Optional Protocol recognize the competence of the CRC Committee to receive communications submitted on behalf of individuals or groups of individuals, within the jurisdiction of a state party, who claim to be victims of a violation by that state of their CRC rights.[120] The Optional Protocol establishes the procedure for dealing with such communications and sets out admissibility requirements for communications to be considered on their merits.[121] Like all UN human rights treaty bodies, the CRC Committee does not have the competence to enforce its decisions on states, meaning that a communication's outcome is generally not legally binding in the same way as a domestic court decision might be.[122] Nevertheless, by signing on to the communications procedure, states have in theory agreed to accept and implement the CRC Committee's findings. These decisions will in any event hold strong persuasive value as authoritative interpretations of the CRC.[123]

5.2-THE COMMUNICATION

5.2.1-Factual Allegations

The petitioners in *Sacchi* alleged that the actions of each of the five respondent states were causing and perpetuating the climate crisis, in turn harming their rights protected under the CRC.[124] The petition underlined, in a detailed fashion, the current and future threat posed by the

[118] The petitioners are from Argentina, Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the US. 'Children vs Climate Crisis' <https://childrenvsclimatecrisis.org/> accessed 10 June 2022.
[119] As of July 2022, 48 states have ratified the Optional Protocol.
[120] Optional Protocol to the CRC on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS Reg 27531. Article 5.
[121] Ibid article 7.
[122] Rosanne van Alebeek and André Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012).
[123] OHCHR, 'Individual Communications' <www.ohchr.org/en/treaty-bodies/individual-communications>accessed 17 June 2022.
[124] Gubbay and Wenzler (n 116) 343.

climate crisis to the lives, rights, and welfare of the world's children.[125] The personal experiences of the petitioners were invoked to demonstrate how climate change is having immediate and devastating consequences on the rights of children, including through exacerbation of health issues and infectious diseases,[126] threats to housing and livelihoods posed by natural disasters,[127] heatwaves and droughts,[128] extreme storms,[129] flooding and rising sea levels,[130] endangerment of indigenous cultural practices,[131] and the deterioration of children's mental health.[132] The petition went to great lengths to illustrate the numerous ways in which petitioners are currently facing the impacts of climate change,[133] making clear that it is not necessary to focus exclusively on the potential impacts of climate change on future generations when current generations are already experiencing harm. While much emphasis was placed on the specific individual experiences of the 16 petitioners, the communication emphasized that the rights of every child, everywhere, were at risk due to the respondents' failure to act adequately in the face of the climate crisis.[134]

5.2.2-Substantive law

At its core the petition contended that the respondents had failed to uphold their international legal obligations to: 1) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; 2) cooperate internationally in the face of the global climate emergency; 3) apply the precautionary principle of environmental law to protect life in the face of uncertainty; 4) and ensure intergenerational justice for children and posterity.[135]

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[125] Chiara Sacchi and others, 'Communication to the Committee on the Rights of the Child' (23 September 2019), para 1-12.
[126] Ibid para 5. Nigerian petitioner Debby Adegbile was repeatedly hospitalized for asthma as hotter temperatures have worsened air quality. Ranton Anjain and David Ackley III from the Marshall Islands contracted dengue fever and chikungunya.
[127] Ibid para 6. Petitioners Raslen Jbeili (Tunisia) and Alexandria Villaseñor (U.S.) have both been exposed to dangerous wildfires and suffered smoke inhalation.
[128] Ibid para 7. Droughts in South Africa have affected water supplies for petitioner Ayakha Melithafa. Heat waves have become a regular part of French petitioner Iris Dusquene's life.
[129] Ibid para 8. Petitioners Chiara Sacchi (Argentina), Raina Ivanova (Germany), and Catarina Lorenzo (Brazil), have all been affected by extreme storms.
[130] Ibid para 9. Carlos Manuel is at risk of rising sea levels in Palau. Indian petitioner Ridhima Pandey has suffered from severe flooding.
[131] Ibid para 10. Indigenous petitioner Ellen-Anne from Sweden has experienced threats to her traditional cultural practices, including reindeer herding.
[132] Ibid para 11. Swedish petitioner Greta Thunberg has experienced depression due to the climate crisis.
[133] Ibid para 96-167.
[134] Ibid para 29.
[135] Ibid para 14.

5.2.2.1-*Alleged rights violations*

The petition argued that by recklessly causing and perpetuating climate change, the respondents had failed to take necessary preventive and precautionary measures to guarantee the petitioners' CRC rights to life (article 6),[136] health (article 24),[137] and culture (article 30).[138] The petition further alleged that climate change threatened the core CRC principle of non-discrimination (article 2) and that the respondents had violated article 3 of the CRC by failing to make the best interests of the child a primary consideration in their climate actions and omissions.[139]

While the petition did not *explicitly* make the argument that children were being subject to intergenerational discrimination, the manner in which the petition was framed *implicitly* took this position by highlighting the disproportionate and unjust consequences of climate change, which will have specifically deleterious impacts on the rights of children. The petitioners also invoked intergenerational equity, noting that "by supporting climate policies that delay decarbonization, the respondents are shifting the enormous burden and costs of climate change onto children and future generations".[140] As the petitioners put it, "the only cost-benefit analysis that would justify any of the respondents' policies is one that discounts children's lives and prioritizes short-term economic interests over the rights of the child".[141]

5.2.2.2-*Extra-territorial jurisdiction*

The petition was particularly innovative in two regards. Firstly, the petitioners sought to hold states accountable for transnational harm caused by their GHG emissions, thereby extending the extra-territorial jurisdiction of their human rights obligations to individuals who had suffered from climate change-related harm in other parts of the world. The petition grounded this legal argument in several legal sources,[142] including a joint statement on human rights and climate change issued by the CRC Committee and several other UN human rights treaty bodies: "State parties have obligations, including extra-territorial obligations to respect, protect and fulfill all

[136] Ibid para 260-275.
[137] Ibid para 276-285.
[138] Ibid para 286-300. Specifically invoked for the indigenous petitioners.
[139] Ibid para 301-308.
[140] Ibid para 193-195.
[141] Ibid para 307.
[142] Ibid para 177-183.

human rights of all peoples", and a duty "to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm".[143]

In essence, the petitioners argued that the respondents' jurisdiction could extend to acts or omissions within their territory which caused "foreseeable cross-border effects", as long as some form of causation could be established between the state's wrongful conduct and the extraterritorial rights violation.[144] In advancing this argument, the petitioners referenced the CRC Committee's General Comment No. 16, the Inter-American Court of Human Rights' (IACtHR) Advisory Opinion on Environment and Human Rights, and the Human Rights Committee's General Comment No. 36,[145] all of which adopted more expansive definitions of extra-territorial jurisdiction recognizing the possibility of cross-border human rights obligations in the case of foreseeable transboundary environmental harm. As well, the petitioners relied on climate science to support their assertion that the risks to children's rights posed by climate change were indeed 'foreseeable'.[146]

5.2.2.3-*Causality*

Secondly, the petition took a novel approach by seeking to establish the respondents' responsibility without demonstrating a specific direct causal link between the GHG emissions of those states and the harms suffered by the petitioners. Rather, the petitioners sought to hold states responsible for their actions and inactions that contribute to climate change and which thereby breach their fundamental human rights obligations.[147] In doing so, the petition attempted to get around the paradox by which every state incontrovertibly contributes to climate change but no state is held individually responsible due to the immense difficulty of causally linking specific climate harms to a specific country's emissions, which ultimately leads to inaction and a lack of accountability.[148]

The petitioners addressed this issue in part by impugning in detail the failure of each respondent state to promptly reduce its GHG emissions at the "highest possible ambition", as mandated by

[143] UN (n 6).
[144] Sacchi (n 125) para 243-253.
[145] Ibid para 245-249.
[146] Ibid para 196-200.
[147] Ibid para 17.
[148] Ibid para 204; Gubbay and Wenzler (n 116) 360.

the Paris Agreement, and as scientifically required to protect the lives and welfare of children.[149] The petition went on to demonstrate how each state had helped cause the climate crisis, particularly through fossil fuel promotion and GHG emissions, and continued to do so in violation of international obligations and despite knowing the danger that this would cause to children.[150] Consequently, in line with traditional legal theories of joint responsibility, the petition argued that the respondents could and should be held accountable for individually and jointly causing climate change, and in turn, individually and jointly causing the injuries suffered by the petitioners.[151]

5.2.2.4-*Relief sought*

The petitioners sought many forms of relief from the CRC Committee, including declarations that climate change is a children's rights crisis**,** that each respondent had shown wilful disregard for the measures necessary to prevent and mitigate climate change, and that each respondent was violating the petitioners' rights to life, health, and the prioritization of their best interests, as well as cultural rights of indigenous communities, by recklessly perpetuating life-threatening climate change.[152] The complaint also called on the respondents to ensure that the best interests of the child were made a primary consideration in climate change mitigation and adaptation efforts and that children's right to be heard and to express their views freely in all such efforts be upheld.[153]

5.2.3-Procedural law

On a procedural level, the petitioners faced the challenging task of meeting one of the admissibility requirements under the CRC's Optional Protocol: the exhaustion of domestic remedies.[154] The petition focused on the exceptions to this requirement where the application of domestic remedies would be "unreasonably prolonged or unlikely to bring effective relief". The petition highlighted many obstacles that children face in accessing justice to enforce their rights as a result of their "special and dependent status", namely the complexities of the justice system, a lack of knowledge and understanding about their rights, fewer financial resources, and the need

[149] Sacchi (n 125) 214-229.
[150] Ibid para 196-202.
[151] Ibid para 241; Lewis (n 31) 201.
[152] Sacchi (n 125) para 326-331.
[153] Ibid para 33.
[154] See article 7(e).

for adult support.[155] According to the petitioners, it would be unduly costly and burdensome, veering on impossible, for them to hold the five respondents responsible if they were obliged to first initiate legal procedures in each state.[156]

As the petitioners explained, part of the strength of their case was that it focused on the global scope and nature of climate change and the injuries suffered by children around the world: "in essence, no single court could provide the same remedy sought in this petition against these five sovereigns".[157] Dividing the petition into five individual actions would not have the same effect, especially given the domestic laws in each of the respondent states which afford jurisdictional immunity to foreign states for their sovereign acts. Moreover, the strength of the petition lies in its collective character, advancing a claim on behalf of a "group of rights-bearers with common interests", which would be completely lost if the petition was divided into individual claims.[158]

The petition also argued that the need to exhaust remedies in multiple jurisdictions would cause 'unreasonable delay', particularly in light of the stonewalling that could be expected from state respondents in such a major case, on top of the delays that are inherent to any judicial proceeding.[159] Delays to accessing justice are especially egregious in the context of the climate crisis when cases revolve around the urgent need to take immediate action.

5.2.4-State responses, amicus curiae, and committee hearings

All five respondent states contested the petition's admissibility on the grounds that the CRC Committee lacked jurisdiction, that the petition was unsubstantiated, and that the petitioners had not exhausted domestic remedies.[160]

The petitioners received support from the UN Special Rapporteur for human rights and the environment, who submitted an amicus curiae brief rejecting the arguments advanced by the respondents concerning jurisdiction, the directness and foreseeability of climate harm, the

[155] Sacchi (n 125) para 310.
[156] Ibid para 312.
[157] Ibid.
[158] Ibid para 313.
[159] Ibid para 317.
[160] Chiara Sacchi and others, 'Petitioners' Reply to the Admissibility Objections of Brazil, France and Germany' (4 May 2020).

fairness of holding those states responsible for their human rights obligations related to the climate crisis, and the exhaustion of domestic remedies.[161]

In addition, the parties were invited to make additional arguments and answer questions during oral hearings. The CRC Committee also held separate online hearings with the young petitioners where they were able to express their views, explaining the impacts that the climate crisis has had on them and their specific motivations for bringing the case.[162]

5.3-DECISIONS OF THE CRC COMMITTEE

The CRC Committee released its decisions on the *Sacchi* petition in October 2021, finding the claim inadmissible for failure to exhaust domestic remedies.[163] Naturally, the rejection of the petition at a preliminary stage without full consideration of the arguments on the merits was disappointing for many. As the petitioners put it, by instructing them to first bring lawsuits in each of the respondent states' national courts, the CRC Committee had basically instructed them "to squander years waiting for inevitable dismissal".[164] It was clear to the children that the CRC Committee had "turned its back" on them, that the "adults [had] failed to protect [them]", and that this decision would "haunt the Committee in the future".[165]

5.3.1-Partial victory

Despite the CRC Committee's ruling on admissibility, the decision represented a milestone in many other regards. The CRC Committee agreed with the petitioners that the respondents could be held legally responsible for the reasonably foreseeable consequences of climate harm

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[161] David Boyd and John Knox, 'Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment' (2021).

[162] Aoife Nolan, 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina' (EJIL:Talk!, 20 October 2021) <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/>accessed 24 June 2022.

[163] The CRC Committee released five decisions with minor differences based on the factual circumstances of each respondent state. For the sake of clarity, references will be made based on the decision for Germany. CRC Committee, 'Decision in respect of Communication No. 107/2019' (8 October 2021) UN Doc:CRC/C/88/D/107/2019 (Germany).

[164] Chiara Sacchi and others, 'UN Committee on the Rights of the Child Turns its Back on Climate Change Petition from Greta Thunberg and Children from Around the World' (11 October 2021) <https://childrenvsclimatecrisis.org/latest-news/>accessed 25 June 2022.

[165] Ibid.

originating in their territory on children around the world.[166] In doing so, they adopted the same line of reasoning as the IACtHR in its advisory opinion, finding that states have extraterritorial human rights obligations in relation to transboundary harm caused by their carbon emissions.[167]

Moreover, the CRC Committee rejected the 'drop in the ocean' defence raised by the respondents, who argued that the existence of multiple parties responsible for climate change should somehow absolve them of any individual responsibility for the harm that the GHG emissions originating from their territory may cause to children at home or abroad.[168] Other courts have taken the same position as the CRC Committee, concluding that if such an argument were accepted, "an effective legal remedy for a global problem as complex as [climate change] would be lacking. […] each state held accountable would then be able to argue that it does not have to take measures if other states do not do so either. That is a consequence that cannot be accepted".[169]

Additionally, the CRC Committee highlighted that children were already being impacted by the consequences of climate change and would continue to be affected throughout their lifetime. The Committee therefore determined that the petitioners had experienced real and significant harm to their rights as a result of the respondents' actions, which justified their victim status.[170] Consequently, the Committee concluded that states have heightened obligations to protect children from foreseeable harm through special safeguards and appropriate legal protection.[171]

5.3.2-Failure to exhaust domestic remedies is determinative

Unsurprisingly, the decision's analysis of the exhaustion of domestic remedies has been heavily scrutinized. Much criticism has focused on the CRC Committee's conclusion that the respondents had reasonably demonstrated the existence and availability of effective domestic

[166] CRC Committee (n 163) para 9.7.
[167] The Committee found that children are under the jurisdiction of the state on whose territory the emissions originated if there is a causal link between the conduct of the state in question and the negative impact on the rights of children located outside its territory, when the state of origin exercises effective control over the sources of the emissions in question.
[168] CRC Committee (n 163) para 9.8-9.10.
[169] *The Netherlands v Urgenda Foundation*, The Hague Court of Appeal (2018), case 200.178.245/01 (English translation), para 96-97.
[170] Sacchi (n 125) para 214.
[171] CRC Committee (n 163) para 9.13.

remedies in each of their states, of which the petitioners could have availed themselves.[172] In the words of the CRC Committee, "mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them".[173]

It is questionable whether such remedies provide effective relief in the face of an urgent crisis like climate change when the adjudication of domestic cases in multiple jurisdictions would assuredly take years, if not decades.[174] Observers would have hoped that in the face of the unprecedented global threat posed by the climate crisis the CRC Committee would have recognized that the availability of domestic judicial remedies on paper was insufficient on its own to ensure the broader and more urgent remedies that were being sought in this case.[175] However, the Committee interpreted the exhaustion of remedies requirement strictly, concluding that the fact that not all of the remedies being sought by the petitioners were available domestically did not in turn mean that the remedies that were indeed available could not provide them with some form of effective relief.[176]

5.3.3-Open letter from the Committee

To its credit, the CRC Committee embraced the principles of child-friendly justice by taking the extra step of drafting an open letter addressed to the 16 young petitioners to make the decision more accessible and easier to understand.[177] The letter acknowledged the importance of the children's actions in bringing this 'historic case' and recognized the 'significance and urgency' of the complaint.[178] As the CRC Committee members put it, they were constrained by the fact that they had to "work within the limits of the legal powers given to [them] under the Optional Protocol".[179] While these words of encouragement were likely of little comfort to the petitioners,

[172] Ibid para 9.17.
[173] Ibid para 9.16.
[174] Gubbay and Wenzler (n 116) 357.
[175] Ibid.
[176] CRC Committee (n 163) para 9.18
[177] CRC Committee, 'Open Letter on Climate Change' (2021) <www.ohchr.org/sites/default/files/2021-12/Open_letter_on_climate_change.pdf>accessed 23 June 2022.
[178] Ibid.
[179] Ibid.

it was nonetheless important to send a message to these children, and children everywhere, that they should not give up their efforts to fight for climate justice.[180]

5.3.4-Petitioners pursue action by other means

Despite facing a disappointing outcome, the youth climate activists at the heart of the *Sacchi* case have not been deterred in their drive to bring about meaningful climate action. In November 2021, one month after the CRC Committee's decision came out, 14 of the original 16 plaintiffs drafted a formal petition addressed to UN Secretary-General António Guterres, calling on him "to declare a climate emergency and mobilize a comprehensive UN response modelled after that taken to combat COVID-19".[181] It bears mentioning that the children's petition was clearly timed to coincide with the closing days of the 26th Conference of the Parties of the UNFCCC held in Glasgow. Those international negotiations were largely viewed as a failure, with global political leaders once again demonstrating to children that they were not up to the task of dealing with the climate crisis satisfactorily. The youth encouraged Guterres to take the urgent action required within his sphere of influence and authority at the UN level, activating a "crisis management team to oversee immediate and comprehensive global action on climate".[182] In a poignant call to action, the 14 youth told Guterres: "The UN Charter promises to protect succeeding generations. That promise will not be kept if the international community does not do all within its power to avert a climate disaster".[183]

Guterres publicly agreed with the young climate activists, noting that he had been calling on states to declare a climate emergency at the domestic level and vowing that he would "mobilize the whole of the U.N. system based on the concept of a climate emergency".[184] Nevertheless, while it is true that Guterres' rhetoric has been increasingly critical of state inaction and has hammered home the urgency of the situation, he has yet to take the concrete steps requested by the youth in their petition.

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[180] Ibid.
[181] Chiara Sacchi and others, 'Petition to the UN Secretary-General to Declare a Climate Emergency and Mobilize a Comprehensive UN Response' (10 November 2021) www.hausfeld.com/media/1roftlln/petition-to-the-unsg-to-declare-a-climate-emergency-november-10-2021.pdf accessed 24 June 2022.
[182] Ibid.
[183] Ibid.
[184] NPR, 'The U.N. chief says the main global warming goal is on 'life support'' (11 November 2021) <www.npr.org/2021/11/11/1054772983/antonio-guterres-cop26-climate-change> accessed 24 June 2022.

5.4-ANALYSIS

5.4.1-Raising public awareness

As with many examples of climate litigation, the legal elements of the *Sacchi* case were only one part of the overall strategy. Drawing attention to the plight of children in the climate crisis was always going to be a major objective driving the petition. Recruiting young petitioners from around the world, including high-profile climate activists like Greta Thunberg, was instrumental in popularizing the idea that the climate crisis represents a global children's rights crisis.[185] Furthermore, the diverse personal narratives that the petition drew on to illustrate the impacts of the climate crisis on children's rights were effective in humanizing the problem and making the issues concrete rather than relying solely on the abstract indeterminate harms caused to faceless entities like distant 'future generations'.[186]

Many of the children involved in the petition received significant media attention, allowing them to communicate their message to a far broader audience than just the CRC Committee. [187] As one petitioner explained, the case remained a "big win" in terms of bringing awareness to the climate crisis, including shedding light on how climate change will impact everyone "socially, economically, racially, and inter-generationally".[188] In sum, the *Sacchi* case illustrates how strategic litigation, even when it might not succeed per se in the courtroom, can still serve as a powerful means of raising awareness, inciting public mobilization, and empowering young activists to have their voices heard.[189]

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[185] Gubbay and Wenzler (n 116) 347.
[186] Parker (n 16) 80; Setzer and Vanhala (n 24) 11.
[187] See eg: Brian Kahn, 'Why Chiara Sacchi Filed a Landmark Climate Complaint Against Five Countries – Including Her Own' (Gizmodo, 26 September 2019) <https://gizmodo.com/why-chiarra-sacchi-filed-a-landmark-climate-complaint-a-1838486838> accessed 18 June 2022; Roshni Chakrabarty, '11-year-old climate activist Ridhima Pandey on fighting climate change and why India is vulnerable' (India Today, 16 December 2019) <www.indiatoday.in/education-today/how-i-made-it/story/india-s-11-year-old-climate-activist-ridhima-pandey-on-her-own-action-against-climate-change-and-why-india-is-vulnerable-1628706-2019-12-16> accessed 18 June 2022; Adegbile Deborah Morayo, 'Climate Change: a threat to human health in Nigeria. Let's take action!' (The Elders, 28 May 2020) <https://theelders.org/news/climate-change-threat-human-health-nigeria-let-s-take-action> accessed 18 June 2022.
[188] Iris Duquesne, 'Youth-led climate litigation' (Sabin Center-UNEP Annual Conference on Global Climate Litigation, 19 April 2022).
[189] Lewis (n 31) 182.

5.4.2-CRC Committee General Comment

Another clear successful consequence of the *Sacchi* petition was that it served as a catalyst for the CRC Committee to draft a General Comment on children's rights and the environment with a special focus on climate change, for which it extended an invitation to the petitioners to share their views during the drafting process.[190] Climate change has proven to be an issue of major concern for the CRC Committee, and it has consistently raised the consequences of the climate crisis on children's rights in its state review processes over the past few years.[191]

The main stated objective of the General Comment is to "provide authoritative guidance to State Parties to undertake all appropriate legislative, administrative and other measures of a child-rights approach to environmental issues with a special focus on climate change", with one specific aim among many, to "clarify the extent of States' obligations relating to climate change and children's rights, including with regard to mitigation, and adaptation".[192] The Committee's General Comments can serve to influence state practice, be integrated into the Committee's recommendations to states during periodic reviews, and be used in potential domestic, regional, or international litigation. The General Comment will allow the Committee to provide clarification on a number of complex substantive and procedural human rights issues related to climate change, many of which were raised by the *Sacchi* petition and which have since stimulated much discussion among legal experts. The CRC Committee has remained committed to consulting young people and facilitating child participation throughout the drafting process, allowing children from around the world to express their views on these issues.[193] A draft version of the General Comment was released in November 2022, and the Committee plans to proceed with public consultations on this draft before launching the final version later in 2023.[194]

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[190] CRC Committee (n 177).
[191] CIEL (n 47).
[192] CRC Committee, 'Concept note: General comment on children's rights and the environment with a special focus on climate change' (2021) <www.ohchr.org/en/treaty-bodies/crc/concept-note-general-comment-childrens-rights-and-environment-special-focus-climate-change> accessed 30 June 2022.
[193] CRC Committee, 'Draft general comment on children's rights and the environment with a special focus on climate change' (2021) < www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and> accessed 30 June 2022.
[194] CRC Committee, 'United for children's environmental rights' <https://childrightsenvironment.org/> accessed 30 June 2022.

5.4.3-Further reflections

An ongoing debate in all matters of climate litigation concerns the institutional role of courts and other adjudicative bodies in deciding cases dealing with climate change. The complex nature of climate policy arguably makes it a matter best left to states and democratically accountable governments to dictate, rather than letting international treaty bodies assess the specific details of wide-ranging domestic policy decisions. By holding firm on the issue of exhaustion of domestic remedies, the CRC Committee stood up for the principle of subsidiarity and guarded its institutional legitimacy, reminding litigants that the role of international human rights bodies is intended to remain supervisory and that domestic legal systems should remain the primary legal arena to obtain remedies for human rights violations.[195]

On the other hand, this case demonstrates that domestic courts may be fundamentally ill-suited for dealing with the multinational and transnational nature of climate change. At its core, climate change is a multifaceted problem that requires a multi-pronged solution involving as many states as possible. No state can solve the problem on its own and the "scale of the climate emergency arguably demands a broader scale of action".[196] Given how challenging and time-consuming it would be to proceed state-by-state, one would think that an international forum would be better placed to provide a global solution to the problem. As Lewis argues, "international litigation is better able to address the reality that all states share responsibility for climate change and that the emissions of developed states in particular are having damaging impacts on the lives of children beyond borders".[197]

5.5-CONCLUSION

State obligations with respect to climate change remain a relatively underdeveloped area of international human rights law, and petitions like *Sacchi* are crucial in helping to promote a new understanding of these issues. In particular, this petition has demonstrated how international human rights law frameworks, including notions like standing, jurisdiction, and causation, may require adaptation and evolution in order to deal with the complex realities associated with the

[195] Nolan (n 162).
[196] Lewis (n 31) 195.
[197] Ibid 181.

climate crisis.[198] This case has also illustrated the challenges that may present themselves in climate litigation at the international level, as well as the power that comes when children act together to pursue justice for rights violations stemming from climate change.

Ultimately, the CRC Committee's bold interpretation of extraterritorial jurisdiction can make it easier for any future communication that raises violations of children's rights in the context of the climate crisis. The decision may also be impactful in shaping case law in domestic legal systems which are welcoming to international legal sources, but also in influencing decisions in other UN human rights treaty bodies and in regional human rights courts. More than anything, the CRC Committee's decision recognized and reaffirmed on an international level that the climate crisis is a children's rights crisis.

[198] Parker (n 16) 79.

6–DUARTE AGOSTINHO AND OTHERS V. PORTUGAL AND OTHERS – EUROPEAN COURT OF HUMAN RIGHTS

6.1-CONTEXT

In light of the importance given to human rights in Europe and the continent's status as a leading contributor to global climate change, it makes sense that concerned citizens have initiated climate litigation in various European states.[199] The European legal order accords great respect for human rights, including the rights of vulnerable groups, which also makes it a prime context in which to utilize strategic litigation to protect the rights of children in relation to the climate crisis.

While national courts at the European level have been engaging with these issues, the two supranational courts in Europe – the Court of Justice of the European Union (CJEU) in Luxembourg and the ECtHR in Strasbourg – have also received their share of climate litigation. For reasons that go beyond the scope of this research, the CJEU presents certain procedural obstacles that make it ill-suited to welcome cases of this nature.[200] Meanwhile, the ECtHR has not yet had the opportunity to pronounce itself on the merits of a case dealing with the climate crisis, though a handful of recent cases should bring the Court to finally rule on these questions.[201] Given the ECtHR's institutional reputation as a beacon in the realm of human rights adjudication, the way in which it decides to engage with these novel legal issues will surely serve as inspiration for other courts.

The ECtHR plays a key role in adjudicating cases concerning alleged violations by Council of Europe (COE) member states of rights enshrined in the ECHR and its optional protocols. The ECtHR is guided in its work by the principle of subsidiarity, meaning that the primary responsibility for ensuring respect for human rights should be through the domestic legal systems

[199] Kleoniki Pouikli, 'Editorial a short history of the climate change litigation boom across Europe' (2021) 22 ERA Forum 569; Jacques Hartmann and Marc Willers, 'Protecting Rights in Climate Change Litigation before European Courts' (2022) 13 Journal of Human Rights and the Environment 90.

[200] Ibid Pouikli, 571. Plaintiffs have faced issues establishing the admissibility of their applications under Article 263(4) of the Treaty on the Functioning of the EU and the *Plaumann* test, as they are not 'individually concerned' by EU climate policies.

[201] Other cases include *KlimaSeniorinnen v. Switzerland*, Application no. 53600/20 (the 'Swiss grandmothers case'), *Greenpeace Nordic and Others v. Norway*, Application no. 34068/21, *Carême v. France*, Application no. 7189/21.

of member states.[202] This principle manifests itself in the requirement under the ECHR (article 35) that an applicant first exhaust domestic remedies (with some exceptions) as a precondition for a case to be heard by the ECtHR. Subsidiarity also finds itself expressed through the 'margin of appreciation' doctrine, which serves to modulate the ECtHR's oversight of member states based on many different factors, by giving states some flexibility in how they interpret and implement their ECHR obligations.[203] Likewise, the ECtHR has long adopted the 'living instrument' doctrine as its primary method of judicial interpretation, meaning that the ECHR is to be interpreted in light of present-day conditions.[204] Relatedly, the ECtHR's jurisprudence emphasizes the need for human rights protections to be 'practical and effective' rather than simply 'theoretical and illusory'.[205] All of these principles are especially relevant when it comes to understanding the discourse surrounding climate litigation before the ECtHR.

6.2-THE *DUARTE AGOSTINHO* CASE

Six young Portuguese applicants, backed by the Global Legal Action Network (GLAN),[206] filed a complaint with the ECtHR in September 2020 against 33 COE member states for breaching their ECHR rights through their respective contributions to climate change.[207] The complaint was filed shortly after Portugal experienced one of its hottest summers of the past century, during which the applicants were exposed to extreme heat and devastating forest fires.[208] As Catarina Mota, one of the young applicants, states: "It terrifies me to know that the record-breaking heatwaves we have endured are only just the beginning. With so little time left to stop this, we must do everything we can to force governments to properly protect us. This is why I'm bringing

[202] *Handyside v. UK* [1976] ECHR 5, para 48.
[203] Ibid para 49; Hana Müllerová, 'Environment Playing Short-handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights' (2015) 24 Review of European, Comparative & International Environmental Law 83, 84.
[204] George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe* (Cambridge University Press 2013).
[205] *Airey v. Ireland* [1979] 2 EHRR 305, para 24.
[206] The plaintiffs (Cláudia Agostinho, Catarina Mota, Martim Agostinho, Sofia Oliveira, André Oliveira, and Mariana Agostinho), aged 8 to 21, have labeled their case #Youth4ClimateJustice. They have also received support from 350.org and Avaaz, two organizations with experience in climate justice activism. GLAN, 'The Case' <https://youth4climatejustice.org/the-case/>accessed 26 June 2022.
[207] The respondents include the 27 EU member states and six major European emitters (UK, Norway, Russia, Switzerland, Turkey, and Ukraine).
[208] GLAN, (n 206).

this case".[209]

6.2.1-Factual allegations and remedy sought

The applicants allege that the respondent states are 'categorically failing' to enact the urgent GHG emissions reductions needed to safeguard their futures, their right to life, and their physical and mental wellbeing.[210] The complainants cite independent scientific analysis establishing that the existing mitigation measures and emissions reduction policies of the respondent states are insufficient to meet the overall 1.5°C threshold of the Paris Agreement, and that they would result in global warming between 3 and 4°C by 2100.[211] The applicants impugn the respondents' contributions to climate change both inside their borders, in terms of weak emissions reduction efforts, and outside their borders, with respect to fossil fuel exportation, carbon-intensive imports, and the overseas activities of multinationals headquartered within their jurisdictions.[212]

In establishing the general impacts of climate change, the complaint emphasizes the consequences of climate change on human health, including in relation to heat-related morbidity and mortality stemming from more frequent heatwaves and increased incidence of vector-borne diseases.[213] With regard to the specific experiences of the applicants, the focus is placed on the increase in average temperatures in Portugal, with heatwaves and wildfires presenting threats to life and health through heat stress, respiratory diseases, and airborne pollutants.[214] The threat of climate change has also impacted the young applicants' mental health and led to climate anxiety.[215] Moreover, the complaint explains how the risk of harm from climate change will increase significantly over the course of the applicants' lives.[216]

In terms of the remedy being sought from the ECtHR, the applicants ask for a declaration that their ECHR rights have been violated as a result of the actions and omissions of respondent

[209] Ibid.
[210] Ibid.
[211] Claudia Duarte Agostinho and others, 'European Court of Human Rights Application form & Annex' (2021) 39371/20, 5.
[212] Ibid 6.
[213] Ibid.
[214] Ibid 6-7.
[215] Ibid 7.
[216] Ibid.

states.[217] Counsel for the applicants explained that such a declaration could then "empower individuals who bring cases in domestic courts throughout Europe, seeking decisions which force their governments to tackle the climate crisis".[218]

6.2.2-Substantive law

The complaint raises alleged violations of articles 2 (right to life), 8 (right to respect for private and family life), and 14 (protection from discrimination) of the ECHR. While the ECHR contains no provision explicitly protecting the right to a healthy environment, the ECtHR's jurisprudence has constructively interpreted existing ECHR rights to ensure effective environmental protection.[219]

6.2.2.1-*ECHR Article 2*

The ECtHR has clarified the obligations stemming from the right to life, which include positive obligations on top of the negative obligation to refrain from intentionally depriving someone of their right to life.[220] Notably, the applicants rely on the *Öneryildiz v. Turkey*[221] decision in which the Court clarified that states have positive obligations in the context of dangerous activities "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[222] As the complaint notes, this obligation requires appropriate systems and effective frameworks to be put into practice.[223] The Court's decision in *Budayeva and others v. Russia* also established that article 2 obligates states to take reasonable measures to protect against foreseeable risks of natural disasters.[224] Additionally, the Dutch Supreme Court's decision in the famous *Urgenda* case, which hinged on the application of the ECHR at the domestic level, makes a strong argument in favour of applying this line of ECtHR case law to the climate crisis.[225]

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[217] GLAN (n 206).
[218] Ibid.
[219] COE, 'Environment and the European Convention on Human Rights' (2022).
[220] *Nicolae Virgiliu Tănase v. Romania* (ECtHR, 25 June 2019) 41720/13, para 135.
[221] ECtHR GC, 30 November 2004, 48939/99, para 89.
[222] Duarte Agostinho (n 211) 8.
[223] Ibid 9.
[224] ECtHR, 29 September 2008, 15339/02, para 137.
[225] *The Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands (2019), ECLI:NL:HR:2009:2007 (English translation), para 5.6.1-5.6.4.

6.2.2.2-*ECHR Article 8*

The right protected under article 8 of the ECHR includes elements of an individual's personal integrity, such as their physical and mental wellbeing.[226] The complaint cites the Court's decision in *Tătar v. Romania*, wherein it determined that states have a positive obligation to enact "reasonable and sufficient measures capable of protecting the right to a private life, a home and, more generally, a healthy, protected environment", particularly with respect to hazardous activities.[227] The *Tătar* case mandates that such positive obligations apply where there exists "a serious and substantial threat to the health and well-being of persons".[228] The Court's jurisprudence on environmental pollution is also crucial to the applicant's arguments, which rely on case law like *Fadeyeva v. Russia*, in which the Court applied such positive obligations to the release of hazardous emissions,[229] and *Dubetska v. Ukraine*, in which the Court clarified that obligations to prevent harm may arise where an environmental hazard reaches "a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life".[230] Furthermore, the applicants argue that both articles 2 and 8 impose duties to take preventive measures to counter risks, even if the materialization of harm only occurs in the long term or if the timing of that danger is uncertain.[231]

The applicants argue that state obligations arising under the ECHR have been triggered by each respondent's contribution to global GHG emissions, which already interfere significantly with their lives and health and will continue to worsen over time.[232] The applicants further contend that the specific injuries that they have suffered as a result of the increased frequency and intensity of heatwaves in Portugal meet the threshold to trigger the application of articles 2 and 8.[233]

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[226] *Cordella and others v. Italy* (ECtHR, 24 January 2019) 54414/13, para 157-160
[227] ECtHR, 27 January 2009, 67021/01, para 107.
[228] Ibid.
[229] ECtHR, 9 June 2005, 55723/00.
[230] ECtHR, 10 February 2011, 30499/03, para 105. See also the more recent decision of *Pavlov and others v. Russia* (ECtHR, 11 October 2022, 31612/09) in which the Court re-examined the interplay between air pollution and the positive obligations arising under article 8 of the ECHR.
[231] *Öneryıldız* (n 221) para 98-101, *Budayeva* (n 224) para 147-158; *Taskin and others v. Turkey* (ECtHR, 10 November 2004) 46117/99, para 111-114.
[232] Duarte Agostinho (n 211) 8.
[233] Ibid.

6.2.2.3-*ECHR Article 14*

In regard to article 14, the applicants argue that the material interference with their rights under articles 2 and 8 was greater on them as young people than it was for older generations. The complainants submit that they will face greater harm, as they will live longer and the impacts of climate change on their rights will worsen over time.[234] Consequently, they claim that the material difference in their treatment on the basis of their age, a protected status against discrimination under article 14, is discriminatory as it does not pursue a legitimate aim and is in no way proportionate.[235] As the applicants put it, "there is no objective and reasonable justification for shifting the burden of climate change onto younger generations by adopting inadequate mitigation measures".[236] It is worth noting that the applicants did not make equality rights arguments based on the freestanding prohibition of discrimination under Protocol No. 14 to the ECHR vis-à-vis the 11 respondent states who have ratified that Protocol.

6.2.2.4-*Other legal obligations*

In addition, the complaint advocates for the ECHR to be interpreted and applied consistently with other obligations under international law.[237] These include the respondents' obligation under article 2 of the Paris Agreement to limit global warming to 1.5° and their obligation under article 3 of the CRC to make the best interests of the child a primary consideration in matters that concern them.[238] The applicants also invoked the international environmental law concepts of intergenerational equity and the precautionary principle to substantiate their proposed legal interpretations of articles 2 and 8.[239] Although not raised in the complaint, the ECtHR has emphasized in its jurisprudence touching on several ECHR articles that states must give adequate weight to the vulnerability of children, ensuring that they take adequate measures to protect them.[240]

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[234] Ibid 9.
[235] Ibid.
[236] Ibid.
[237] Ibid 8-9; *Demir & Baykara v. Turkey* (ECtHR GC, 12 November 2008) 34503/97, para 85-86.
[238] Ibid Duarte Agostinho.
[239] Duarte Agostinho (n 211) 8-9. References made to the UNFCCC Article 3(1) on intergenerational equity and 3(3) on the precautionary principle.
[240] See eg: *Ateşoğlu v. Turkey* (ECtHR, 20 January 2015) 53645/10; *Nencheva and others v. Bulgaria* (ECtHR, 18 June 2013) 48609/06.

6.2.2.5-*Extra-territorial jurisdiction*

Given that the complaint impugns the actions of state respondents both inside and outside of their territory, the applicants had to establish that states could be held legally responsible for their extraterritorial contributions to climate change. Much academic discussion has surrounded the ECtHR's approach to jurisdiction and whether it is well suited to the extra-territorial human rights violations raised in climate litigation.[241] In this regard, the complaint cites the Court's leading authority on responsibility for the extra-territorial effects of state actions: *Ilascu and others v. Moldova & Russia.*[242] The complainants further support their arguments with reference to other ECtHR jurisprudence and identify a host of elements which may lead to a finding of extraterritorial jurisdiction, including:[243] where the extraterritorial effect is envisaged by or a direct consequence of a law adopted by the state; where it was entirely foreseeable that a state's act or omission would produce effects outside of its territory; where the relevant effects were felt both within and outside the state's territory; where a state's act or omission gave rise to extraterritorial effects related to resources under its control; and where the protection of an interest protected by the ECHR required the intervention of more than one contracting state. The applicants argue that they fall within the jurisdiction of all the respondent states, as each of those elements is present in their case.[244] Additionally, the complaint relies on several other international legal sources to support the existence of an obligation to prevent transboundary environmental harm.[245]

6.2.2.6-*Inadequacy of state conduct*

Much of the applicants' claim hinges on the argument that since projections indicate that current emissions measures and mitigation frameworks would exceed the 1.5°C target set in the Paris Agreement,[246] the respondents' actions should be legally *presumed* inadequate and therefore

[241] Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' [2022] Nordic Journal of Human Rights 1, 7-8.
[242] ECtHR, 8 July 2004, 48787/99.
[243] Duarte Agostinho (n 211) 7-9 (annex).
[244] Ibid 10-11 (annex).
[245] Human Rights Committee (n 6) para 22; CESCR, 'General Comment No. 24 on State obligations under the ICESCR in the context of business activities' (2017) UN Doc:E/C.12/GC/24; IACtHR, Advisory Opinion OC-23/17 (15 November 2017). Presumably, arguments presented at an eventual oral hearing might also rely on the CRC Committee's *Sacchi* decision.
[246] Duarte Agostinho (n 211) 9.

presumptively in breach of the ECHR.[247] The applicants contend that this would be consistent with the way that the ECtHR has reversed the burden of proof in past cases, including with respect to articles 2, 8, and 14.[248] Such a presumption could be rebutted if a state respondent can justify their actions by demonstrating "that their contributions to the risk of harm posed by climate change are not excessive".[249] The application further claims that in determining whether state mitigation measures are adequate, the ECtHR should concern itself with the question of what constitutes a state's 'fair share' of the global burden to mitigate climate change.[250] Objectively assessing the adequacy of state mitigation measures would be a tricky task for the Court, which is why the applicants suggest adopting the approach taken by the Climate Action Tracker: "an independent scientific analysis that tracks government climate action and measures it against the globally agreed [goal of the] Paris Agreement" to assess the fairness of states' mitigation measures.[251]

6.2.3-Procedural Law

6.2.3.1-*Exhaustion of domestic remedies*

The applicants in *Duarte Agostinho* face a familiar obstacle in that they brought a complaint to a subsidiary supranational human rights body without first exhausting domestic remedies. The applicants address this issue by claiming that they are dispensed from this obligation, as there are no adequate domestic remedies reasonably available to them.[252] Given the urgency of the matter, the applicants argue that they could not pursue an adequate remedy in each of the respondents' domestic courts, nor could any single domestic court impose an enforceable remedy for the violations of the applicants' rights cumulatively caused by the contributions to climate change of 33 different respondents.[253]

That said, the applicants clarified that they were not suggesting that climate change presents legal issues which can *only* be addressed by ECtHR, recognizing instead that domestic courts in

[247] Ibid 12-17 (annex).
[248] Ibid 13 (annex); Keller and Heri (n 241) 17.
[249] Ibid.
[250] Ibid 14 (annex).
[251] Ibid 15-16 (annex).
[252] Ibid 10.
[253] Ibid.

respondent states "can and must provide an adequate remedy in respect of shortcomings in climate change mitigation measures".[254] As the application explains:

> The likelihood of every one of the Respondents' domestic courts providing such a remedy in time to prevent global warming exceeding 1.5°C will be greatly enhanced if the ECtHR recognizes that the Respondents share presumptive responsibility for climate change. There is an exceptional need for the Court to provide such recognition as a matter of urgency and therefore to absolve the Applicants from the requirement to exhaust domestic remedies before each of the Respondents' domestic courts.[255]

The applicants also contend that they would be subject to an unreasonable or disproportionate burden, especially financially, if they were obliged to pursue domestic legal proceedings to their conclusion in each of the 33 respondent states.[256] Additionally, the application raised the difficulties faced by children in pursuing remedies for rights violations, due to their special and dependent status, their lack of legal knowledge, and just generally being "less well equipped to deal with the complexity of the justice system".[257]

6.2.3.2-*Victim status*

The rules for standing before the ECtHR constitute another procedural obstacle to accessing justice for the applicants. To qualify as a 'victim' under article 34 of the ECHR, individuals must have been personally and directly affected by an alleged violation.[258] Plaintiffs are thus theoretically precluded from bringing 'actio popularis' or 'in abstracto' proceedings to the ECtHR, meaning cases where plaintiffs take legal action in the name of the public interest or where an applicant alleges that a law, policy, or state action appears to violate ECHR rights, without any concrete evidence of real-life violations in practice.[259]

This rule can be particularly problematic in the context of the climate crisis. Requiring a risk of harm to have manifested itself concretely in order to make a claim essentially renders it more difficult to proactively address the problem and avert irreparable harm.[260] This is especially true when it comes to children's climate litigation, as the objective is to protect their futures from the

[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid 20 (annex).
[258] Ibid 3 (annex); *Zaharov v. Russia* (ECtHR GC, 4 December 2015) 47143/06, para 164.
[259] COE, 'Practical Guide on Admissibility Criteria' (2022), 11, 15.
[260] Keller and Heri (n 241) 4.

worst impacts of the climate crisis.

Over time the Court has relaxed its jurisprudence on this question, allowing for exceptions in certain circumstances, and finding that the effective protection of ECHR rights requires article 34 to not be applied in a "rigid, mechanical and inflexible way".[261] Furthermore, the ECtHR does allow for "potential victimhood" to meet the requirements of article 34 where it deems that there is "more than mere suspicion or conjecture", meaning "reasonable and convincing evidence of the likelihood that a violation affecting [an applicant] personally will occur".[262] In any event, the applicants in this case have tried getting around any uncertainty surrounding their victim status by raising factual allegations about actual harm that they have already suffered, on top of any future risk of harm.

6.2.4-State responses

The positions taken by the 33 respondent states on both the admissibility and merits of the application are not yet known, as the applicants have decided not to make them public. Nevertheless, observers have been able to make educated guesses about which arguments states are most likely to make in defending this case.

6.2.4.1-*Inadmissibility*

Firstly, the complaint's admissibility is most vulnerable to attack for the failure to exhaust domestic remedies. Respondent states will surely attempt to demonstrate how the applicants could have gone about impugning the legality of their climate policies through domestic legal systems and procedures. The *Sacchi* petition illustrated how such arguments could be persuasive for an adjudicative body like the CRC Committee or the ECtHR, which must be mindful of its subsidiary role in human rights protection.

Secondly, the respondents (other than Portugal) will no doubt attack the complaint's admissibility for being outside of their jurisdiction, rebutting the novel approach to extraterritoriality advocated for by the complainants. Likewise, the respondents might attempt to

[261] *Zakharov* (n 258) para 164.
[262] *Senator Lines GMBH v. Austria and others* (ECtHR, 10 March 2004) 56672/00, 11-12. See also the ECtHR's recent *Cordella v. Italy* decision (n 226) para 105, in which the Court demonstrated openness to adopting a less restrictive interpretation of victimhood for claims related to environmental harm.

argue that the case does not disclose a violation of rights, as required by article 34 of the ECHR, to the extent that the past harm which it invokes does not meet the threshold of severity to trigger articles 2 or 8 of the ECHR, and to the extent that any future harm invoked does not meet the required levels of imminence and certainty to qualify for victim status.

6.2.4.2-*Margin of appreciation*

Lastly, the respondents will likely make arguments based on the ECtHR's 'margin of appreciation' doctrine. The margin of appreciation generally comes into play after the Court has determined that there has been interference with certain ECHR rights, when a state respondent can try to justify such interference as being 'necessary in a democratic society' or by weighing it against competing public interests.[263] This doctrine is founded on the recognition that "through democratic processes, national governments are the best placed to determine how to balance conflicting interests, a task which can be particularly complex in environmental matters".[264]

In this regard, the Court has generally given states a 'wide' margin of appreciation in the sphere of environmental protection.[265] This was the case in *Hatton v. United Kingdom,* where the Court's Grand Chamber concluded that in exercising its supervisory role to determine whether a state has struck a 'fair balance between individual rights and the public interest', it was not its place to second-guess policy choices made in the "difficult social and technical sphere" of environmental law.[266] As a counterargument, the applicants could advance that no interference with their rights as a result of inadequate mitigation efforts against climate change could possibly be deemed 'necessary in a democratic society'.[267] The balancing exercise would be one-sided in the case of climate change, as both individual rights and the public interest would best be served

[263] Eleni Frantzou, 'The margin of appreciation doctrine in European human rights law' (2014, UCL) <www.ucl.ac.uk/public-policy/sites/public_policy/files/migrated-files/European_human_rights_law.pdf>accessed 23 June 2022.
[264] Lewis (n 31) 197.
[265] Müllerová (n 203).
[266] ECtHR GC, 8 July 2003, 36022/97, para 100-101, 128-130; Ole Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (EJIL:Talk!, 22 September 2020) <www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/>accessed 29 June 2022
[267] Paul Clark, Gerry Liston and Ioannis Kalpouzos, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case'(EJIL:Talk!, 6 October 2020) <www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/>accessed 29 June 2022.

by ensuring adequate climate action.[268]

A wider margin of appreciation could be particularly justifiable in this case for two reasons: the number of state respondents, and the lack of prior domestic proceedings. Firstly, the ECtHR might deem it beyond the appropriate exercise of its subsidiary jurisdiction to adjudicate the legality of climate mitigation measures of 33 states all at once, given the complex balancing exercise that needs to be undertaken in each case.[269] This issue is compounded by the fact that in bypassing domestic legal proceedings, the applicants have deprived the ECtHR of a full evidentiary record and the judicial reasoning of domestic courts.[270] While the Court might have felt comfortable exercising its supervisory role in determining whether national courts had satisfactorily balanced the competing interests at play in coming to a decision, it might find it to be an infringement of the subsidiarity principle to make the same judgment about each state's policies without the benefit of a domestic court's decision on the issue. The applicants could counter that a wide margin of appreciation should only be granted for the choice of means by which states will meet their obligations to mitigate climate change – not the underlying obligation itself.[271] Ultimately, much of the Court's potential analysis of this question will necessarily hinge on the specific arguments advanced by the parties.

6.2.5-Case status

The case has proceeded relatively quickly since being filed in September 2020, after the Court agreed to give it priority and accelerate its treatment using the 'fast-track' procedure, recognizing the "importance and urgency of the issues raised" despite the objections of many state respondents.[272] Following the filing of the initial complaint, the Court communicated the case to the respondents and formally requested their response, including on two new issues that it was raising on its own initiative: the applicability of the prohibition of torture or inhuman or degrading treatment or punishment (ECHR, article 3) and the right to property (ECHR Protocol

[268] Müllerová (n 203) 89.
[269] Lewis (n 31) 197.
[270] Keller and Heri (n 241) 7.
[271] Clark (n 267); *Fadeyeva* (n 229) para 96.
[272] GLAN (n 206).

1, article 1).[273] This was noteworthy, as these kinds of argument have not previously played much of a role in other instances of human rights-based climate litigation.

The Portuguese youth have received backing from a number of intervening parties who filed amicus curiae briefs in support of their position, including two UN Special rapporteurs, the COE's Commissioner for Human Rights, several academics, and NGOs like Save the Children, Amnesty International, and Greenpeace.[274] Given the implication of all EU member states and the allegations founded in part on the purported insufficiency of EU climate policies, the European Commission was able to submit written observations defending the legality and adequacy of EU climate policy.[275]

The state parties transmitted their defences to the applicants on both the admissibility and merits in August 2021.[276] In turn, the applicants submitted their replies in February 2022. The next steps will involve oral hearings before the ECtHR's Grand Chamber, which deals with cases presenting 'a serious question' affecting the interpretation of the ECHR.[277]

6.3-ANALYSIS

Even if other cases dealing with the climate crisis may well be decided first, the ECtHR's decision in *Duarte Agostinho* will be hugely impactful regardless of how the Court rules. The case represents an opportunity to change the course of Europe's climate trajectory, but it could just as easily do the opposite, shutting the door to human rights-based climate litigation at the ECtHR level.

6.3.1-Strengths

Part of the strength of the *Duarte Agostinho* case is its sheer ambition. The applicants have

[273] Corina Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' (EJIL:Talk!, 22 December 2020) <www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> accessed 25 June 2022.
[274] Interventions can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 10 June 2022.
[275] European Commission, 'Written Observations' (19 May 2021) <https://jusmundi.com/en/document/pdf/other/en-duarte-agostinho-others-v-portugal-and-others-third-party-intervention-of-the-european-commission-wednesday-19th-may-2021> accessed 11 June 2022.
[276] GLAN (n 206).
[277] Maria Antonia Tigre, 'Advancements in Climate Rights in Courts Around the World' (State of the Planet, 6 July 2022) <https://news.climate.columbia.edu/2022/07/06/advancements-in-climate-rights-in-courts-around-the-world/> accessed 9 July 2022.

presented a case that could fundamentally alter the human rights and climate landscape in Europe and have ripple effects around the world. The applicants argue that their situation, and the climate crisis more generally, demands that courts evolve judicial doctrines to respond to the greatest threat to human rights of our time. Risk-taking and judicial creativity will be crucial in adapting existing legal and human rights concepts to the specific difficulties posed by climate change. The ECtHR is in some respects an ideal forum for pioneering legal argumentation, as the Court's interpretation of the ECHR has always been heavily influenced by the 'living instrument' doctrine. The ECtHR has pushed the judicial interpretation of rights forward over the years in ways that could have hardly been imagined by the drafters of the ECHR seven decades ago. In doing so, the Court has endeavoured to make the enjoyment and protection of rights effective and practical for all.

As many interveners advance in their amicus briefs, the Court will have to be guided in its judicial interpretation by the 'object and purpose' which underlie the ECHR – namely as an "instrument for the protection of individual human beings [requiring] that its provisions be interpreted and applied so as to make its safeguards practical and effective".[278] Consequently, if the Court holds that the respondents could or should not be held accountable under the ECHR for violations of human rights related to climate change, this would result in a "vacuum of protection within the legal space of the Convention" – a situation that the Court has previously found untenable in other cases.[279]

At the end of the day, the applicants have persuasively demonstrated that granting effective remedies for rights violations stemming from climate change is a logical consequence of the living instrument doctrine and the effective protection of rights in the ECHR system. They have also established that their legal claims are plausible as a natural progression of the Court's jurisprudence, particularly with respect to the case law dealing with positive obligations and environmental harm under articles 2 and 8. Both the applicants and interveners have drawn extensively on a range of legal sources and emerging human rights jurisprudence at the international, regional, and domestic levels, to demonstrate how the path they are asking the ECtHR to take is by no means unprecedented.

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[278] *Soering v. UK* [1989] ECHR 14, para 87.
[279] *Al Skeini and others v. UK* (ECtHR GC, 7 July 2011) 55721/07, para 142.

In addition, and similarly to the CRC Committee's decision to draft a new General Comment on climate change following *Sacchi*, this application could also act as a catalyst for the ECtHR to eventually adopt an advisory opinion clarifying state obligations related to climate change under the ECHR.[280] Protocol 16 to the ECHR empowers the Court to issue advisory opinions on questions concerning the application and interpretation of the ECHR, where such a request has been made by the highest court or tribunal of a state party to the Protocol.[281] An advisory opinion could allow the Court to expand on material legal and human rights issues related to climate change, without being hampered by admissibility requirements or the specific factual details of a particular case. The repercussions of an advisory opinion, even though it would be non-binding, would certainly be significant and hold persuasive value for any domestic court of a state party called upon to interpret the ECHR in the context of climate litigation.

6.3.2-Shortcomings

The *Duarte Agostinho* application has been the subject of much commentary since being filed. While some see the innovation that underlies the complaint as a strength, others consider that the case goes too far, pushing the ECHR and the ECtHR beyond their reasonable limits.

On the other hand, the case can also be critiqued for not going far enough. Specifically, the portion of the complaint dealing with article 14 and allegations of discrimination is relatively under-developed. The applicants have left some ambiguity about the specific qualification of the group that they allege is being discriminated against. The discrimination claim is made on the basis of 'age', but it does not specify if it only concerns children/minors, or if it concerns a more amorphous category of 'young people' or 'younger generations' with an unknown cut-off point. This lack of precision and specificity could lead the Court to forego examining the article 14

[280] Pedersen (n 266); See also, Vanuatu's campaign for an advisory opinion from the International Court of Justice. Vanuatu presented a draft resolution to the UN General Assembly in November 2022, formally requesting that the ICJ assess the international legal obligations imposed on states with respect to the consequences of climate change: Kate Lyons, 'From Vanuatu law school to the Hague: the fight to recognise climate harm in international law' (The Guardian, 19 June 2022) <theguardian.com/world/2022/jun/20/from-vanuatu-law-school-to-the-hague-the-fight-to-recognise-climate-harm-in-international-law> accessed 27 June 2022 ; Valerie Volcovici, 'Island nation Vanuatu sends climate resolution to UN for court opinion' (Reuters, 30 November 2022) <www.reuters.com/business/cop/island-nation-vanuatu-sends-climate-resolution-un-court-opinion-2022-11-30/> accessed 15 December 2022.

[281] Since entering into force in 2018, 16 states have ratified the Protocol.

dimensions of the claim if it deems it unnecessary to dispose of the case.[282] Additionally, the applicants cite only two ECtHR judgments and seemingly little effort is made to demonstrate why or how the Court's anti-discrimination jurisprudence should be applied to this new and complex set of facts. Submissions from intervenors address some of these gaps, advancing arguments on the positive state obligation to guarantee substantive equality, the notion of intersectional discrimination, and the lowered threshold for the burden of proof in cases of indirect discrimination.[283]

As well, for a case that is rooted in the specific claims of children, the application does not go into significant detail about how the Court should deal with their best interests or their vulnerability. Nor is any mention made by the applicants about child participation and the right to be heard under article 12 of the CRC. Child participation could be particularly relevant in the ECHR context in light of the various procedural duties that have been emphasized by the Court in recent years.[284] Fortunately, this shortcoming is in part compensated by the submissions made by interveners, most notably the brief from Save the Children.[285]

6.3.3-Further reflections

The *Duarte Agostinho* application and the manner in which the ECtHR will choose to deal with it present a number of pressing questions about the role of the Court in guaranteeing human rights in Europe.

First of all, under the subsidiarity principle, to what extent should it be up to a regional court to pronounce itself on complex matters so deeply rooted in the socio-economic intricacies of domestic climate policy, particularly when balancing of rights and interests must occur?

Moreover, climate change challenges our understanding of human rights obligations and the traditional rules of international law. What sets climate change apart from environmental phenomena, like pollution, which are already dealt with by the Court, are its gravity, scale, and

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[282] *Dudgeon v. U.K.* [1981] ECHR 5, para 70. See also *Airey* (n 205), in which the ECtHR concluded that there "should be a clear inequality of treatment" in a "fundamental aspect of the case" in order for a separate determination of discrimination to be considered under article 14.
[283] See (n 274), interventions coordinated by ESCR-Net and Climate Action Network Europe.
[284] Lewis (n 31) 199.
[285] See (n 274).

worldwide scope. The sources of GHG emissions are so numerous and widespread across society that they require solutions that touch upon virtually every aspect of human activity. The fact that climate change truly affects *everyone* does not fit naturally with the traditional individual logic of human rights. Simply put, the ECHR does not easily apply to a global, collective problem like the climate crisis.

Should the Court break with its past precedent in order to adapt itself to this phenomenon? Or is this simply a signal to litigants that human rights-based climate litigation before the ECtHR is not the answer and that they should bring cases elsewhere?

Depending on the path taken by the Court, the issue of functional legitimacy could arise: if the Court cannot address the greatest threat to human rights of our time, does this call into question its *raison d'être*? This also relates to the Court's credibility, as "the Court's role as 'Europe's conscience' would be imperilled were it to abdicate its supervisory function in cases concerning climate change, especially given the problem's scale and potential to impact human rights".[286]

In answering these questions the Court could surely be influenced – even if only subconsciously – by broader debates around judicial activism and the democratic legitimacy of court interventions. Members of the ECtHR are undoubtedly aware of the magnitude of the threat posed by climate change, and the challenge they face in addressing the issue, as the President of the ECtHR Judge Robert Spanó has made clear:

> We are present in a transformative moment in human history, a moment of planetary impact and importance. No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the [ECtHR] will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory.[287]

Consequently, it will be interesting to see how the Court resolves these dilemmas. As the applicants and intervenors argue, the Court has a role in guaranteeing practical and effective rights and ensuring reasonable prospects of redress for human rights violations. While the Court may not be best placed to dictate the details of climate policy to national authorities, that is not

[286] Keller and Heri (n 241) 18.
[287] Robert Spanó, 'Should the European Court of Human Rights become Europe's environmental and climate change court' (Conference on Human Rights for the Planet, Strasbourg, 5 October 2020).

what applicants are asking it to do in this case. The remedy being sought in fact appears crafted in a way to respect the principle of subsidiarity, calling on the Court to exercise its supervisory function to declare that the respondents have violated the applicants' ECHR rights. It does not seek an order requiring a specific emissions reduction, nor does it ask the Court to exceed its jurisdiction by striking down domestic law. The application's stated goal is precisely to obtain a judgment from the ECtHR that will then incite national courts to come to their own conclusions about the measures that need to be taken domestically to remedy the impugned rights violations.[288] Seen in this light, any perceived threats to subsidiarity posed by this case would appear overstated.

6.4-CONCLUSION

Ultimately, the *Duarte Agostinho* application has the potential to fundamentally shake up European human rights law and the continent's response to climate change. Much uncertainty persists at this stage and it remains to be seen how the Court will respond to the challenging legal questions raised by this case, including with respect to victim status, extraterritorial jurisdiction, attribution of responsibility, and the role played by regional human rights courts in the context of climate change.

[288] Hartmann and Willers (n 199) 101-102.

7-Environnement Jeunesse v. Canada; La Rose v. Canada; Mathur et al. v. Ontario

7.1-CONTEXT

In many ways, Canada represents an ideal jurisdiction for climate litigation, and for human rights-based climate litigation more specifically. As a major oil-producing country, Canada ranks among the top 10 GHG emitters in absolute terms (roughly 2% of global emissions) and in the top five in terms of emissions per capita.[289] Canada has a responsibility as a wealthy developed nation to do its part in mitigating emissions and addressing the climate crisis. And yet, Canada had a negative reputation on the international climate policy stage for years, earning the particularly dishonourable distinction of being the first party to withdraw from the *Kyoto Protocol* on GHG reductions in 2011.[290] When the country changed governments in 2015, so too did its rhetoric on climate change – however, the new rhetoric has not been met with meaningful action as Canada has continued to fail to meet its international climate commitments.[291] Canada's lack of ambition in this regard is all the more regrettable given that the country is particularly vulnerable to the impacts of climate change. Canada is warming at twice the global average and climate change will have particularly harmful consequences for its Arctic regions, for Indigenous people, and for the country's many coastal communities.[292]

In the face of these challenges, Canada has a highly developed legal culture which places significant importance on the constitutionally entrenched protections afforded by the Canadian Charter of Rights and Freedoms (Canadian Charter). The country has many active NGOs and public interest organizations working on environmental and human rights issues and a tradition of strategic litigation. Unsurprisingly then, three high-profile climate litigation cases have been initiated in Canada since 2018, focusing on the rights of children in the climate crisis and basing legal arguments on sections 7 (right to life, liberty, and security of the person) and 15 (right to

[289] Nathalie Chalifour, Jessica Earle, and Laura Macintyre, 'Coming of Age in a Warming World: The *Charter's* Section 15 Equality Guarantee and Youth-Led Climate Litigation' (2021) 17 Journal of Law & Equality 1, 16.
[290] Lisa Benjamin and Sara Seck, 'Mapping Human Rights-based Climate Litigation in Canada' (2022) Journal of Human Rights and the Environment [forthcoming] 4.
[291] Nathalie Chalifour and Jessica Earle, 'Feeling the Heat: Climate Litigation Under the Charter's Right to Life, Liberty and Security of the Person' (2017) 42 Vermont Law Review 689, 691.
[292] Chalifour, Earle, and Macintyre (n 289) 8-9; Benjamin and Seck (n 290) 3.

equality) of the Canadian Charter.[293]

In the interest of brevity, this case study will focus primarily on the first piece of litigation, and be more concise for the other two cases. Given that the cases are still in preliminary stages, the emphasis will be on procedural questions and the legal framing of the substantive claims.

7.2-ENVIRONNEMENT JEUNESSE V. CANADA

Environnement Jeunesse (EnJeu), an environmental non-profit organization focusing on youth based in Quebec, brought the first Canadian children's rights climate litigation case in November 2018.[294] The case was filed as a class-action lawsuit against the Canadian government in the name of all youth in the province of Quebec under the age of 35.[295]

7.2.1-Factual allegations and legal arguments

In its application, EnJeu accused the Canadian government of violating the fundamental rights of Québécois youth, by failing to adopt GHG reduction targets that are sufficient to avoid dangerous climate change.[296] EnJeu referenced the many significant impacts that are already occurring due to climate change, threatening the health, food security, housing, and livelihoods of young people.[297] By not implementing the necessary measures to curb climate change, EnJeu alleged that Canada was violating the right to life and the right to security of the person under section 7 of the Canadian Charter.[298] The plaintiffs also alleged a violation of the right to equality under section 15 of the Canadian Charter, claiming that climate-related harm will disproportionately impact Quebec's youth because they will have to assume higher economic and social costs than their elders.[299]

In addition, EnJeu argued that the government's inaction was violating their rights to life (section 1) and equality (section 10), and putting at risk their "right to live in a healthful environment in

[293] Any deprivation of section 7 rights must be 'in accordance with the principles of fundamental justice'. Section 15 guarantees the equal protection and equal benefit of the law – it is a freestanding right to equality that does not need to be invoked in conjunction with other rights.
[294] For case documents, see: EnJeu, 'Youth vs Canada' <https://enjeu.qc.ca/en/justice/> accessed 10 June 2022.
[295] EnJeu, 'Motion for Authorization to Institute a Class Action and Obtain the Status of Representative' (26 November 2018) 500-06-000955-183.
[296] Ibid 2.
[297] Ibid 5-7.
[298] Ibid 17.
[299] Ibid 18.

which biodiversity is preserved" (section 46.1), under the Quebec Charter of Rights and Freedoms (Quebec Charter), the provincial equivalent of the Canadian Charter.[300] Furthermore, EnJeu argued that Canada's failure to meet commitments under various international environmental agreements over the past 25 years constitutes gross and intentional negligence.[301]

In terms of remedies, EnJeu sought declarations that the Canadian government violated the rights of the class members and a court order to cease interfering with those rights.[302] EnJeu also requested that the government implement a GHG reduction target and the measures necessary to respect the group members' fundamental rights.[303] Additionally, in an unprecedented move, the organization asked for 100 $ (CAD) in punitive damages for each member of the class (~3.5 million Quebecers under 35), up to 350 million $, to be invested in the implementation of climate change response measures.[304] EnJeu argued that punitive damages are justified in light of the government's illicit and intentional rights violations, as the government acted with full knowledge of the immediate, natural and probable consequences that its negligent conduct would have on the members of the group.[305]

7.2.2-Proceedings before the Quebec Superior Court

Class actions in Quebec must first receive preliminary court authorization before proceeding on the substantive merits of the application. In July 2019, the Quebec Superior Court rejected EnJeu's request for class action authorization.[306] The crux of the Court's decision centred on the choice of 35 as the maximum cut-off age for class members, as the judge considered that this choice was not adequately or rationally justified. While the judge recognized that Quebec youth would suffer more violations of their fundamental rights than older generations due to climate change, the judge felt that the choice of 35 years old was arbitrary and inappropriate.[307] The judge also took issue with the inclusion of minors in the class, concluding that children are not

[300] Ibid 17-18.
[301] Ibid 11-16.
[302] Ibid 20-21.
[303] Ibid 21.
[304] Ibid 21.
[305] Ibid 19.
[306] *Environnement Jeunesse v. Procureur Général du Canada* (Superior Court of Quebec, 11 July 2019), 2019 QCCS 2885.
[307] Ibid para 116-123.

fully capable of exercising their civil rights and that EnJeu could not claim to be lawfully acting on their behalf.[308]

The Court did however reject the government's argument that the issues raised in the lawsuit were non-justiciable because they concerned the exercise of purely political power.[309] Rather, the Court held that it was entitled to exercise its powers of judicial review in cases where the executive has allegedly violated Charter rights, as all governmental power must be exercised in conformity with the Constitution.[310] Nevertheless, the judge questioned whether much of the debate was based on theoretical assumptions about future rights violations, rather than presently ascertainable violations.[311] Finally, the judge also cast doubt on the appropriateness of the class action as the chosen procedural vehicle in this case.[312]

7.2.3-Appeal to the Quebec Court of Appeal

EnJeu appealed the Court's ruling, contending that its use of age as a criterion in defining class composition, in a case where it asserts that climate change disproportionately affects young people, is clearly rational.[313] The choice of 35 as a cut-off age corresponded with a classification used by Statistics Canada to refer to 'youth'.[314] EnJeu also argued that it was not obliged to advance the interests of *all* persons whose rights are affected by climate change and that choosing to concentrate on youth did not make the class composition arbitrary.[315] As EnJeu's mission involves amplifying the voices of youth with respect to environmental issues, it was justified in wanting to focus on this group and the specific injustice that they face due to governmental climate inaction.[316] As for the exclusion of minors, EnJeu maintained that there was no reason why minors should be unable to join the class, as the judge did not base his decision on any legal authority.[317] The fact that this class action is rooted in the disproportionate

[308] Ibid para 125-134.
[309] Ibid para 40-72.
[310] Ibid para 59.
[311] Ibid para 122.
[312] Ibid para 141-143.
[313] EnJeu, 'Notice of Appeal' (16 August 2019) 500-09-028523-199, 2-5.
[314] Ibid 3.
[315] Ibid 3-4.
[316] Ibid 4.
[317] Jasminka Kalajdzic, 'Climate Change Class Actions in Canada' (2021) 100 Supreme Court Law Review 31, 49-50.

impacts of climate change on children would make it especially unjustifiable to exclude minors.[318]

Amnesty International Canada (Amnesty) joined the appeal as an intervenor, bringing an international human rights law perspective to the debate.[319] Amnesty's arguments focused on access to effective remedies in relation to the climate crisis and on the rights of children in this context. Although international law sources are not directly enforceable in Canadian courts (unless they have been incorporated into domestic law), they may be used as a persuasive tool for interpreting domestic law, particularly in the application of the Canadian Charter.[320] Amnesty therefore argued that the applicable domestic law should be interpreted in light of Canada's international obligations related to children's rights and access to justice. Amnesty focused on the importance of class actions as a means of reducing the logistical and financial barriers that often prevent children from accessing justice.[321] Moreover, in response to the Court questioning whether EnJeu was an appropriate organization to represent children in this action, Amnesty emphasized article 12 of the CRC, which allows children the right to be heard in all matters that affect them "either directly, or through a representative or an appropriate body".[322] As Amnesty argued, precluding an organization like EnJeu from representing children would make it burdensome for a minor to bring an individual claim before the courts and would deprive them of a valuable means of accessing effective remedies.[323] Finally, Amnesty drew on both domestic and international sources to demonstrate that other lawsuits alleging human rights violations related to the climate crisis have been found to be justiciable.[324]

The Quebec Court of Appeal rendered its judgment in December 2021, dismissing EnJeu's appeal and allowing the Canadian government's cross-appeal on the issue of justiciability.[325] In a brief decision, the Court ruled that EnJeu was essentially asking the judicial branch to violate the

[318] Ibid EnJeu, 6.
[319] Disclaimer: the author worked for Amnesty International Canada during this period and was involved in strategizing the legal intervention in this case.
[320] Amnesty International Canada, 'Factum of the Intervener' (6 March 2020) 500-09-028523-199, 2.
[321] Ibid 7.
[322] Ibid 9.
[323] Ibid; Kalajdzic (n 317) 49.
[324] Ibid Amnesty, 12-15.
[325] *Environnement Jeunesse v. Procureur Général du Canada* (Quebec Court of Appeal, 13 December 2021), 2021 QCCA 1871.

principle of the separation of powers.[326] In the Court's opinion, reviewing governmental inaction and whether it was appropriate for the legislature to act were beyond the scope of the judiciary's power.[327] The judges considered that the Superior Court had erred in concluding that the action was justiciable, as "it is up to the democratically elected government to respond, not to the courts to dictate to the State the choices it should make".[328] In addition, the Court qualified the class cut-off age as arbitrary.[329] The Court went even further by rejecting the premise that the right to equality could be relevant in the context of climate change, as it viewed the issue as one that affects the entire Canadian population.[330]

7.2.4-Appeal to the Supreme Court of Canada

Despite this setback, EnJeu immediately went about applying for leave to appeal the decision to the Supreme Court of Canada. Much of the appeal focuses on justiciability, arguing that courts have a legitimate role to play in reviewing governmental conduct and deciding constitutional questions.[331] In July 2022, the Supreme Court denied EnJeu's request for leave to appeal, declining to provide reasons for this decisions, as is customary.[332] As a result, the Quebec Court of Appeal's judgment, rejecting EnJeu's application for a class action, was maintained. These decisions hinge primarily on procedural issues and do not deal with the substantive allegations made by EnJeu about whether the Canadian government's climate inaction is violating the fundamental rights of youth in Quebec.

7.2.5-Analysis

7.2.5.1-*Class actions in children's rights climate litigation*

The *EnJeu* case is unique in certain regards, but also representative of many of the common challenges involved in children's rights climate litigation. For starters, the case was the first of its kind to choose the procedural vehicle of a class-action lawsuit to challenge inadequate

[326] Ibid para 24.
[327] Ibid para 24-25.
[328] Ibid para 29-36.
[329] Ibid para 43.
[330] Ibid.
[331] EnJeu (n 294).
[332] Jean-Thomas Léveillé, 'La Cour suprême refuse d'entendre les jeunes' (La Presse, 28 July 2022) <https://www.lapresse.ca/actualites/environnement/2022-07-28/action-climatique-du-canada/la-cour-supreme-refuse-d-entendre-les-jeunes.php> accessed 15 December 2022.

government climate policy. For children especially, but also for other marginalized groups more generally, class actions can be instrumental in overcoming financial and logistical barriers associated with traditional litigation.[333] Canadian class action rules also minimize the risk of adverse cost orders, when plaintiffs have to pay the legal costs incurred by defendants if they lose, which can often act as a deterrent in public interest environmental litigation.[334] There is also power and security that comes from joining people together in a common cause, rather than having to take on the burdens of climate litigation alone.

7.2.5.2-*Innovative monetary remedies*

EnJeu's claim was furthermore innovative in terms of the monetary remedies that it sought from the Court. Instead of seeking compensatory damages for existing climate-related harms, the claim focused on the availability of punitive damages in cases of intentional rights violations. EnJeu recognized that distributing 100 $ to every class member would be onerous and impractical and would not have the same concrete benefit as pooling the money together to fund governmental climate action. This case signals to other climate litigants that they should think outside the box when coming up with requested remedies (although the viability of such remedies will depend on the openness of courts in any given jurisdiction).[335]

7.2.5.3-*Justiciability*

One of the most common hurdles in climate litigation is the question of 'justiciability': is it within the scope of appropriate judicial intervention to assess the legitimacy of governmental policy choices?[336] Justiciability is closely connected to the separation of powers and to the legislative process, and is often relied on by courts to avoid dealing with issues that may be considered 'novel, complex or politically controversial'.[337] In *EnJeu*, much of the Court of Appeal's unease with the claim came from the fact that the applicants were impugning the government's *inaction*. For the Court, this meant that it would have to conduct a detailed

[333] In Canadian class actions, law firms will often proceed on a contingency basis, meaning that plaintiffs will not have to pay upfront legal fees.
[334] Benjamin and Seck (n 290) 25; Kalajdzic (n 317) 55.
[335] Liefaard (n 85) 202.
[336] Camille Cameron and Riley Weyman, 'Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices' (2022) 34 Journal of Environmental Law 195, 199-200.
[337] Kalajdzic (n 317) 44.

analysis of all the complex socioeconomic and political factors which might explain this inaction and essentially order the government to legislate on the matter. This was a role that the Court was uncomfortable playing and it rejected the case primarily on this basis. This issue could well have been remedied if EnJeu had focused its claim on specific governmental actions and legislation, rather than impugning the inadequacy of Canada's climate action as a whole.

As justiciability continues to be raised by governments to reject court intervention in climate litigation, this begs the question: is the judiciary not an equal branch of government whose role is precisely to ensure accountability for the government's conduct, particularly in cases of fundamental rights violations? Climate litigants may find it useful to take inspiration from the *Urgenda* case, in which the Dutch courts dealt with justiciability by declaring that rights violations had occurred and that a certain GHG emissions reduction target was required to comply with the state's human rights obligations, without going so far as to prescribe the means by which the Dutch government would have to meet this target.[338]

7.2.5.4-*Issues on the merits*

Even if EnJeu's application for class action authorization had been granted, cases of this nature would still face significant obstacles on the merits. The right to a healthy environment and its constituent parts are not explicitly mentioned in the Canadian Charter.[339] While some scholars argue that the right to a healthy environment is implicitly guaranteed in the protection of the right to life under section 7, no Canadian court has yet adopted this interpretation.[340] Judicial interpretation of the Canadian Charter has historically been unreceptive to the idea that its provisions protect social and economic rights.[341] Likewise, Canadian courts have long been averse to the notion that Section 7 can impose positive duties on the government, leaving open this possibility only in the most exceptional circumstances.[342] Moreover, while the right to a healthy environment is protected in the Quebec Charter, that document does not hold constitutional status and the provision limits the right "to the extent and according to the standards provided by law".

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[338] Chalifour and Earle (n 291) 767.
[339] Ibid 693.
[340] Cameron and Weyman (n 336) 203-204.
[341] Chalifour and Earle (n 291), 742.
[342] Ibid 741.

With respect to discrimination, the Court of Appeal's decision signalled that EnJeu would have faced an uphill battle in convincing a court that youth face rights violations in this regard. Firstly, establishing an appropriate cut-off age for claimants alleging discrimination will prove challenging, as choosing any age will necessarily be seen to exclude individuals who could have been included. It is also worth noting the peculiar remark made by the Court in its decision, first stating that it would be hard to base an equality rights violation on a phenomenon like climate change which affects the entire population, before adding matter-of-factly that "if youth will undeniably feel the impacts more it is only because they will be subjected to them, in principle, for longer".[343] This passage is revealing in that it demonstrates that the Court saw no issue, from an equality rights standpoint, in the disproportionate impacts that youth will face in the future as a result of climate change. It indicates that the logic that grounds discrimination claims in many youth-based climate litigation cases – the principle of intergenerational equity essentially – would not necessarily be accepted by courts. Conversely, recent case law from the Supreme Court has left the interpretation of equality rights under section 15 uncertain, particularly as it relates to adverse effects-based discrimination.[344] The manner in which the Supreme Court resolves this ambiguity in the future will prove crucial for any other cases advancing an equality rights argument based on the disproportionate impacts of climate change on youth. Regrettably, the Supreme Court's decision not to examine the *EnJeu* appeal will leave many of these pressing legal questions unanswered for the time being.

7.2.5.5-*Failure to centre children's narratives*

While EnJeu's efforts in advancing climate justice should be applauded, this claim arguably lacked some of the meaningful impact that comes from having child litigants at the centre of a case. The academic literature has concluded "that the public finds it hard to identify with climate change victims, because those victims can appear distant in time and space" and that overcoming this obstacle may require employing "techniques that increase individuals' affinity and

[343] *Environnement Jeunesse* (n 325), para 43.

[344] Notably, the Court's decision in *R v. Sharma* (2022 SCC 39) in November 2022 appears to have disrupted a long line of jurisprudence that affirmed an expansive interpretation of equality rights under section 15. Paragraphs 205-206 of the dissenting reasons in *Sharma* highlight the manner in which the majority's decision has essential revised the section 15 analytical framework. See Chalifour, Earle, and Macintyre (n 289) 37-93 for an overview of the previous section 15 jurisprudence and its promise for youth-led climate litigation.

identification with future generations".[345] The role of representative organizations like EnJeu is certainly important in assisting children in expressing their views, but nothing beats specific first-hand narratives from children to drive the point home that the climate crisis is a children's rights crisis. The active participation of children in this case would have made it even harder for observers to dismiss victims of climate change as some kinds of abstract entities. In addition, ensuring direct involvement of youth in the litigation process would have been a powerful way to empower affected children.

7.3-LA ROSE ET AL. V. CANADA

In October 2019, a group of 15 young Canadians aged 10 to 19 launched a lawsuit in Federal Court against the Canadian government ("*La Rose* case").[346] The youth were assisted in their action by three prominent environmental NGOs: the David Suzuki Foundation, the Pacific Centre for Environmental Law and Litigation, and Our Children's Trust (OCT).

7.3.1-Factual allegations and legal arguments

The youth claim that the Canadian government has taken grossly insufficient measures in the face of climate change, instead fuelling the crisis by causing and contributing to levels of GHG emissions that are incompatible with a stable climate system, adopting (and failing to meet) GHG emissions targets that are inconsistent with what is necessary to avoid dangerous climate change, and by actively supporting fossil fuel industries.[347] The plaintiffs allege that through this conduct the Canadian government is interfering with their physical and psychological integrity and their ability to make fundamental life choices, thus violating their rights under sections 7 and 15 of the Canadian Charter.[348] The lawsuit relies on similar argumentation to *EnJeu* based on the right to life and the right to equality of young people.[349] In particular, the *La Rose* claim poignantly distils the essence of the discrimination argument as follows:

> This inequality perpetuates prejudice and exacerbates the pre-existing disadvantage

[345] Grace Nosek, 'Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories' (2018) 42 William & Mary Environmental Law and Policy Review 733, 790.
[346] Given that the plaintiffs reside across the country, they could only bring a case together against the federal government by suing in Federal Court. For case documents, see: Our Children's Trust, 'Youth v. Gov: Canada' <www.ourchildrenstrust.org/canada> accessed 9 June 2022.
[347] Cecilia La Rose and others, 'Statement of Claim to the Defendants' (25 October 2019) T-1750-19, para 5.
[348] Ibid para 6. 78-79.
[349] Ibid para 223-230, 231-235.

> suffered by the plaintiffs and all children and youth particularly in circumstances where the plaintiffs and other children and youth are unable to vote and have little political influence. The Impugned Conduct benefits the short-term economic interests of older persons and the fossil fuel industry at the expense of the plaintiffs and all children and youth and this reinforces the view that their lives and well-being are not as valuable as those of persons who are already adults.[350]

7.3.2-Dismissal for non-justiciability

The *La Rose* case did not get far before it was dismissed at a preliminary stage, largely because the plaintiffs' claims were deemed non-justiciable. The Federal Court ruled that the lawsuit was challenging conduct that was overly broad and diffuse, essentially impugning the entirety of the government's actions that could be associated with GHG emissions.[351] The Court considered that the applicants should have circumscribed their claim by focusing on a specific law, policy, or state action, rather than on an "unquantifiable number of actions and inactions".[352] The Court also took issue with the redressability of the claim (ie whether it was empowered to grant the remedies sought by the plaintiffs), finding it particularly problematic that it was being asked to order the government to implement "an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a stable climate system".[353] The government argued that this kind of relief was "vague and unmanageable" and would "require the court to supervise and direct the government's development, implementation and compliance with a climate change plan for decades".[354] The Court agreed, ruling that such a remedy would represent an "incursion into the policy-making functions of the executive and legislative branches by requiring specific standards that the climate recovery plan must meet".[355] The Court's reasoning on justiciability in *La Rose* later informed the Quebec Court of Appeal's decision on the same issue in *EnJeu,*[356] with both courts finding that the plaintiffs were asking them to exceed their proper role under the separation of powers. This approach to justiciability has been criticized in the academic literature:

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[350] Ibid para 233.
[351] *La Rose v. Canada* (Federal Court, 27 October 2020), 2020 FC 1008, para 41-46.
[352] Ibid para 40.
[353] Ibid para 41, 53-55.
[354] Canada, 'Statement of Defence' (7 February 2020), para 106.
[355] *La Rose* (n 351) para 55.
[356] *Environnement Jeunesse* (n 325) para 37

> To shield the Canadian government's conduct from Charter scrutiny—because it requires courts to consider the impact of a constellation of decisions or an omission—would be to allow the government to infringe on rights through a legislative vacuum. Put another way, form rather than substance would dictate whether someone's Charter rights were protected. Surely this is not what was intended.[357]

In November 2020, the plaintiffs in *La Rose* appealed the Federal Court's decision to dismiss their case.[358] Scheduling the hearing at the Federal Court of Appeal was delayed pending the Supreme Court's decision on EnJeu's application for leave to appeal. The Court's decision in this regard, which ultimately upheld the Quebec Court of Appeal's justiciability findings, may well end up having an impact on the *La Rose* case.[359] As of December 2022, no hearing date has yet been set for the appeal.

7.3.3-Analysis

7.3.3.1-*Focus on children's experiences*

The *La Rose* case set itself apart from *EnJeu* by presenting detailed factual allegations about the impacts of climate change on each of the 15 plaintiffs, emphasizing the particular consequences felt by different categories of youth across Canada.[360] For example, the claim addresses the situation of 15-year-old Cecilia La Rose from Ontario, who suffers from allergy-induced asthma triggered by airborne pollutants that are worsened by extreme temperature fluctuations, and who has experienced severe flooding events that damaged her family home, all of which has led to a diagnosis of climate-related anxiety.[361] The claim also deals with the cases of 12-year-old Montay Beaubien-Day and 16-year-old Haana Edenshaw, two Indigenous children from British Columbia who have experienced serious impacts to their traditional livelihoods and cultural practices as a result of climate change, including threatened food security and reduced availability of fauna and flora traditionally used in ceremonies and cultural practices.[362] As well, the case recounts the experiences of 15-year-old Ira Reinhart-Smith from Nova Scotia, who has

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[357] Chalifour and Earle (n 291) 740.
[358] OCT (n 346).
[359] Federal Court of Appeal, 'Cecilia La Rose et al. v. Her Majesty the Queen' A-289-20 <www.fct-cf.gc.ca/en/court-files-and-decisions/court-files> accessed 7 July 2022. Strictly speaking, the Federal Court is not bound by the precedents of the Quebec Court of Appeal, but on matters relating to constitutional issues, any provincial court's decision may end up informing its own reasoning.
[360] La Rose (n 347) 23-55.
[361] Ibid 23-24.
[362] Ibid 34-36, 38-40.

faced rising sea levels, extreme rainfall, storm flooding, and coastal erosion, all of which have affected his family home and his community.[363]

7.3.3.2-*Risk of transposing legal arguments across jurisdictions*

One of the legal arguments advanced in the *La Rose* case was founded on an alleged breach of the 'public trust doctrine': an affirmative obligation to protect the integrity of common natural resources that are fundamental to sustaining human life and liberties.[364] This concept was largely transposed from American common law and the arguments were borrowed from climate litigation in the U.S. that had also been initiated by OCT, one of the organizations leading the *La Rose* case. However, this argument had not been adapted to Canadian jurisprudential realities and there was little basis in Canadian common law to back up the existence and applicability of such a doctrine in the *La Rose* case, which is why the Court rejected it completely.[365] Organizations like OCT can play an important role in replicating successful climate claims around the world, but in doing so they should pay special attention to the significance of domestic legal context.

7.4-MATHUR ET AL. V. ONTARIO

The third case in the Canadian children's rights climate litigation trifecta came in November 2019, when seven young climate activists aged 12 to 24 brought a lawsuit in the Ontario Superior Court of Justice against the provincial government of Ontario ("*Mathur* case").[366] The seven plaintiffs brought their claim with the assistance of Ecojustice, a renowned Canadian environmental NGO.

7.4.1-Factual allegations and legal arguments

The focus of the application is on the GHG emissions reduction target set by Ontario in a 2018 law known as the *Cap and Trade Cancellation Act*, which replaced a previous target with a weaker ambition to reduce GHG emissions by 30% below 2005 levels by 2030.[367] The plaintiffs

[363] Ibid 32-34.
[364] Ibid 62-63.
[365] *La Rose* (n 351) para 58-59.
[366] For case documents, see: Ecojustice, '#GenClimateAction Mathur et. al. v. Her Majesty in Right of Ontario' <https://ecojustice.ca/case/genclimateaction-mathur-et-al-v-her-majesty-in-right-of-ontario/> accessed 9 June 2022.
[367] Sophia Mathur and others, 'Notice of Application' (25 November 2019) CV-19-00631627-0000, 6.

note that Canada is not on track to meet the Paris Agreement temperature standard, partially as a result of Ontario's inadequate GHG reduction target, which will lead to a dangerous level of climate change that will violate their rights under section 7 of the Canadian Charter and have devastating consequences on their lives, health, and ability to make fundamental life choices.[368] Specifically, the applicants argue that they will suffer from extreme heat events, the spread of infectious diseases, increased wildfire activity, dangerous flooding, psychological harm, and much more.[369] Moreover, the application alleges that the consequences of climate change will be disproportionately felt by youth and future generations, a uniquely vulnerable population given their age, and by marginalized communities, including Indigenous peoples and those with pre-existing health issues, in violation of the right to equality guaranteed under section 15 of the Canadian Charter.[370]

The remedies sought by the plaintiffs are varied, most notably requesting that the Court acknowledge that the inadequate target violates their rights under sections 7 and 15 and should therefore be declared of no force and effect.[371] The plaintiffs also ask the Court to order Ontario to set a science-based GHG reduction target consistent with the province's share of the minimum level of reductions necessary to limit global warming to below 1.5° C, and to then revise its climate change plan accordingly.[372]

7.4.2-Early victories

The *Mathur* case is still on track after the Court denied the provincial government's motion to dismiss in November 2020, rejecting Ontario's argument that the case presented "no reasonable cause of action" and, crucially, dismissing the argument that the case was non-justiciable.[373] The Ontario government's attempt to appeal this decision was denied and the case proceeded to a full trial hearing on the merits in September 2022.[374] The Court's decision remains pending as of December 2022.

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[368] Ibid 5-6.
[369] Ibid.
[370] Ibid.
[371] Ibid 7.
[372] Ibid 8.
[373] *Mathur v. Ontario* (Ontario Superior Court of Justice, 12 November 2020) 2020 ONSC 6918, para 125-140.
[374] Ecojustice (n 366).

The key to *Mathur*'s success so far has been its choice to target the constitutionality of a specific provision of a particular piece of Ontario legislation, rather than targeting government action/inaction more broadly.[375] Framing the case in this way gave the Court confidence that reviewing the legality of the matter would be a legitimate and appropriate exercise of its judicial competence under the separation of powers. On the other hand, scaling back the ambition of climate claims by narrowing them down to meet justiciability requirements "may come at the price of reduced impact and/or inadequate redress for climate harm suffered".[376]

7.4.3-Analysis

7.4.3.1-*Strengths*

Just like in *La Rose*, the *Mathur* case was able to bolster its claim by framing it around the personal narratives of the young plaintiffs.[377] The fact that these litigants are then able to spread their message by conducting interviews and speaking publicly is crucial in raising public awareness about the consequences of climate change on children and framing the narrative of the climate crisis around intergenerational equity.[378] Both cases have helped the youth involved in overcoming the lack of agency they may feel and given them space to have their voices heard in the legal process, consistent with the CRC's core principles.[379]

The fact that all seven plaintiffs in *Mathur*, and 10 out of 15 plaintiffs in *La Rose*, are women and girls should also be emphasized. This detail does not appear coincidental when it comes to youth-led climate litigation or youth-led climate activism more broadly.[380] It is a reminder that women and girls are disproportionately impacted by climate change and that climate justice must account for gender inequality if it is to be inclusive and effective. The contributions of the strong, motivated, and engaged young women and girls who are leading the way in climate litigation around the world should be celebrated. The list includes, among others, Greta Thunberg, Chiara Sacchi, Catalina Lorenzo, Iris Duquesne, Ridhima Pandey, Ayakha Melithafa, Claudia Duarte

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[375] *Mathur* (n 373) para 132.
[376] Parker (n 16) 84.
[377] Ecojustice, 'Climate Case Backgrounder' <https://ecojustice.ca/wp-content/uploads/2019/11/Ontario-Climate-Case-Backgrounder.pdf?x64512> accessed 17 June 2022.
[378] Parker (n 16) 79.
[379] Ibid.
[380] Jacqueline Peel and others, 'Women Leading the Fight Against Climate Change' (Pursuit, 7 March 2022) <https://pursuit.unimelb.edu.au/articles/women-leading-the-fight-against-climate-change> accessed 20 June 2022.

Agostinho, Catarina Mota, Sofia Oliveira, Cecilia La Rose, Sophia Mathur, Kelsey Juliana, Laura Jiménez Ospina, Luisa Neubauer, and Anjali Sharma.

7.4.3.2-*Shortcomings*

While this case presents significant promise for a potential breakthrough in Canadian climate litigation, it does have shortcomings that may prove problematic at a later stage. The plaintiffs may face difficulties in establishing that the impacts they are currently facing due to climate change are grave enough to reach the threshold of application of sections 7 and 15 of the Canadian Charter, given that they are mostly framed around concerns about future threats posed by climate change.[381] Nevertheless, it should be noted that in rejecting the government's motion to dismiss, the Court acknowledged that both the section 7 and 15 claims had a 'reasonable prospect of success' and that it was conceivable for positive obligations to exist in Canadian law in the context of climate change.[382]

The case also faces a weakness in that it is limited in its scope to the province of Ontario. The environment has been recognized as an area of dual legislative competence for the provincial and federal orders of government in Canada,[383] making it important to target climate litigation at both levels. However, it is only natural that litigation that is national in scope is likely to have a greater impact than that which is limited to a single province. Any positive outcomes resulting from the *Mathur* case could still help inspire comparable actions in other provinces or at the federal level.

Furthermore, it is possible that the outcome of the *EnJeu* and *La Rose* cases, particularly on the issue of justiciability, may have an impact in any potential appeals in *Mathur* down the line. That being said, the scope of the application in *Mathur*, and the nature of the remedies being requested, will likely be crucial in distinguishing this case and its analysis of justiciability from *EnJeu* and *La Rose*. In any case, the issues surrounding justiciability will surely continue to fuel much debate in climate litigation in Canada and elsewhere for years to come.

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[381] Chalifour and Earle (n 291) 725-726.
[382] *Mathur* (n 373) para 171, 189, 228, 233-234.
[383] *References re Greenhouse Gas Pollution Pricing Act* (Supreme Court of Canada, 25 March 2021) 2021 SCC 11.

7.5-CONCLUSION

EnJeu, *La Rose,* and *Mathur* demonstrate the variety of ways in which young people in Canada are trying to seek climate justice through strategic litigation. Importantly, the courts involved in all three cases recognized the reality of climate change and the severe consequences that will be faced by Canadians due to global warming. It will be worth watching to see how each of these cases is conclusively resolved, how key questions of substantive law are answered by the courts, and whether failures and successes in one case or another will spur further children's rights-based climate litigation across the country.

8-DISCUSSION

The three case studies that have formed the basis of this piece are illustrative of many of the common issues faced by plaintiffs in children's rights climate litigation. While each case should be considered within the particular socio-legal context in which it arises, these examples nevertheless demonstrate some of the advantages and disadvantages that may come from pursuing cases at the international, regional or domestic level. In this regard, it is worth briefly mentioning a collection of other youth-led climate cases initiated at the domestic level to observe the possibility for action in jurisdictions other than Canada. Finally, some recommendations will be formulated to the attention of future plaintiffs based on a number of relevant factors identified in the case law.

8.1-TRENDS IDENTIFIED IN THE CASE STUDIES

The unique nature of climate change as a threat to children's rights has created issues in bringing strategic litigation cases at all levels, such as the challenge of establishing jurisdiction for human rights violations of an extraterritorial nature, obtaining standing by demonstrating that one has either experienced an injury or is at imminent risk of suffering harm, and making a causal link between impugned governmental conduct and harms suffered. In addition, the novel nature of climate litigation has challenged the role of decision-makers in adjudicating such complex legal disputes, raising particular issues with respect to justiciability. Furthermore, children face barriers in accessing justice in relation to climate change, due to the expensive and time-consuming nature of litigation, as well as asymmetrical power dynamics that can exacerbate their inherent vulnerabilities. Additionally, when making claims based on their right to equality, young people may face specific conceptual difficulties in framing their allegations of intergenerational discrimination. Finally, ensuring child participation in climate litigation – while not always fully assured in practice – remains a powerful way of enhancing climate action and empowering children to express their views on important matters of climate policy.[384]

8.2-ADVANTAGES AND DISADVANTAGES IN DIFFERENT JURISDICTIONS

After having conducted a thorough analysis of children's rights climate cases at the international, regional and domestic levels, it is possible to identify some strengths and weaknesses with each

[384] Lewis (n 31) 187.

jurisdictional level. However, regardless of the jurisdiction a case's success or failure will always depend on a multitude of factors and choices made by the litigants.

First of all, international human rights treaty bodies have arguably adopted the most progressive interpretation of states' substantive human rights obligations, as evidenced for example by the CRC Committee's ruling on extraterritorial jurisdiction in *Sacchi*. While both the ECtHR and Canadian courts embrace the 'living instrument' doctrine in their interpretation of their respective human rights texts, legal precedents in both systems show a greater level of prudence in expanding human rights obligations.

Plaintiffs at all three jurisdictional levels face challenges related to the scope of a particular adjudicative body's mandate when it comes to complex questions like climate change, whether it is the subsidiarity principle before the CRC Committee and ECtHR or the question of justiciability at the domestic level. As well, the requirement to exhaust domestic remedies that is common to the CRC Committee and the ECtHR is an additional barrier to bringing claims in these jurisdictions. Plaintiffs who choose to pursue claims before domestic courts do not have to contend with this requirement but may face different obstacles in establishing standing. Conversely, the generous rules on public interest standing represent one of the strengths in initiating climate litigation in Canadian domestic courts.

When it comes to ensuring child participation, all three jurisdictions allow the involvement of young litigants to varying degrees. In this regard, the CRC Committee set itself apart in *Sacchi* by organizing a hearing specifically for its members to hear the views of the young petitioners. That being said, there is a lack of empirical research on the experiences of child plaintiffs in climate litigation and greater attention should be paid towards researching this issue in order to assess how to optimize child participation.[385]

Finally, there are significant differences in the remedies that may be obtained at each level. While the CRC Committee could theoretically have the greatest geographic scope of impact with its decisions, this is offset by the lack of strict enforcement power. Meanwhile, the remedial power of the ECtHR retains a potentially wide and multinational scope of impact, with the political oversight of the COE's Committee of Ministers to assure the enforcement of its

[385] Donger (n 40) 19.

decisions.[386] On the other hand, domestic courts will generally have more effective and robust means of enforcing their decisions, but any positive or negative impact will usually be limited in scope to a single country.

Ultimately, and notwithstanding the advantages that any level may have, the takeaway should not be that one jurisdiction should be privileged for climate litigation to the exclusion of all others. Climate change remains a multi-polar phenomenon that requires concerted action at every jurisdictional level.

8.3-MAJOR CASES IN OTHER JURISDICTIONS

Beyond the case studies that have already been examined, there are several high-profile instances of youth-led climate litigation which merit mention.

8.3.1-Juliana v. United States

The *Juliana* case led by OCT in the U.S. has gained attention as one of the first climate cases to advance arguments based on the rights of children. The basic premise of the case, initiated by 21 young plaintiffs, a prominent climate scientist (Dr. James E. Hansen) acting on behalf of future generations, and an NGO (Earth Guardians), is that through its various actions contributing to climate change, the U.S. federal government has violated the fundamental right to a stable climate system capable of sustaining human life and failed to protect essential public trust resources.[387]

The case has been ongoing since 2015, facing a range of procedural setbacks as the government has repeatedly tried to get the case stayed or dismissed. Initially, the plaintiffs obtained a significant victory in 2016 when U.S. District Court Judge Ann Aiken denied the government's motion to dismiss, stating "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society".[388] However, a 3-judge panel of the U.S. Court of Appeals for the Ninth Circuit dismissed the case in January 2020, finding

[386] Øyvind Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' (2021) 51 British Journal of Political Science 899, 899-901.
[387] Case documents can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/case/juliana-v-united-states/> accessed 14 June 2022. See also: OCT, 'Youth v. Gov: Juliana v. US' <www.ourchildrenstrust.org/juliana-v-us> accessed 14 June 2022.
[388] *Juliana et al v. United States* (District Court for the District of Oregon, 10 November 2016) Opinion, Case 6:15-Cv-01517-TC, 31.

that courts lacked the power to order the U.S. government to prepare a plan to phase out fossil fuel emissions. Despite acknowledging that climate change would wreak havoc on the planet if left unchecked, the majority stated, "Any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches".[389] In a powerful dissent, Judge Josephine Staton presented her own view on the claim's justiciability:

> In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barrelling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.
>
> My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.[390]

In closing, Judge Staton made the stakes raised by this case crystal clear:

> Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?[391]

The plaintiffs have since tried to salvage their case by attempting to amend their claim to fix the issues with the requested remedies that were identified by the Court.[392] As of December 2022, the Court has yet to rule on this motion or on a parallel motion to intervene in the proceedings filed by 18 U.S. states.

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[389] *Juliana et al. v. United States* (Court of Appeal for the Ninth Circuit, 17 January 2020) Opinion No. 18-36082, 5.
[390] Ibid 32-33.
[391] Ibid 64.
[392] OCT (n 387).

When one of the central contentions behind climate cases is the need for immediate responses to stave off the climate crisis' worst consequences, cases like *Juliana* – still yet to reach the merits stage after 7 years of preliminary motions and appeals – legitimately call into question whether strategic litigation is the optimal means of inciting urgent climate action.

Conversely, the plaintiffs in *Juliana* have done an excellent job in crafting a powerful narrative about the impacts of climate change and the threats faced by young Americans across the country.[393] The plaintiffs have also underlined the immorality of the government's conduct, placing particular emphasis on the intentionality behind its actions and its knowledge of the consequences of inadequate climate action.[394] Finally, OCT has led a legal campaign in which it has replicated some of the central elements of the *Juliana* case in claims across several states, with one such case in Montana set for trial on the merits in June 2023.[395]

8.3.2-Demanda Generaciones Futuras v. Minambiente (Colombia)

In a 2018 case from Colombia known as the *Future Generations* case, the Supreme Court ruled in favour of 25 young plaintiffs who were suing the government and many corporations, alleging that their contributions to climate change and Amazonian deforestation violated their rights to a healthy environment, life, health, food, and water.[396] Remarkably, the Colombian court ruled that the scope of fundamental rights concerned in this case included not only those of the 25 plaintiffs who brought the action, but also those of future generations.[397] The Court ordered the government to formulate an "intergenerational pact for the life of the Colombian Amazon" and to implement action plans to address deforestation in the Amazon with the plaintiffs' active participation.[398]

Any satisfaction with the judgment has since been greatly tempered by the fact that the

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[393] Nosek (n 345) 785; Donger (n 40) 20-21; A documentary film was made about the *Juliana* case, see: Christi Cooper, 'Youth v. Gov' (Barrelmaker Productions, 2020).
[394] Ibid Nosek, 790.
[395] OCT, 'Legal Proceedings in all 50 States' <www.ourchildrenstrust.org/other-proceedings-in-all-50-states> accessed 28 June 2022.
[396] *Future Generations v. Ministry of the Environment and Others* (Supreme Court of Colombia, 5 April 2018) STC4360-2018. Case documents can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/> accessed 14 June 2022.
[397] Donger (n 40) 11.
[398] Ibid 20.

Colombian government has failed to execute the Court's orders in a prompt and effective manner.[399] This case demonstrates that although domestic courts may in theory hold greater remedial power than regional or international bodies, the impact of their decisions in climate cases remains largely dependent on the government's willingness and ability to enforce them.

8.3.3-Neubauer et al. v. Germany

More recently, the *Neubauer* case saw Germany's Federal Constitutional Court rule in April 2021 that the country's GHG emission reduction targets were insufficient and violated the fundamental rights of the young plaintiffs.[400] In a ground-breaking decision, the Court determined that Germany's constitution not only obliges the legislature to protect the climate, but also to take into account the rights and interests of future generations when it comes to distributing environmental burdens and carbon budgets between present and future generations.[401] The Court's reasoning undoubtedly, if not explicitly, relied on the principle of intergenerational equity: "one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom".[402] Similarly to the Colombian case, the *Neubauer* case demonstrates how important it is to have domestic political will to back up climate litigation victories, although in this case German lawmakers quickly adopted more stringent GHG reduction targets in response to the Court's ruling.[403]

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[399] Parker (n 16) 81.

[400] *Neubauer et al. v. Germany* (Federal Constitutional Court, 24 March 2021) BvR 2656/18/1. Case documents can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/> accessed 14 June 2022.

[401] Andreas Buser, 'Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German Constitutional Court's Climate Decision' (2021) 22 German Law Journal 1409, 1417.

[402] Jaap Spier, 'A Ground-Breaking Judgment in Germany' (Climate Law Blog, 10 May 2021) <blogs.law.columbia.edu/climatechange/2021/05/10/guest-commentary-a-ground-breaking-judgment-in-germany/> accessed 18 June 2022.

[403] Guruparan and Moynihan (n 10) 16.

8.3.4-Sharma v. Minister for the Environment (Australia)

Lastly, the *Sharma* case in Australia has taken a different approach by focusing on a natural resource extraction project.[404] Eight young Australians led a class action seeking an injunction to stop their government from approving the extension of a coalmine, essentially arguing that the Minister for the Environment had a common law 'duty of care' towards young people, by which she had to avoid causing them harm. The Federal Court agreed with the plaintiffs, establishing that the Minister owed a duty of care to all Australian minors to consider the loss of life and personal injury that they were reasonably likely to suffer as a result of the expansion, but declined to grant an injunction as there was insufficient evidence that approval was imminent.[405]

However, this partial victory for the young plaintiffs was short-lived as the Federal Court's decision was unanimously overturned on appeal in March 2022. The three judges who heard the case each allowed the Minister's appeal for different reasons, including non-justiciability, insufficient legal proximity between the Minister and the children, and a lack of foreseeability that the coal mine approval would cause personal injury to the plaintiffs.[406] The young plaintiffs had to make the difficult choice to abandon their claim and not appeal this decision to the High Court of Australia, in order to avoid the unwanted effect of establishing a binding precedent that would then preclude any other Australian child from being able to bring similar cases in the future.[407]

Ultimately, the *Sharma* case remains emblematic of the difficulties associated with children's rights climate litigation, particularly in a country like Australia that lacks a constitutional bill of rights or human rights legislation at the federal level.[408] The *Sharma* plaintiffs initially overcame this legal constraint through creative legal argumentation, framing their case as a negligence claim and emphasizing the vulnerability of children to climate change. Presumably the case's outcome on appeal would have been different if the plaintiffs could rely on fundamental rights

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[404] Case documents can be found in the Sabin Center for Climate Change Law's climate litigation database: <http://climatecasechart.com/non-us-case/raj-seppings-v-ley/> accessed 15 June 2022.
[405] *Sharma v. Minister for the Environment* (Federal Court of Australia, 27 May 2021) [2021] FCA 560; *Sharma v. Minister for the Environment* (Federal Court of Australia, 8 July 2021) [2021] FCA 774.
[406] *Minister for the Environment v. Sharma* (Federal Court of Australia, 15 March 2022) [2022] FCAFC 35.
[407] *Minister for the Environment v. Sharma* (Federal Court of Australia, 22 April 2022) [2022] FCAFC 65.
[408] Noam Peleg, 'Has the Federal Court put the heat on the Environment Minister over climate change and children's rights?' (Australian Human Rights Institute, 1 June 2021) <www.humanrights.unsw.edu.au/news/has-federal-court-put-heat-environment-minister-over-climate-change-and-childrens-rights> accessed 20 June 2022.

protections in Australian law. Moreover, the plaintiffs' lost appeal and their decision not to appeal further also underlines a major risk inherent to climate litigation: the possibility of establishing a negative legal precedent that might prejudice the chances of future climate litigants.[409]

8.4-RECOMMENDATIONS FOR LITIGANTS

Several relevant factors that can influence the outcome of strategic climate litigation have been identified in the academic literature.[410] Many of these elements have already been examined in the context of the case studies in this research.

First of all, in planning strategic litigation attention should be paid to the selection of the ideal plaintiffs in order to best communicate the desired narrative behind a case.[411] The selection of diverse plaintiffs can be effective in demonstrating the variety of lived experiences faced by children when it comes to climate change, as evidenced by cases like *Sacchi*, *La Rose,* and *Mathur*. It can also be determinative in obtaining positive media attention and in having an extra-legal impact by influencing the views and behaviours of governments or the public.[412]

Secondly, partnering with experienced lawyers and established organizations is crucial for young plaintiffs to be well-supported in their legal actions, helping them overcome systemic barriers to accessing justice, and ensuring a professional and coordinated approach that marries legal and non-legal strategies of action.[413] Every case that has been mentioned so far was led or supported by NGOs, including Earthjustice in *Sacchi*, the GLAN in *Duarte Agostinho,* EnJeu, OCT in *La Rose* and *Juliana,* and Ecojustice in *Mathur*.

Next, while climate change represents a global issue for which all countries share responsibility, international environmental law is founded on the principle of 'common but differentiated responsibility', recognizing that different states may have different legal duties when it comes to

[409] Ben Batros and Tessa Khan, 'Thinking strategically about climate litigation' (OpenGlobalRights, 28 June 2020) <www.openglobalrights.org/thinking-strategically-about-climate-litigation/> accessed 3 July 2022.
[410] Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success? Lessons for Strategic Climate Litigation from the *Sharma, Neubauer*, and *Shell* Cases' (2021) 22 German Law Journal 1484.
[411] Ibid 1487.
[412] Ibid 1485-1486.
[413] Ibid 1489.

reducing their GHG emissions.[414] Therefore, in order to maximize impact, it is particularly useful to target defendants who are major contributors to climate change and/or who are trailing in their climate action.[415] Litigants in the *Sacchi* and *Duarte Agostinho* cases explicitly took this approach.

Another important element in children's rights climate litigation is to draw on the latest climate science when preparing a case.[416] Presenting solid scientific evidence has led courts to make crucial findings of fact about the nature of man-made climate change and its impact on humans.[417] This can include relying on the reports and findings of the IPCC, as well as the emerging field of climate attribution science, which has the potential to help litigants establish causality between GHG emissions and extreme weather events.[418]

Moreover, it should go without saying that any children's rights climate litigation will have to be creative and innovative in its legal argumentation, testing existing doctrines and the limits of the law, with any success being heavily dependent on the receptivity of the adjudicator and the legal system in question.[419] All of the aforementioned cases have adopted novel legal arguments, particularly on challenging issues like extraterritorial jurisdiction and the framing of climate change as a question of intergenerational discrimination.

Litigants will also need to consider what kind of governmental conduct they wish to impugn in their claim. Cases like *Mathur* and *Neubauer* demonstrate that it may be more effective to focus on a single legally binding GHG emission reduction target, rather than targeting inaction or a collection of policies like in *EnJeu* or *La Rose*. Climate litigants will also need to find the right balance in seeking remedies that are sufficiently ambitious to have macro-level impacts, while exhibiting sufficient restraint so as to avoid triggering concerns about justiciability.[420]

Finally, the success of any claim will depend on the specific social and legal context of a given jurisdiction. Evidently, jurisdictions with high levels of environmental protection and progressive

[414] Ibid 1490.
[415] Ibid 1490-1491.
[416] Ibid 1492.
[417] Ibid.
[418] Guruparan and Moynihan (n 10) 10.
[419] Peel and Markey-Towler (n 410) 1494.
[420] Ibid 1495.

human rights jurisprudence will be better suited for children's rights climate litigation. Two examples of advantageous factors are particularly pertinent in this regard: 1) whether international treaties, including the UN's core human rights treaties and the Paris Agreement are considered legally binding and enforceable in domestic law; 2) whether the right to a healthy environment is explicitly protected in the legal order in question.[421]

In conclusion, while children's rights climate litigation is still a relatively recent phenomenon, it is certainly a trend that will continue to gain traction around the world in the coming years. Cases of this nature that have already been heard by courts demonstrate that there are many challenges to overcome to obtain a successful outcome. Nevertheless, even those cases that have not been successful in obtaining the desired legal outcome have done their part to put a spotlight on the rights of children in the context of the climate crisis. Altogether these cases can serve as a roadmap, helping future litigants figure out what legal arguments and methods are best suited for any given context or jurisdiction.

[421] Guruparan and Moynihan (n 10) 14. The adoption of resolutions by the UN HRC in October 2021 and by the UN General Assembly in July 2022, recognizing the right to a safe, clean, healthy and sustainable environment as a human right - although not legally binding - constitute a powerful and persuasive political statement that may strengthen rights-based climate litigation at all levels.

9-CONCLUSION

Reminders of the scale and gravity of the climate crisis are ever-present. In May 2022, the World Meteorological Organization released a report in which it established that four key climate change indicators had set records in 2021: GHG concentrations, sea-level rise, ocean heat, and ocean acidification.[422] The report further confirmed that the world's temperature increase keeps getting closer to the 1.5°C target set by the Paris Agreement.[423] Extreme weather events have continued to garner headlines, whether it be droughts in East Africa, extreme heat in Western Europe, or deadly flooding in South Asia.[424] As former UN High Commissioner for Human Rights Michelle Bachelet has warned, "The world has never seen a human rights threat of this scope. This is not a situation where any country, any institution, any policy-maker can stand on the sidelines".[425] And yet, while expert bodies like the IPCC continue to urge states to take immediate and comprehensive climate action, governments are not making enough progress in this regard. Faced with this frustrating situation, people have been forced to look elsewhere for solutions, increasingly turning to the courts for answers and resorting to climate litigation for action. Significantly, the IPCC has itself endorsed climate litigation as a means of influencing the outcome and ambition of climate governance.[426]

Vulnerable groups like children are among those who have heeded the IPCC's recommendation. Climate litigation has given children an opportunity to hold governments accountable and shape climate action, when so many traditional forums of climate policymaking are inaccessible to them. Young people have a particularly strong incentive to act, as they will be disproportionately impacted by the consequences of climate change despite having the least responsibility in contributing to the problem. This element of intergenerational injustice has been highlighted in many youth-led climate cases and has been used as the basis for claims alleging discrimination. As well, young people face barriers in accessing justice and obtaining effective remedies for

[422] World Meteorological Organization, 'Four key climate change indications break records in 2021' (18 May 2022) <https://public.wmo.int/en/media/press-release/four-key-climate-change-indicators-break-records-2021> accessed 29 June 2022.
[423] UN, 'Climate: World getting 'measurably closer' to 1.5-degree threshold' (9 May 2022) <news.un.org/en/story/2022/05/1117842> accessed 29 June 2022.
[424] WMO (n 421).
[425] UN, 'We are 'burning up our future', UN's Bachelet tells Human Rights Council' (9 September 2019) <news.un.org/en/story/2019/09/1045862> accessed 3 July 2022.
[426] IPCC, 'Climate Change 2022: Mitigation of Climate Change' (2022) 13-29, 13-30, 13-31.

human rights violations. Fortunately, a children's rights approach anchored in the core principles of the CRC can assist in overcoming these obstacles, ensuring child participation and empowerment in the legal process, and safeguarding the best interests of the child.

It is in this context that this work analyzed the phenomenon of children's rights strategic litigation in the climate sphere. Using case studies drawn from the international, regional, and domestic levels, both the procedural and substantive dimensions of the issue were examined. At the international level, the *Sacchi* petition underlined the challenges associated with the global nature of climate change. In Europe, the ongoing *Duarte Agostinho* case has illustrated the difficulty of bringing climate cases in regional human rights systems that are premised on the principle of subsidiarity. Furthermore, the *EnJeu, La Rose,* and *Mathur* cases in Canada demonstrate how children's rights climate litigation can take a variety of forms and approaches at the domestic level. Likewise, cases like *Juliana, Future Generations, Neubauer,* and *Sharma,* exemplify the rich diversity in children's rights climate cases and present models for future litigation to emulate. This article then identified some of the advantages and disadvantages of each jurisdictional level as well as some common challenges and opportunities faced at all levels.

In light of the track record established by children's rights climate litigation so far, it is fair to say that there have not been many successful legal outcomes. Nevertheless, success in the context of strategic litigation can be more than just a positive court decision – it can be about influencing public opinion, mobilizing affected stakeholders, prompting political action, and stimulating social change.[427] These cases have had symbolic value and helped raise awareness about the plight of children in the climate crisis.

Given the recent nature of youth-led climate litigation, it is also appropriate to focus attention on the promise and potential for successful legal outcomes in the future. The overwhelming motivation of children to address the climate crisis and the persistent failure of governments to take adequate climate action make it all the more likely that these cases will continue being filed around the world.[428] Faced with this inevitable rise in children's rights climate litigation, it will

[427] Peel and Osofsky (n 52) 67.

[428] Another youth-led climate case was initiated in November 2022 in Sweden, with Greta Thunberg and more than 600 young people under the age of 26 bringing legal action against the Swedish state for insufficient climate action. See: Nicolas Rolander, 'Greta Thunberg sues her native Sweden for failing to take action on climate' (phys.org, 28

be interesting to see whether courts find themselves reassessing their institutional role in order to better respond to the greatest crisis of our time. Accepting the alternative – that conventional legal systems and the traditional logic of human rights are inadequate to deal with an existential threat to humanity – would be simply unfathomable for many.

At the end of the day, the fight against climate change is a fight against time, and time is running out. Upholding the fundamental rights of children and young people will require that solutions to the climate crisis be implemented as soon as possible. It is important to emphasize that children's rights climate litigation is not a panacea as of yet. Strategic litigation can have potentially transformative results, but it is necessarily reactive and time-consuming and cannot be the only answer to the climate crisis. Consequently, the coming years will be decisive in determining the role that strategic litigation can play in helping children to uphold their equality rights and obtain effective remedies in the face of the climate crisis.

In the meantime, young people who want to meaningfully influence climate action at home and abroad will have to continue combining legal and non-legal strategies to tackle the climate crisis, in the hopes that a cumulative and complementary approach to this multi-faceted human rights issue will help them meet their goals. They should continue pursuing action in the courts, at the voting booth, and in the streets. They should engage in strategic litigation, political lobbying, media relations, advocacy campaigns, public education initiatives, protests, and all forms of youth activism. For the young people who will be facing the brunt of climate change in the coming decades, climate litigation can represent a much-needed tool of empowerment and hope. The power of hope in the fight against climate change should not be underestimated. In the words of Greta Thunberg:

> Hope is not something that is given to you. It is something you have to earn, to create. It cannot be gained passively from standing by passively and waiting for someone else to do something. It is taking action. It is stepping outside your comfort zone. And if a bunch of school kids were able to get millions of people on the streets and start changing their lives, just imagine what we could all do together if we try.[429]

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[429] Josh Halliday, 'Greta Thunberg makes surprise appearance at Glastonbury festival' (The Guardian, 25 June 2022) <www.theguardian.com/environment/2022/jun/25/greta-thunberg-makes-surprise-appearance-at-glastonbury-festival> accessed 1 July 2022.

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