

**Litigation for Future: On the Added Value of Child-led Strategic
Climate Litigation Regarding the Disproportionate Impact of Climate
Change and the Right to Participation**



**Universiteit
Leiden**

Thesis submitted by: Isabelle Oberschulte

Master of Laws: Advanced Studies in International Children's Rights

Faculty of Law

2023 – 2024

19.847 words



Date: 01.07.2024

Location: Leiden, The Netherlands

Declaration Statement

I further hereby certify that this is an original work, that this thesis does not contain any materials from other sources unless these sources have been clearly identified in footnotes, and any and all quotations have been properly marked as such and full attribution made to the author('s) thereof.

I further authorise Leiden University, the Faculty of Law, the Master of Laws: Advanced Studies in International Children's Rights, its Programme Board and Director, and/or any authorised agents of the Institution, and persons named here in and above, to place my thesis in a library or other repository including but not limited to associated websites, for the use of the visitors to or personnel of said library or other repository. Access shall include but not be limited to hard copy or electronic media

- Executive Summary.....iv
- Main Findingsvi
- 1. Introduction 1
- 2. The Disproportionate Impact of Climate Change on Children..... 2
 - 2.1. Non-health Impacts..... 2
 - 2.2. Health Impacts 2
 - 2.2.1. Extreme weather conditions and natural disasters 3
 - 2.2.2. Malnutrition and access to clean water 3
 - 2.2.3. Infectious disease 3
 - 2.2.4. Air pollutants 3
 - 2.2.5. Mental health impacts 4
 - 2.2.6. Summary health impacts 4
 - 2.3. Intergenerational Equity as Part of the Disproportionate Impact..... 4
 - 2.3.1. Definition Principle of Intergenerational Equity 5
 - 2.3.2. Connection Between Children’s Rights and Intergenerational Equity..... 5
 - 2.4. Conclusion Disproportionate Impact..... 7
- 3. Definition of Child-led Strategic Climate Litigation 8
 - 3.1. Strategic Litigation 8
 - 3.2. Strategic Climate Litigation 8
 - 3.3. Child-led..... 9
 - 3.4. Child-led Strategic Climate Litigation..... 10
- 4. Comparison of Legal Argumentation in Adult- and Child-led Cases11
 - 4.1. National Courts11
 - 4.1.1. Adult-led: Climate Action Czech Republic v. Czech Republic.....11
 - 4.1.2. Child-led: Neubauer v. Germany 12
 - 4.1.3. Comparison 13
 - 4.2. European Court of Human Rights..... 14
 - 4.2.1. Adult-led: KlimaSeniorinnen v. Switzerland 14
 - 4.2.2. Child-led: Duarte Agostinho v. Portugal..... 16
 - 4.2.3. Comparison 17
 - 4.3. International and Regional Treaty Bodies..... 18
 - 4.3.1. Adult-led: Arctic Athabaskan Peoples v. Canada 18
 - 4.3.2. Child-led: Sacchi v. Argentina..... 18
 - 4.3.3. Comparison 20
 - 4.4. Conclusions on the Comparisons 20
- 5. Child-led Strategic Climate Litigation and the Right to Participation 23

- 5.1. Standard Set by Article 12 CRC 23
- 5.2. Child-led Strategic Climate Litigation as a Realisation of Article 12 CRC 24
 - 5.2.1. Barriers to Access to Courts 24
 - 5.2.2. Overall Meaning for Article 12 CRC 27
- 5.3. Child-led Strategic Climate Litigation as Part of the Post-Paternalistic Movement 28
 - 5.3.1. Paternalistic Approach 28
 - 5.3.2. Youth Climate Justice Movement as a Turning Point 28
- 5.4. Janus-faced? Possible downsides to Child-led Strategic Climate Litigation 29
 - 5.4.1. Financial Risk 29
 - 5.4.2. Mental Burden 29
 - 5.4.3. Risk of Instrumentalising Children for the Climate Justice Movement 30
- 5.5. A Child Rights-consistent Approach to Child-led Strategic Climate Litigation 31
- 5.6. Conclusion 32
- 6. Conclusions 33
- Bibliography 35
 - International Legal Instruments 35
 - Regional Legal Instruments 35
 - UN Documents 35
 - Academic Literature 35
 - Journal Articles 35
 - Books and Book Chapters 37
 - Reports 38
 - Web Resources 38
 - Case Law 39

Executive Summary

Climate change is one of the biggest and most pressing threats to humanity in the modern age. While it impacts every human all over the world, children are especially endangered by the effects of climate change. Since the Paris Agreement in 2015, a new surge of strategic climate litigation has been observed. The cases sought to address states' inadequate actions on climate change and based their claims on human rights. In this context, some cases were also led by children as applicants.

This research examined the added value of child-led strategic climate litigation regarding the disproportionate impact of climate change on children and the right to participation in Article 12 of the Convention on the Rights of the Child.

In the first chapter, the disproportionate impact of climate change on children is set out. In this context, the principle of intergenerational equity is also explored. The main aspect of the disproportionate impact is children's still-developing physiology. Due to this, the effects of climate change have a harsher impact on children's bodies and health than on adults. Furthermore, children's dependency on adults as caregivers and overall lack of social and legal agency makes them more vulnerable in the aftermaths of natural disasters caused by climate change, resulting in a heightened exposure to violence and exploitation. Regarding intergenerational equity, it is found that there is a certain connection between this principle and children's rights in climate change. However, after analysing several contributions in academic literature on this issue, no clear elaboration or consensus on children's standing regarding the rights of future generations can be observed.

The second chapter defines the term child-led strategic climate litigation. After exploring definitions for strategic litigation, strategic climate litigation and child-led strategic litigation, aspects of the different definitions are combined. This results in the definition of child-led strategic climate litigation as litigation that aims to invoke systemic change in a state's actions against climate change and where at least one of the plaintiffs is a person under the age of 18 when the claim is lodged at court.

The third chapter compares three cases of adult-led strategic climate litigation and three cases of child-led strategic climate litigation in three respective jurisdictions: national courts (Climate Action Czech Republic v. Czech Republic and Neubauer v. Germany), the ECtHR (Klimaseniorinnen v. Switzerland and Duarte Agostinho v. Portugal) and regional and international treaty bodies (Artic Athabaskan Peoples v. Canada and Sacchi v. Argentina). Criteria for the comparison include what the rights of which legal document are claimed, how a particular vulnerability to climate change is claimed and if intergenerational equity plays a role in the argumentation. The comparison finds that while both adult- and child-led cases lay out a particular vulnerability to climate change of the applicants, adult-led cases focus on current violations while child-led cases rather claim future violations. It is also observed that child-led cases focus on intergenerational equity, yet the legal argumentation also displays the aforementioned lack of clarity regarding the connection between children's rights and future generations. These findings are supported by drawing on other analyses of the cases and analyses of other child-led cases in literature.

The fourth chapter analyses the meaning of child-led strategic climate litigation for the right to participation in Article 12 of the CRC. After setting out the standard set by Article 12, potential risks and barriers for the realisation of this right in child-led strategic climate litigation. These include barriers to access to courts for children, financial and mental burdens and the potential instrumentalization of children for the climate justice movement. Some possibilities to negate these risks according to scholars and recommendations by the Committee on the Rights of the Child are also presented. Lastly, the importance of a child rights-consistent approach to the planning and preparation of the case in child-led strategic climate litigation, so participation outside of the courtroom, is established as the defining factor whether the right to participation is truly realised.

This research concludes that child-led strategic climate litigation bears a lot of potential to valuably contribute to bringing the disproportionate impact of climate change on children to the attention of courts and realise the right to participation. However, this thesis finds that ultimately this potential is yet not fully realised.

Main Findings

Like the ECtHR remarks about climate change in its judgement for *Klimaseniorinnen v. Switzerland*: “the number of persons affected, in different ways and to varying degrees, is indefinite.” In this context, child-led strategic climate litigation poses the unique opportunity to raise awareness for children's voices on the issue and bring their disproportionate impact to the attention of courts, state bodies with legal power which can truly further children's rights in the context of climate change by assessing governments' climate change policies and demanding change where needed.

Upon examining six cases in three jurisdictions (national courts, the ECtHR and regional and international treaty bodies) the research finds that child-led strategic climate litigation differs from adult-led cases in certain aspects. While it can be observed that both forms of litigation follow a similar course of argumentation, the child-led cases examined display a higher level of ambition and innovation. Child-led cases attempt to establish new constitutional principles or rights and include claims of extraterritorial jurisdiction. Another difference observed is the use of intergenerational equity claims in child-led cases which are often absent from adult-led cases. In child-led strategic climate litigation, claims for the forms of disproportionate impact currently feelable by children are underrepresented, with claims for intergenerational equity taking the front seat. The according legal argumentation however does not provide a detailed connection between children's rights and the principle of intergenerational equity. It is unclear if the applicants claim future generations' rights as members, representatives or proxies. This question also remains unanswered in academic literature, UN documents and legal frameworks such as the Maastricht principles. So, while a certain connection between children's rights and intergenerational equity in the context of climate change cannot be denied, children's standing remains unclear despite the growing attention and awareness of the issue. Due to this focus on intergenerational equity and the lack of clarity on children's exact standing regarding future generations, the children's rights lens can get neglected. This takes away from bringing the currently feelable disproportionate impact on children as one of the most vulnerable groups in climate change to the attention of courts. Still, it can be said that child-led strategic climate litigation draws on intergenerational equity so much because it does not only seek remedies for current violations but rather wants to invoke long-lasting change in states' policies which will affect their future lifetimes. While adult-led cases also touch upon the temporal aspect of climate change, the explicit reference to intergenerational equity as such a long-term perspective on the issue is a unique value to child-led strategic climate litigation. Overall, child-led strategic climate litigation does provide a rights-based perspective on the current impact of climate change on children as one of the most vulnerable groups and the future impact of climate change on their lifetimes, something severely lacking from adult-led litigation.

Regarding the child's right to participation, the research finds that, due to the rising popularity of child-led strategic climate litigation, there is a growing risk of instrumentalising children for the climate justice movement as applicants in strategic climate litigation. Other risks children encounter in this context are financial and mental burdens and barriers to their access to courts. All this must be taken into account when assessing the value child-led strategic climate litigation has for the realisation of the right to participation. In addition to negating these risks, it is essential that children are not only heard in the courtroom but are able to participate in planning the argumentation and course of litigation outside the courtroom. The research finds that this is the deciding factor which truly turns child-led strategic climate litigation into a realisation of the right to participation. Therefore, child-led strategic climate litigation is not by default furthering the right to participation but requires an according implementation.

Accordingly, child-led strategic climate litigation bears a lot of potential to valuably contribute to bringing the disproportionate impact of climate change on children to the attention of courts and realise the right to participation. The research finds that ultimately this potential is yet not fully realised. But as the issue progresses there is hope for further realisation of this potential in the future.

1. Introduction

Climate change is one of the biggest challenges in modern history. In the last few years, several strategic litigation cases concerning climate change have been carried out. Some of these cases are led by children themselves. While child-led strategic litigation is common in fields like the right to education¹ and child protection², strategic climate litigation covers an issue that affects both adults and children – climate change. Cases regarding climate change are not primarily a children's rights issue. It can develop into one though – and this thesis will argue that it should. Considering that climate change cases can also be brought to court by adults, it is worth examining what exactly the added value of having children lead strategic climate litigation cases is. It is especially interesting if there can be found a meaningful addition in terms of legal argumentation in the claims of the litigants.

This thesis aims to examine child-led strategic climate litigation and its relation to the right to participation in Article 12 of the Convention on the Rights of the Child (CRC) and the disproportionate impact of climate change on children. It is meant to showcase how child-led strategic climate litigation furthers children's rights and provides a valuable perspective on the disproportionate impact of climate change on children as one of the most vulnerable groups affected.

The central research question this thesis will answer is: What is the added value of child-led strategic climate litigation regarding the right to participation and the disproportionate impact of climate change on children?

This will be done by also considering the following sub-questions:

1. What constitutes the disproportionate impact of climate change on children?
2. What can be defined as child-led strategic climate litigation?
3. What is the difference between child-led and adult-led strategic climate litigation in terms of legal argumentation? Going along with that, to what extent is the disproportionate impact of climate change on children reflected in the legal argumentation compared to the extent that adult-led cases reflect claims for particular vulnerability?
4. Is child-led strategic climate litigation by default furthering the realisation of the right to participation?

These questions will be answered through desk research, legal analysis and by drawing on and examining the legal argumentation and verdicts in three cases of child-led strategic climate litigation and three cases of adult-led strategic climate litigation.

¹ E.g. Environmental And Consumer Protection Foundation v. Delhi Administration And Others (3rd October 2012); O'Donoghue v. Minister for Health (27th May 1993).

² E.g. on the ban of corporal punishment: Association for the Protection of All Children (APPROACH) Ltd v. France in front of the European Committee of Social Rights (3rd November 2014).

2. The Disproportionate Impact of Climate Change on Children

In order to examine how the disproportionate impact of climate change on children is reflected in child-led strategic climate litigation, this disproportionate impact shall first be set out in the following chapter. Climate change is one of the biggest global threats in the modern day and generally affects all humans. However, there are aspects which constitute a disproportionate impact of climate change on children. The disproportionate impact of climate change on children can be divided into health and non-health impacts.

2.1. Non-health Impacts

The non-health impacts of climate change on children are under-researched, so they will just be mentioned briefly. One of the non-health impacts is the particular vulnerability of children due to their dependence on adults as their caregivers. Climate stressors also affect parents and other caregivers and can impact their physical and mental health, limiting their capacities to provide care and protection for their children.³ Furthermore, children's education can be affected. For example, natural disasters caused by climate change can destroy school infrastructure.⁴ Even if the education infrastructure stays intact, research has shown that school attendance significantly decreases during extreme weather conditions caused by climate change, e.g. droughts or floods.⁵ Lastly, there is growing evidence suggesting that the effects of climate change heighten the risk of experiencing violence for children. Natural disasters caused by climate change often put children in situations of heightened vulnerability⁶ – e.g. leaving them displaced⁷ and reducing “social control and create social conflict”.⁸ Thereby these situations pose an “increased vulnerability of children to sale, trafficking, and exploitation”⁹ for children.

2.2. Health Impacts

The most researched and noticeable aspect of the disproportionate impact of climate change on children are the health-related impacts. Already in the early 2000s paediatricians found that children are especially vulnerable to the effects climate change brings.¹⁰ The WHO estimates that, while health impacts caused by climate change will affect all humans, children will bear more than 80% of the illnesses, injuries and deaths attributable to climate change impacts.¹¹ So overall, children are more prone to the negative health impacts of climate change than adults.¹² The health impacts can so far be broken down to extreme weather conditions and natural disasters caused by climate change (floods,

³ A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p. 10 (2022); A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, p.345 (2020).

⁴ E.D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice, Health and Human Rights*, 16 (1), (2014) p.22; A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p.11 (2022).

⁵ *Ibid.*

⁶ B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.184

⁷ E.D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice, Health and Human Rights*, 16 (1), (2014) p.22.

⁸ A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, p.348 (2020).

⁹ E.D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice, Health and Human Rights*, 16 (1), (2014) p.22; cf. A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p.10 (2022).

¹⁰ K.L. Ebi, J. Paulson, *Climate Change and Children*, *Pediatric Clinics of North America*, 54, (2007) p.213.

¹¹ A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, p.345 (2020).

¹² K. Arts, *Children's Rights and Climate Change* in C. Fenton-Glynn (ed.), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, p.218 (2019); A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p.7 (2022).

storms, heatwaves), malnutrition and access to clean water, infectious diseases, air pollutants and mental health impacts.¹³

2.2.1. Extreme weather conditions and natural disasters

Climate change has already caused and in the future is likely to cause even more extreme weather events and natural disasters.¹⁴ Children are particularly vulnerable in extreme weather events caused by climate change.¹⁵ They are more likely than adults to suffer physical afflictions during extreme weather conditions and natural disasters.¹⁶

2.2.2. Malnutrition and access to clean water

Climate change severely affects food supply.¹⁷ The disproportionate effect of this on children is best put in a UNICEF report in 2014: “Children are more vulnerable than adults to famine and nutritional deprivation since they require three to four times the amount of food on a body weight basis than adults.”¹⁸ In addition to food supplies, access to clean drinking water is also restricted by the effects of climate change. For example, natural disasters caused by climate change often destroy infrastructure for clean drinking water. Another restriction caused by climate change is the contamination of drinking water by pollutants reaching drinking water sources due to rising sea levels or droughts concentrating contaminants.¹⁹ Again, since children drink more fluids compared to their body weight than adults their vulnerability to contaminated water is increased in comparison to adults.²⁰

2.2.3. Infectious disease

Climate change also leads to an increased spread of infectious diseases. Especially increases in temperatures have been proven to lead to an increase in the spread of vector-borne infectious diseases.²¹ Children’s immature immune systems make them more vulnerable to those compared to adults.²²

2.2.4. Air pollutants

Air pollution levels have increased significantly due to climate change²³, affecting both outdoor and indoor air quality.²⁴ Still, especially outdoor and urban air quality is negatively impacted by climate

¹³ Based on the categorising: K.L. Ebi, J. Paulson, *Climate Change and Children*, *Pediatric Clinics of North America*, 54, (2007); UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line* (2014); Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, UN Doc. A/HRC/35/13 (2017), para.6.

¹⁴ Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, UN Doc. A/HRC/35/13 (2017), para.7.

¹⁵ K.L. Ebi, J. Paulson, *Climate Change and Children*, *Pediatric Clinics of North America*, 54, (2007) p.218.

¹⁶ A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoor, S.E.L. Burke, *Children and Climate Change*, p.9 (2022); A. Papantoniou, *Children and the Environment – Pathways to Legal Protection*, p.44 (2022).

¹⁷ E.D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice*, *Health and Human Rights*, 16 (1), (2014) p.21.

¹⁸ UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.18 (2014).

¹⁹ E.D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice*, *Health and Human Rights*, 16 (1), (2014) p.21; A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoor, S.E.L. Burke, *Children and Climate Change*, p.8 (2022); B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.184.

²⁰ A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoor, S.E.L. Burke, *Children and Climate Change*, p.7 (2022).

²¹ J.A. Patz, D. Campbell-Lendrum, T. Holloway, J.A. Foley, *Impact of regional climate change on human health*, *Nature*, 438, (2005) p.311.

²² B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.184; UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.18 (2014).

²³ UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.18 (2014).

²⁴ *Ibid.*

change.²⁵ On average children spend more time outdoors than adults and therefore are more exposed to the outdoor air pollution caused by climate change.²⁶ However, also overall air pollution affects children more and in a different way than adults. Similar to their vulnerability to malnutrition, children “have a higher respiratory rate and take in more air on a body weight basis than adults.”²⁷ Again, children’s still developing and therefore immature immune systems come into play and place them at a higher risk of damage from any inhaled toxicants and toxins.²⁸ Additionally, exposure to air pollution in childhood “may result in a reduction in lung function and ultimately in increased risk of chronic respiratory illness”.²⁹

2.2.5. Mental health impacts

In addition to the physical well-being, children’s mental health is also often impacted by natural disasters. It is often reported that children, especially young children, develop PTSD which has long-term effects on their lives.³⁰ Besides the aftermaths of natural disasters climate change in general affects children. The psychological impact of climate change includes fear, sadness, anger and a sense of powerlessness.³¹ Especially increased levels of anxiety regarding climate change have been observed.³²

2.2.6. Summary health impacts

Overall it can be said that, due to their still developing physique and physical defence systems, children are more vulnerable to and impacted by effects of climate change which leave adults largely unaffected.³³ Children are especially at risk of long-term and cumulative health impacts of climate change since they are exposed to the effects of climate change from a younger age and for an overall longer time than present-day adults.³⁴ Early afflictions caused by climate change can worsen into chronic illnesses or cognitive impairments, thereby affecting children over their entire future lifetime.³⁵ This shows that children are not only at a higher risk of experiencing health risks due to climate change in the present day but also at risk of being impaired over the course of their whole lives due to any physical afflictions in their childhood caused by climate change. This already ties into another aspect which is often claimed to be part of the disproportionate impact of climate change on children: intergenerational equity.

2.3. Intergenerational Equity as Part of the Disproportionate Impact

Climate change has a certain temporal nature, meaning it is constantly worsening and the most significant threats are yet to come.³⁶ Therefore, the concept of intergenerational equity is crucial for examining children’s disproportionate affection by climate change and child-led strategic climate litigation. The Committee on the Rights of the Child (the Committee) mentions the concept of

²⁵ Ibid.

²⁶ A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p.7 (2022).

²⁷ UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.18 (2014).

²⁸ Ibid.

²⁹ Ibid. p.19.

³⁰ A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, p.9 (2022).

³¹ A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. -Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, p.345 (2020).

³² B. Lewis, *Children’s Human Rights-based Climate Litigation at the Frontiers of Environmental and Children’s Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.184; S.E.L. Burke, A.V. Sanson, J. Van Hoorn, *The Psychological Effects of Climate Change on Children*, *Current Psychiatry Reports*, 20 (35), p.35 (2018).

³³ UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.16 (2014).

³⁴ Ibid.

³⁵ UNICEF Innocenti Research Centre, *The Challenges of Climate Change: Children on the Front Line*, p.16 (2014); A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. -Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, p.346 (2020).

³⁶ A. Daly, *Intergenerational rights are children’s rights: Upholding the right to a healthy environment through the UNCRC*, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.134.

intergenerational equity in its General Comment no.26 children's rights and the environment, with a special focus on climate change (GC no.26).³⁷

2.3.1. Definition Principle of Intergenerational Equity

The principle of intergenerational equity was majorly shaped and influenced by Brown Weiss. Her work was a turning point for thinking in that area, connecting future generations and climate change.³⁸

According to Brown Weiss, the concept of intergenerational equity relies on the idea that present generations have a certain obligation towards future generations concerning natural resources.³⁹ Every generation has an interest in receiving the earth and its available resources in as good a state as the generation before it.⁴⁰ Therefore, each generation has an obligation to pass on the planet in no worse condition than it was before with equitable access to the earth's resources.⁴¹ In the context of climate change, this obligation especially means preventing a rapid advancement of climate change and preventing or mitigating damage from climate change.⁴²

2.3.2. Connection Between Children's Rights and Intergenerational Equity

Brown Weiss in her definition of intergenerational equity only refers to future generations as those who are not born yet.⁴³ She even, in her analysis in 1989, states that the rights of future generations are not individual rights but held by a generation as a class.⁴⁴ Therefore it must be examined how the principle of intergenerational equity relates to children's rights. Brown Weiss herself picks up this issue in her elaborations in 1994 and refers to children as "the first embodiment of future generations".⁴⁵ She also argues that intergenerational rights contain protection of such a general interest that remedies for violations benefit children as a whole.⁴⁶

After Brown Weiss introduced the subject, intergenerational equity has gotten a lot of attention in the context of climate change. Especially the role of children and the definition of "future generations" are often discussed. For example, Daly in 2023 argues that present and future generations are interconnected. Generations are in constant motion as children come into the world every minute, crossing the line between future generations (those unborn) and present generations (those already born).⁴⁷ Also in 2023, the Maastricht Principles on the Human Rights of Future Generations were adopted. They give a special role to children as preamble VII. states: "Children and youth are closest in time to generations still to come and thus occupy a unique position, and have an important role to play, within this transition to long-term, multigenerational thinking. Accordingly, their perspectives and participation in decision-making with respect to long-term and intergenerational risks must be accorded special weight."

³⁷ General comment No.26 (2023) on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.11.

³⁸ A. Daly, Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.139.

³⁹ E. Brown Weiss, *Climate Change, Intergenerational Equity and International Law: an Introductory Note*, *Vermont Journal of Environmental Law*, 15 (1-2), (1989) p.330.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ E. Brown Weiss, *In Fairness to Future Generations*, *Environment*, 32 (3), (1990) p.10.

⁴⁴ *Ibid.*

⁴⁵ E. Brown Weiss, *In Fairness to our Children: International Law and Intergenerational Equity*, *Childhood*, 2, (1994) p.22.

⁴⁶ *Ibid.* p.25.

⁴⁷ A. Daly, Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.140.

The Committee too recognises the concept of intergenerational equity in GC no.26 and mentions that children consulted on the General Comment themselves “overwhelmingly”⁴⁸ referred to it. The tie between children and future generations is addressed by recognising that “[w]hile the rights of children who are present on Earth require immediate urgent attention, the children constantly arriving are also entitled to the realization of their human rights to the maximum extent”.⁴⁹ While this recognition helps to clarify that children’s rights in climate change and intergenerational equity are connected, it does not provide a detailed explanation as to why.⁵⁰ Other UN documents also refer to the concept of intergenerational equity and children’s role in it, e.g. a report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in 2018⁵¹, yet also do not explicitly explain children’s standing regarding the rights of future generations. Similarly, the most recent draft of the UN Declaration on Future Generations on the one hand defines future generations as those who do not exist yet⁵² and on the other hand mentions children as an instance to help safeguard the needs and interests of future generations.⁵³ Therefore, as Nolan points out, UN documents do not provide an authoritative definition or explanation of the implications of children’s rights for the principle of intergenerational equity.⁵⁴

A different approach taken by Skogly clearly positions children in the group of future generations. She defines the term “human rights of future generations” as the rights of “current youth and children, and other people who will live in the future”.⁵⁵ It is furthermore pointed out that children’s future lifetimes and their enjoyment of their human rights are influenced by the conduct of adults today.⁵⁶ This interpretation clearly takes the impairment of human rights for a significant period of a future lifetime as the criterion for “future generations”.

Skogly remains one of the only ones who establish such a clear classification since the lack of clarity on children’s rights and intergenerational equity is even reflected in climate litigation. Nolan remarks that, while climate change cases, especially child-led litigation, often refer to intergenerational equity, courts and litigators alike only engage with the principle on a superficial basis.⁵⁷ Despite courts partially accepting that children are part of or represent future generations, they do not give a detailed justification for their findings.⁵⁸

While no clear answer on how children shall be positioned in the principle of intergenerational equity can be provided, scholars, UN bodies and courts agree that children’s rights and any future impairment of those due to climate change are part of the principle. This again poses an additional impact on children, tying back to the disproportionate impact of climate change on children overall.

⁴⁸ General comment No.26 (2023) on children’s rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.11.

⁴⁹ Ibid.

⁵⁰ A. Daly, Intergenerational rights are children’s rights: Upholding the right to a healthy environment through the UNCRC, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.141.

⁵¹ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/37/58 (2018), para.67, para.68.

⁵² REV1 Declaration on Future Generations, para.3, (<https://www.un.org/sites/un2.un.org/files/sof-declaration-on-future-generations-rev1.pdf>), last visited (01-07-2024).

⁵³ Ibid.

⁵⁴ A. Nolan, Children and Future Generations Rights before the Courts: The Vexed Question of Definitions, *Transnational Environmental Law*, 13 (3) (forthcoming), (2024) p.16.

⁵⁵ S.I. Skogly, The Right to Continuous Improvement of Living Conditions and Human Rights of Future Generations – A Circle Impossible to Square ? *in* B. Goldblatt, J. Hohmann (eds.), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges*, p.154 (2021).

⁵⁶ Ibid.

⁵⁷ A. Nolan, Children and Future Generations Rights before the Courts: The Vexed Question of Definitions, *Transnational Environmental Law*, 13 (3) (forthcoming), (2024) p.8.

⁵⁸ Ibid.

2.4. Conclusion Disproportionate Impact

As the previous elaborations show, children are among the most vulnerable considering the effects of climate change. Due to their still developing physiology the effects climate change has on human health, disproportionately affect children. Next to the physical aspects, there are also social and temporal aspects heightening the impact of climate change on children. Since children are exposed to climate change earlier and for a longer period than adults, any impact is likely to leave a long-lasting effect on children and their future lifetimes. This temporal aspect of the disproportionate impact ties into the concept of intergenerational equity. While there is no uniform or authoritative explanation of how children's rights can be positioned in intergenerational equity, all this amounts to a significant disproportionate impact of climate change on children.

3. Definition of Child-led Strategic Climate Litigation

After setting out the disproportionate impact of climate change, this chapter will seek to define the term “child-led strategic climate litigation”. The term “child-led strategic climate litigation” contains three elements: “strategic”, “climate litigation” and “child-led”.

Therefore, this chapter will first examine what the terms “strategic litigation”, “strategic climate litigation” and “child-led” encompass and then base its definition of “child-led strategic climate litigation” on that.

3.1. Strategic Litigation

The term “strategic litigation” first emerged in the 1960s in the United States.⁵⁹ This form of litigation has been an important tool to advance rights, especially human rights.⁶⁰ Strategic litigation can be defined as litigation that seeks to achieve rights-related change in law, policy and/or public awareness, ultimately increasing rights enjoyment.⁶¹ In other words, strategic litigation aims to achieve impacts beyond the individual plaintiffs in the case at hand.⁶²

Regarding the very aim of strategic litigation, it is important to also note that cases which are unsuccessful in front of courts can still invoke the desired change by raising public awareness for the issue and initiating new policies or laws in legislative bodies and governments.⁶³ Achieving the very objective of the litigation might sometimes require not to bring a case to court, but rather rely on other mobilisation mechanisms, like campaigning or direct advocacy with governments.⁶⁴

While many different terms for this type of litigation exist, inter alia “impact litigation” or “public interest litigation”, this thesis will use the term “strategic litigation” due to their interchangeability.⁶⁵

3.2. Strategic Climate Litigation

Strategic climate litigation is a certain subtype of strategic litigation. Since several effects of climate change have become present in the last years, many types of cases which concern climate change or environmental matters in some ways have been brought to courts. However, not all cases that concern climate change or environmental matters can be classified as strategic climate litigation.

As Schoukens points out the term “climate litigation” covers a broad range of cases, including holding companies or private actors accountable for their contribution to climate change.⁶⁶ Saravesi in her analysis of climate litigation also sets out that some cases concerning climate and environmental matters focus on particular, individual claims.⁶⁷ These cases only touch upon climate change incidentally, as the cause for or background of the environmental phenomenon which caused the claimed violation, e.g.

⁵⁹ S.L. Cummings, D.L. Rhode, Public Interest Litigation: Insights from Theory and Practice, *Fordham Urban Law Journal*, 36 (4), (2009) p.606.

⁶⁰ Cf. Open Society Justice Initiative, *Strategic Litigation Impacts – Insights from Global Experience*, (2018) p.42.

⁶¹ Open Society Justice Initiative, *Strategic Litigation Impacts – Insights from Global Experience*, (2018) p.25; A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.3.

⁶² A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.3.

⁶³ M. McCann, Law and Social Movements: Contemporary Perspectives, *Annual Review of Law and Social Science*, 2, (2006) p.26, p.31, p.32; J. Peel, R. Markey-Tower, Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases, *German Law Journal*, 22, (2021) p.1486; see also for direct and indirect effects of strategic climate litigation 3.1.2.

⁶⁴ Open Society Justice Initiative, *Strategic Litigation Impacts – Insights from Global Experience*, (2018) p.25.

⁶⁵ Ibid.

⁶⁶ H. Schoukens, Strategic Climate Change Litigation and the EU Habitats Directive: Squaring the Circle with the Help of the U.S. Endangered Species Act?, *Journal for European Environmental & Planning Law*, 20, (2023) p.52.

⁶⁷ A. Saravesi, Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, *Journal of Human Rights and the Environment*, 13 (1), (2022), p.16.

deforestation or operation of coal power plants.⁶⁸ Claims in such cases do not address states' policies on climate change and no broad change is sought.⁶⁹

Starting from the definition of strategic litigation above⁷⁰, it makes more sense to take a more limited approach to the term "strategic climate litigation" and not include the cases described in the paragraph above in the definition. This is supported by Schoukens' definition of the term which notes that strategic climate litigation are cases which aim to generate impacts that go beyond an individual case.⁷¹ Since strategic litigation seeks systematic change⁷², it seems more intuitive to classify the aspect that climate change concerns are the main focus of the litigation, meaning inadequate climate policy or laws are at the core of the applicants' claims⁷³, as a trait for strategic climate litigation. Such cases, as Saravesi points out, especially connect climate change and human rights. She explains that human-rights-based claims are used to fill gaps to sanction inadequate actions against climate change which are left by environmental law⁷⁴ and to provide remedies where there are none available otherwise.⁷⁵ To furthermore take the definition of strategic litigation into account, this thesis will only focus on cases brought against states, not private actors, as strategic climate litigation.

Based on these considerations, strategic climate litigation, for the purpose of this thesis, is defined as litigation that seeks to hold states responsible for inaction or insufficient action regarding climate change and aims to invoke change in government policy by drawing on human or fundamental rights.⁷⁶ Similar to strategic litigation in general, it is also important to note that the effects of strategic climate litigation are not limited to courts' rulings. One can differentiate between direct and indirect effects. Direct effects are any changes in states' climate change policies and legislations brought about by successful litigation and court rulings.⁷⁷ Indirect effects are those that go beyond the legal power of court rulings. They include raising public awareness for the issue of the litigation, putting pressure on governments or influencing a society's behaviour to contribute to climate change goals.⁷⁸

3.3. Child-led

According to Skelton and Nolan, the first aspect to consider when defining child-led litigation is to determine who initiated the case.⁷⁹ Specifics for this may depend on the rules in domestic procedural law, as different jurisdictions have different provisions on the standing required to bring a case to court. Especially in the case of strategic litigation in children's rights, cases are also often brought to courts by

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ See 3.1.

⁷¹ H. Schoukens, Strategic Climate Change Litigation and the EU Habitats Directive: Squaring the Circle with the Help of the U.S. Endangered Species Act?, *Journal for European Environmental & Planning Law*, 20, (2023) p.53.

⁷² See 3.1.

⁷³ A. Saravesi, Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, *Journal of Human Rights and the Environment*, 13 (1), (2022), p.16.

⁷⁴ Ibid. p.8.

⁷⁵ A. Savaresi, Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation, *Questions of International Law Zoom-In*, 77, (2021) p.2.

⁷⁶ This definition is also found in or based on the following literature: A. Saravesi, Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, *Journal of Human Rights and the Environment*, 13 (1), (2022), p.8; H. Schoukens, Strategic Climate Change Litigation and the EU Habitats Directive: Squaring the Circle with the Help of the U.S. Endangered Species Act?, *Journal for European Environmental & Planning Law*, 20, (2023) p.53.; J. Nedevska, An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges, *Sustainability*, 13, (2021) p.1.

⁷⁷ J. Peel, R. Markey-Tower, Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases, *German Law Journal*, 22, (2021) p.1486.

⁷⁸ Ibid.

⁷⁹ Cf. A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.5.

adults, such as guardians or parents.⁸⁰ One type of adult-led litigation in children's rights is guardians ad litem. This legal concept is especially present in the United States. Generally, a guardian ad litem is "a legal representative appointed by the court to protect a child's best interests in litigation before the court".⁸¹ Furthermore, some jurisdictions have the possibility for judges themselves to initiate a case.⁸² But also more collective action is possible in children's rights strategic litigation. This often takes the form of a group of individual children, without a particular form of organisation, claiming their rights within one case.⁸³ If the respective jurisdiction has the possibility of a collective litigation complaint mechanism, such has also been used by litigators in children's rights strategic litigation.⁸⁴ Even though some of these forms to initiate a case include adults acting on behalf of children, litigation led by children themselves is also not completely independent from adult involvement. Children are usually not likely to themselves bring a case in front of a court or to a litigator but rather receive some form of support and consultation in the process.⁸⁵ Therefore, for the sake of a realistic view on strategic climate litigation, the term "child-led" will not exclude any cases where adults were involved in the process or decision to bring a case to court. Rather, "child-led" for the purpose of this thesis refers to cases where at least one of the plaintiffs is a person who is under the age of 18 when the claim is lodged at court.

3.4. Child-led Strategic Climate Litigation

Based on the preceding considerations, for the purpose of this thesis child-led strategic climate litigation is defined as litigation that aims to invoke systemic change in a state's actions against climate change and where at least one of the plaintiffs is a person under the age of 18 when the claim is lodged at court. This limited definition is necessary because this thesis adopts a comparative approach and is based on literature research and legal analysis of available case documents. The material available for analysis is limited, therefore several non-legal factors such as the intention behind the claims lodged and the involvement of adults in the decision to bring the case to court cannot be examined since they are usually not reflected in accessible documents on the cases. The definition above ensures that there is an adequate selection of cases and a sufficient basis to compare them.

Furthermore, the words "plaintiff", "claimant" and "applicant" will be used interchangeably, depending on which term is used in the according type of legal action or jurisdiction. The default term will be applicant.

⁸⁰ A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.5.

⁸¹ C.G. Hastings, Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes, *Boston College Third World Law Journal*, 24 (2), (2004) p.293.

⁸² A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.5.

⁸³ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.55.

⁸⁴ A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.7.

⁸⁵ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.3.

4. Comparison of Legal Argumentation in Adult- and Child-led Cases

After setting out the disproportionate impact of climate change on children, it stands to examine to what extent this is reflected in child-led strategic climate litigation. As mentioned above the disproportionate impact concerns several aspects of children's lives and also concerns the concept of intergenerational equity. The following chapter will compare child-led and adult-led strategic climate litigation cases to examine how they respectively claim their rights and connect them to climate change. This will give an indication of the particular characteristics of child-led strategic climate litigation in comparison to adult-led cases.

The legal argumentation of six cases will be examined in-depth – three adult-led and three child-led. To ensure a reasonable basis for comparison, all the cases examined concern carbon emissions and they will be examined according to jurisdictions. Therefore, one child-led case and one adult-led case brought to national courts and one child-led and one adult-led case respectively brought to the European Court of Human Rights (ECTHR) will be examined. Lastly, one child-led and adult-led case respectively which were brought to bodies of international treaties – the Committee under the Optional Protocol on a communications procedure (OPIC) and the Inter-American Commission on Human Rights – will be examined.

For comparison, the following criteria will be examined for each case:

- Who are the applicants? Is it an individual, a group of individuals or an organisation?
- The rights of which legal document are claimed (e.g. domestic constitution or international treaties)?
- The violation of which rights are claimed?
- How are the applicants arguing for a particular vulnerability or impact of climate change? In child-led cases, how is the disproportionate impact described above reflected in legal argumentation?
- To what extent do the applicants refer to intergenerational equity?

4.1. National Courts

4.1.1. Adult-led: Climate Action Czech Republic v. Czech Republic

Climate Action Czech Republic et al. v. Czech Republic (Climate Action Czech Republic v. Czech Republic) is a case that was brought in front of the Municipal Court Prague by adult applicants, inter alia a climate justice organisation and several individuals, all residing in the Czech Republic. The applicants claimed interference with their right to life, right to health and right to privacy and family life, right to property and right to carry out economic activity according to the European Convention on Human Rights (ECHR) and the Czech Charter of Fundamental Rights and Freedoms.

The applicants argued that the current Czech legal framework failed to ensure that the state reduces its carbon emissions to the amount required to be in compliance with the Paris Agreement.⁸⁶ They set out how they are affected by listing damage to forests, loss of drinking water in springs and spells, loss of biodiversity and protected species of animals and plants as results of climate change and rights violations.⁸⁷ A core argumentation was furthermore that the present effects of climate change will only worsen in the future, posing a foreseeable and serious threat, if the state does not act now.⁸⁸ While this does not explicitly concern intergenerational equity, it does touch upon a certain temporal element of climate change which the concept of intergenerational equity also relies on.

⁸⁶ Climate Action Czech Republic v. Czech Republic (15th June 2022), para.28.

⁸⁷ Ibid. para.7 – 9.

⁸⁸ Ibid. para.28.

4.1.2. Child-led: Neubauer v. Germany

Neubauer et al. v. Germany (Neubauer v. Germany) was a landmark decision and the first child-led strategic climate litigation in the country. Several plaintiffs, including a group of children, claimed a violation of their fundamental rights as set out in the constitution in front of the German Constitutional Court. They claimed that the current actions of the German legislative, namely the Climate Protection Act, fail to meet the aims of the Paris Agreement and that this violates their fundamental rights to life, physical integrity and health, property and the right to ecological existential minimum which the plaintiffs tried to establish in their argumentation.⁸⁹

For their particular vulnerability to climate change, the plaintiffs heavily relied on future disadvantages they will suffer. It was argued that these future right violations are foreseeable due to scientific research and findings, therefore the state must protect fundamental rights from these foreseeable future risks in the legislation they pass in the present day.⁹⁰ The plaintiffs also referred to a form of intergenerational equity and the remaining carbon emissions budget according to the Paris Agreement.⁹¹ They did not focus on the substantial impact on children by referring to negative health impacts but rather referred to the impact future mitigation measures would have on today's children's freedom rights.⁹² In detail, it was argued that the state allowing for a large portion of the remaining carbon emissions budget to be used up by 2030, future mitigation measures will be of a much harsher nature and restrict freedom rights much more compared to current restrictions.⁹³ Therefore, it can be said that Neubauer v. Germany frames the concept of intergenerational equity in a different way here: instead of arguing that all generations are equally entitled to the earth's resources and therefore each generation has an obligation to preserve the earth and pass it on in no worse state than it received it, the focus is on the burden of mitigation of climate change that each generation must bear, concluding that states must take measures in the present day which are drastic enough so that future generations must not endure measures which restrict their freedom rights more severely. The plaintiffs claimed a so-called "full-stop" for carbon emissions and connected freedom rights would await children in their future lifetime and future generations if the state does not sufficiently set limits for carbon emissions in the present day.⁹⁴

The court dismissed several specific rights violations, clarifying that these are too abstract and cannot be seen as subjective rights since fundamental rights deriving from the constitution can only be held by living humans.⁹⁵ Despite the dismissal of the majority of the claims, the ruling was still a landmark decision in German jurisprudence. Going off the plaintiffs' claims for an equal distribution of the mitigation measures across generations, the constitutional court found that the state is obliged to an intertemporal guarantee of fundamental rights.⁹⁶ This obligation includes the responsibility to distribute restrictions and measures to fight climate change evenly across current and future generations.⁹⁷ It was found that the current efforts of the German state to combat climate change do not amount to the level of efforts required to ensure that the intertemporal guarantee of fundamental rights is abided by.⁹⁸ Every amount of carbon emission that is allowed today directly lessens the amount that can be spent in the future, placing a burden on future generations.

⁸⁹ Neubauer et al. v. Germany (24th March 2021), para.41, para.43.

⁹⁰ Neubauer et al. v. Germany (24th March 2021), para.45.

⁹¹ Ibid. para.71.

⁹² Ibid. para.72.

⁹³ Ibid. para.71, para.72.

⁹⁴ Ibid. para. 72.

⁹⁵ Ibid. para.146, para.148.

⁹⁶ Ibid. operative part of the judgment, para.4.

⁹⁷ Ibid. operative part of the judgment, para.4.

⁹⁸ Ibid. para.266.

4.1.3. Comparison

Regarding the rights which are claimed in these domestic cases, it can first be noticed that *Climate Action Czech Republic et al. v. Czech Republic* also drew on rights in the ECHR for their claims as opposed to *Neubauer v. Germany* which based claims solely on national constitutional rights. The reason for that might just be that the applicants in *Climate Action Czech Republic et al. v. Czech Republic* wanted to draw on case law of the ECtHR for their argumentation.⁹⁹

Substantially, however, the two cases claim similar rights, the right to life and a form of the right to health or physical integrity, although the terminology differs due to the national constitutions. It is also conspicuous that the child-led case tries to establish a new constitutional right, trying to claim a right to an ecological minimum. While it ultimately fails in this attempt, this shows a certain level of innovation which *Climate Action Czech Republic et al. v. Czech Republic* does not display.

It can overall be noticed that *Neubauer v. Germany* makes use of national constitutional rights rather than rights enshrined in human rights treaties, especially the CRC. This might be due to the fact that Germany has a more dualist system in place¹⁰⁰ which makes it difficult for parties to directly draw on international human rights and which also means that constitutional rights have the highest rank in the countries. While this is an understandable choice, it leads to question how children's rights-based the claims truly were. As depicted above the case heavily relies on future violations and the temporal nature of climate change, not explicitly drawing on the current impact of climate change on children. Germany does not have specific children's rights incorporated in their constitutions, so the plaintiffs refer to constitutional rights which apply to adults and children alike. It of course can be argued that the constitutional rights, since they apply to children, entail the same substance as the corresponding rights in the CRC. However, it must also be noted that the rights in the CRC provide a more child-centred lens than the national constitutional rights on the issues. While the case was brought to court before GC no.26 was published in 2023, there were already some elaborations on children and climate change by the Committee.¹⁰¹ And while Germany does not have the CRC directly incorporated in its domestic legislation, it has ratified the CRC. So, considering the court and applicants were willing to refer to the Paris Agreement as an international treaty, it could have been helpful to set out the current impact of climate change on children by drawing on the rights enshrined in the CRC and General Comments. Of course, it might have been a strategic choice to stick to domestic constitutional rights to keep the claims as concrete and domestic as possible. Still, since the case relies on the plaintiffs' ages for their claims, an additional elaboration on specific children's rights might have further illustrated the point that climate change impacts are not future uncertainties but rather already currently affecting children. This might have also led to a different assessment by the court since some claims were dismissed as being too abstract and too far in the future.¹⁰²

When establishing a particular vulnerability, both *Neubauer v. Germany* and *Climate Action Czech Republic v. Czech Republic* drew on the health damages due to climate change. Yet, *Climate Action Czech Republic v. Czech Republic* argued already existing health disadvantages which are caused by climate change, e.g. by the loss of drinking water, while the plaintiffs in *Neubauer v. Germany* only refer to health issues which already exist independently of climate change and argue that these will worsen

⁹⁹ *Climate Action Czech Republic v. Czech Republic* (15th June 2022), para.19.

¹⁰⁰ see Article 59 GG; M. Nettesheim, Artikel 59 GG in G. Dürig, R. Herzog, R. Scholz (eds.), *Grundgesetz Kommentar*, 102. Edition, para.182, para.184, para.185.

¹⁰¹ E.g. General comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc. CRC/C/GC/15 (2013), para.5: "a growing understanding of the impact of climate change [...] on children's health" and para.50 also refers to climate change: "The Committee draws attention to the relevance of the environment, beyond environmental pollution, to children's health. Environmental interventions should, inter alia, address climate change [...]".

¹⁰² *Neubauer et al. v. Germany* (24th March 2021), para.146, para.148.

due to the effects of climate change. In this regard, the effects of climate change are depicted as still in the future in *Neubauer v. Germany*. Still, both cases focus on the line of argumentation that a worsening of health is foreseeable if the states' inadequate action regarding the reduction of emissions continues. However, *Climate Action Czech Republic v. Czech Republic* established a continuing unlawful interference with their rights in front of the court.¹⁰³ In comparison, *Neubauer v. Germany* focused on future effects of climate change and the state's responsibility to protect children in their coming lifetime from rights violations that will occur both due to climate change itself and the state's measures against it, which supposedly will grow stricter and stricter.

As already mentioned above the reliance on future violations in *Neubauer v. Germany* relates to the concept of intergenerational equity. Considering the court's reluctance to accept most of the claims for future rights violations, it is noteworthy that the plaintiffs succeed in arguing that "off-loading"¹⁰⁴ the burden of worse future risks poses a present injustice to German children and future generations who will be affected by more radical state action or effects of climate change for a longer period of time due to their young age.¹⁰⁵ This in itself is a success not every child-led strategic climate litigation has achieved.¹⁰⁶

Overall, for these cases, it can be observed that the adult-led case relies more on present rights violations, while child-led cases focus more on foreseeable, yet future rights violations that will occur due to a worsening of climate change.

4.2. European Court of Human Rights

4.2.1. Adult-led: *KlimaSeniorinnen v. Switzerland*

Verein KlimaSeniorinnen et al. v. Switzerland (*KlimaSeniorinnen v. Switzerland*) is a case brought to the ECtHR by an association of elderly women and four individual applicants. It is challenging Switzerland's provisions on carbon emission reduction targets since these are not meeting the numbers required to achieve the aim set by the Paris Agreement: limit global warming to a temperature increase of 1,5°C.¹⁰⁷ The applicants claimed that, inter alia, their rights according to Articles 2 and 8 ECHR are violated due to that.

The applicants based their claim on the effects of heatwaves on their health.¹⁰⁸ They argued that women over the age of 75 are especially vulnerable, a higher health risk for them than for the general population.¹⁰⁹ It was argued that this particular victim status co-exists with a general public interest for climate change impacts.¹¹⁰ The link between the applicants' individual rights violations and the insufficient action by the state in the following way: heatwaves are a result of climate change and their very occurrence and any negative effects from it would be significantly reduced if Switzerland complied with its obligations of the Paris Agreement.¹¹¹ The progress of climate change and its consequences

¹⁰³ M.A. Tigre, Guest Commentary: An Unexpected Success for Czech Climate Litigation, *Climate Law – A Sabin Center Blog*, (<https://blogs.law.columbia.edu/climatechange/2022/10/18/guest-commentary-an-unexpected-success-for-czech-climate-litigation/>), last visited (01-07-2024).

¹⁰⁴ L. O'Callaghan-White, A. White, *Taking Governments to Court Climate Litigation and its Consequences*, Institute of International and European Affairs, p.12.

¹⁰⁵ *Ibid.*

¹⁰⁶ E.g. *Mathur et al. v. His Majesty the King in Right of Ontario* (14th April 2023).

¹⁰⁷ *Verein Klimaseniorinnen et al. v. Switzerland*, application to the ECtHR (26th November 2020), para.8, para.9.

¹⁰⁸ *Verein Klimaseniorinnen et al. v. Switzerland*, application to the ECtHR (26th November 2020), para.2 – 4.

¹⁰⁹ *Ibid.* para.6.

¹¹⁰ *Ibid.* additional submission, para.39.

¹¹¹ *Ibid.* para.13.

was also included in the argumentation. Any worsening of negative effects of climate change was argued to be foreseeable in the coming years, still in the lifetime of women over the age of 75.¹¹²

The applicants did not explicitly refer to intergenerational equity, but they did draw on the principle of precaution to illustrate how Switzerland is responsible for mitigating future rights violations caused by climate change by implementing sufficient measures in the present day.¹¹³ In its essence this is very similar to the concept of intergenerational equity; establishing an obligation to act today to prevent as much damage in the future as possible. What is conspicuous, is that while the applicants themselves never explicitly referred to intergenerational equity, several third-party interveners do.¹¹⁴ The ECtHR itself in its judgement also elaborates on the concept of intergenerational burden-sharing when considering Switzerland's obligations.¹¹⁵ This, as Nolan remarks in her analysis of the judgement, is similar to the argumentation of the constitutional court in *Neubauer v. Germany*.¹¹⁶ What is especially interesting is the way the ECtHR refers to intergenerational burden-sharing not only for future generations but also for "the different generations of those currently living".¹¹⁷

In its ruling in April 2024, the court found a violation of all rights claimed. The ruling is overall a landmark decision for climate litigation, as it is the first time that the ECtHR found a violation in a state's inadequate measures against climate change.¹¹⁸ In this context, the judgement sets out specific requirements for a victim status regarding climate change. The reason for such a limited approach to the victim status for climate change under the ECtHR jurisdiction is, according to the court, that due to "the nature of climate change and its various adverse effects and future risks"¹¹⁹ the number of people affected and thereby potential victims would otherwise be "indefinite".¹²⁰ Therefore, the court requires a person to be directly and personally affected by the alleged failures of a state regarding climate change.¹²¹ In detail, the court set out two requirements: "[...] (a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and (b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm."¹²² This seems at first glance to limit the possibility to claim victim status significantly. However, the court in its elaborations preceding these requirements mentions the intergenerational burden-sharing regarding climate change and how the members of society "who stand to be most affected by the impact of climate change can be considered to be at a distinct representational disadvantage"¹²³, which lets one hope that children's particular vulnerability to climate change will find adequate consideration when the ECtHR applies this standard in the future.

¹¹² Ibid. additional submission, para.29

¹¹³ Ibid. additional submission, para.56.

¹¹⁴ E.g. United Nations High Commissioner for Human Rights, the United Nations Special Rapporteurs on toxics and human rights; on human rights and the environment; and the Independent Expert on the enjoyment of all human rights by older persons in *Verein Klimaseniorinnen et al. v. Switzerland* (9th April 2024), para.377, para.379.

¹¹⁵ *Verein Klimaseniorinnen et al. v. Switzerland* (9th April 2024), para.419.

¹¹⁶ A. Nolan, *Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klimaseniorinnen Decision*, Blog of the European Journal of International Law (<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>), last visited (01-07-2024).

¹¹⁷ *Verein Klimaseniorinnen et al. v. Switzerland* (9th April 2024), para.420.

¹¹⁸ F. Bretscher, C. Nacht, V. Hirsiger, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: European Court of Human Rights identifies shortfalls in Swiss climate mitigation measures and access to justice*, Global Litigation News, (<https://globallitigationnews.bakermckenzie.com/2024/04/17/verein-klimaseniorinnen-schweiz-and-others-v-switzerland-european-court-of-human-rights-identifies-shortfalls-in-swiss-climate-mitigation-measures-and-access-to-justice/>), last visited (01-07-2024).

¹¹⁹ *Verein Klimaseniorinnen et al. v. Switzerland* (9th April 2024), para.479.

¹²⁰ Ibid. para.479.

¹²¹ Ibid. para.487.

¹²² Ibid. para.487.

¹²³ Ibid. para.484.

4.2.2. Child-led: Duarte Agostinho v. Portugal

Duarte Agostinho et al. v. Austria and 32 others (Duarte Agostinho v. Portugal) is the first climate change application brought to the ECtHR. It concerns 33 ECHR state parties' reduced carbon emissions targets. The application was also lodged without prior domestic proceedings in any of the states targeted. The applicants reside in Portugal but brought the case against 32 additional states, so extraterritorial jurisdiction was a big part of the claims in this case.

A violation of the rights according to Articles 2, 8 and Article 14 ECHR is claimed. No rights under the CRC were claimed, but the argumentation drew on the principle of the best interests of the child in Article 3 CRC by drawing on case law of the ECtHR which states that the court must assess any claims in accordance with this principle.¹²⁴

The applicants, instead of laying out children's particular vulnerability to the effects of climate change, referred to an expert paper which lays out a particular vulnerability due to the children's location in Portugal, rather than their age.¹²⁵ However, the applicants still listed all the impacts of climate change on their lives in the present day, depicting the consequences of heatwaves, wildfires, air pollution and mental health impacts caused by climate change on their health, education and possibilities to play outdoors.¹²⁶ These depictions, whilst not explicitly referring to children's disproportionate impact by climate change, in substance reflect just that: the impact of heatwaves on their bodies, respiratory diseases caused or worsened by air pollution, smoke from wildfires and heatwaves, no access to schools in the aftermath of a wildfire and a negative mental health impact due to the feelable effects of climate change in their everyday life.¹²⁷ It was argued that all states violate their obligations under the ECHR by implementing insufficient efforts to reduce carbon emissions in a way that is in line with the targets of the Paris Agreement since science shows that global warming is on its way to exceed the 1,5°C target set in the agreement.¹²⁸ It was also argued that these obligations must be read in conjunction with the principle of intergenerational equity.¹²⁹

The applicants also took on the concept of intergenerational equity in the form of age-based discrimination in their legal argumentation. A violation of Article 14 of the ECHR was claimed. The applicants argued that age can be seen as "other status" under the provision, as established by previous case law of the ECtHR.¹³⁰ It was then established that the interference the insufficient action of states against climate change has and will have on the applicants' rights in Articles 2 and 8 of the ECHR is greater than upon older generations since the applicants will live longer and the effects of climate change will worsen over time.¹³¹ Lastly, it was argued that the inadequate mitigation actions of states against climate change shift the burden of climate change onto children and younger generations without an objective and reasonable justification.¹³²

In its judgement in April 2024, the court ultimately declared the application inadmissible, due to the lack of exhaustion of domestic remedies in Portugal and the lack of jurisdiction towards the applicants by the other 32 states.¹³³ It furthermore referred to the new standards set for a victim status regarding climate

¹²⁴ Ibid. additional submission, para.8.

¹²⁵ Duarte Agostinho et al. v. Austria et al., application to the ECtHR (2nd September 2020), para.16.

¹²⁶ Duarte Agostinho et al. v. Austria et al., application to the ECtHR (2nd September 2020), para.17 – 23; Duarte Agostinho et al. v. Austria et al. (9th April 2024), para.26.

¹²⁷ Duarte Agostinho et al. v. Austria et al. (9th April 2024), para.26.

¹²⁸ Duarte Agostinho et al. v. Austria et al., application to the ECtHR (2nd September 2020), para.29.

¹²⁹ Ibid. para.28.

¹³⁰ Ibid. para.31.

¹³¹ Ibid. para.31.

¹³² Ibid. para.31.

¹³³ Duarte Agostinho et al. v. Austria et al. (9th April 2024), para.231.

change in *KlimaSeniorinnen v. Switzerland*¹³⁴ and declared that it could not be examined if the applicants fit the criteria since there was a lack of clarity regarding their individual situations.¹³⁵

4.2.3. Comparison

It must first be noted that both, *Klimaseniorinnen v. Switzerland* and *Duarte Agostinho v. Portugal* are two of the first three climate change cases brought in front of the ECtHR which serve as precedents for several similar claims which followed.¹³⁶

Both cases based their claims of rights violations on already feelable effects of climate change due to heatwaves. Furthermore, both cases used the applicants' ages as a way to substantiate their claims of a disproportionate impact by climate change and states' insufficient action against it. However, while the applicants in *Klimaseniorinnen v. Switzerland* argued that their age makes them more vulnerable to the effects of climate change, on a physical level, *Duarte Agostinho v. Portugal* argued that the applicants' ages expose them to more severe effects and for a longer period of time, so on a temporal level. The factor of age is also the basis for the claim of the violation of Article 14 ECHR in *Duarte Agostinho v. Portugal*. While this child-led case drew on discrimination based on age directly, the legal argumentation of the applicants in *Klimaseniorinnen v. Switzerland* did not.

As mentioned above, especially *Klimaseniorinnen v. Switzerland* is perceived as a landmark decision in the ECtHR's jurisprudence on climate change. The court's elaborations on victim status have already been discussed and analysed thoroughly. The inadmissibility decision in *Duarte Agostinho v. Portugal* on the other hand could be seen as a loss for child-led strategic climate litigation. Many already criticised the case as too ambitious and predicted the ECtHR's decision.¹³⁷ Still, Nolan concludes in her analysis of the *Klimaseniorinnen* case that the court's findings are useful for future child-led strategic climate litigation. She notes how the ECtHR recognised that those who are most at risk of climate change are often excluded from democratic processes which are responsible for shaping sustainable climate policy.¹³⁸ Furthermore, the court commented on the particular importance of intergenerational burden-sharing in the context of climate change and how legal action by interest groups may be one of the only means available to those affected to be heard on the issue.¹³⁹ Ultimately Nolan remarks that this attention given to intergenerational issues and standing of organisations sets the scene for future climate change litigation brought by children's rights organisations.¹⁴⁰ And, indeed, while *Duarte Agostinho v. Portugal* failed on admissibility, the general elaborations on climate change victim standing in *Klimaseniorinnen* can at least provide guidance or a "recipe for success" of sorts for future child-led cases.

¹³⁴ See 4.1.2.1.

¹³⁵ *Duarte Agostinho et al. v. Austria et al.* (9th April 2024), para.229.

¹³⁶ European Court of Human Rights, Press Release, ECHR 046 (2023) (9th February 2023).

¹³⁷ E.g. O.W. Pedersen, Climate Change and the ECHR: The Results Are In, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/>), last visited (01-07-2024); M. Milanovic, A Quick Take on the European Court's Climate Change Judgments, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>), last visited (01-07-2024).

¹³⁸ A. Nolan, Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' *Klimaseniorinnen* Decision, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>), last visited (01-07-2024).

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

4.3. International and Regional Treaty Bodies

4.3.1. Adult-led: Arctic Athabaskan Peoples v. Canada

The Arctic Athabaskan Peoples' petition to the Inter-American Commission on Human Rights (Arctic Athabaskan Peoples v. Canada) claimed that due to Canada's failure to reduce black carbon emissions the claimant's rights to property, culture and physical health in the American Convention on Human Rights were violated.¹⁴¹

The petitioners argued for a particular vulnerability to the effects of black carbon emissions due to their indigenous lifestyle. In detail, they set out how black carbon emissions severely affect the Arctic ice, resulting in its fast melting which affects the lives of Arctic Athabaskan peoples.¹⁴² According to the petitioners, the reduction of black carbon emissions is one of the most effective ways to reduce melting in the Arctic.¹⁴³ It was argued that the effects of climate change, the rapid melting of the Arctic ice, are felt by Arctic Athabaskan Peoples, e.g. by warmer temperatures, wildfires, the difficulty of travelling due to burned areas, changing vegetation and worsened conditions in animals.¹⁴⁴ These effects were claimed to be worse and more rapid than in other parts of the world.¹⁴⁵ Especially the petitioners' cultural rights played a crucial role in explaining their particular vulnerability. It was argued that, since aboriginal culture and traditions are closely tied to the environment, climate change affects the Arctic Athabaskan Peoples' cultural rights.¹⁴⁶ Overall, the survival of their culture relies on the natural environment.¹⁴⁷ It was depicted how climate change in this regard affects traditional practices of hunting, fishing, gathering and access to traditional foods.¹⁴⁸ Another aspect that was brought up for a particular vulnerability is that the Arctic Athabaskan Peoples as a group live off their natural environment and are therefore especially vulnerable to the effects of climate change.¹⁴⁹

The petitioners' argumentation also made a link to younger generations by arguing that the changing ecological circumstances mean that older people can no longer pass on knowledge of nature and surroundings due to unpredictable weather.¹⁵⁰ That remains however the only reference the petition makes to future generations. Not even the otherwise often found argument, that the effects of carbon emissions and climate change are only expected to worsen in the future is brought up here.

4.3.2. Child-led: Sacchi v. Argentina

In *Sacchi et al. v. Argentina et al.* (*Sacchi v. Argentina*) 16 children claimed rights violations in front of the Committee under OPIC against five states: Argentina, Brazil, Germany, France and Turkey. The authors claimed violations of the right to life (Article 6), right to health (Article 24), right to culture (Article 30) and the child's best interests (Article 3).

Considering the location of the authors, it is conspicuous that only five state parties to the CRC were chosen as respondents. Only four of the 16 authors live in respondent states, Argentina, Brazil, France

¹⁴¹ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting From Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (23rd April 2013) p.10.

¹⁴² Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting From Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (23rd April 2013) p.13.

¹⁴³ *Ibid.* p.14.

¹⁴⁴ *Ibid.* p.26.

¹⁴⁵ *Ibid.* p.27.

¹⁴⁶ *Ibid.* p.42.

¹⁴⁷ *Ibid.* p.54.

¹⁴⁸ *Ibid.* p.2.

¹⁴⁹ *Ibid.* p.42.

¹⁵⁰ *Ibid.* p.44.

and Germany, while none of the authors live in Turkey. However, the choice of the respondent states proves to be strategic. The authors decided to bring a communication against these five states in particular because out of all the states which ratified OPIC, these five states are contributing the most to climate change due to their carbon emissions.¹⁵¹ This also marks claims of extraterritorial jurisdiction in this case.¹⁵²

Several claims concerned the impact on children's health due to natural catastrophes, as consequences which were foreseeable and life-threatening, caused by climate change.¹⁵³ All respondent states are part of the Paris Agreement and the authors argued that their failure to implement the necessary restrictions on carbon emissions in their jurisdictions results in these described violations.¹⁵⁴ The particular vulnerability of children due to their still-developing physiology was brought up as a line of legal argumentation. The 16 authors described the disproportionate impact of climate change on them, while not explicitly naming it as such. They set out how extreme heat, natural disasters caused by climate change, infectious diseases and the psychological impact of climate change especially affects the applicants¹⁵⁵ – the particular impact of weather extremes and air pollution due to the children's still developing physiology¹⁵⁶, restricted access to power¹⁵⁷ or clean water¹⁵⁸ and high risk for infectious diseases.¹⁵⁹

Cultural rights are also touched upon in these cases. The authors argued that due to the impact climate change has on the natural environment indigenous children's livelihood and cultural practices are heavily endangered since animal migration and natural phenomena caused by climate change impede cultural practices.¹⁶⁰ It was depicted how the effects of climate change make traditional practices, like fishing, hunting and gathering, more difficult, sometimes impossible.¹⁶¹ In their claim of a violation of Article 30 CRC, the authors argued that the endangered traditional practices are not only the main source of their livelihoods, but also "directly relate to a specific way of being, seeing, and acting in the world, that are essential to their cultural identity."¹⁶² Cultural sensitivity is one of the distinguishing characteristics of the CRC¹⁶³, with provisions beyond Article 30 having cultural dimensions.¹⁶⁴ However, considering the other provisions deal with cultural rights in the context of education and mass media, drawing on Article 30 is the only logical line of argumentation. Article 30 recognises the child's right to be part of a collective identity, including access to the traditional practices and indigenous lifestyles that come with it.¹⁶⁵ And these specific ways of life and the child's right to take part in them and enjoy them are endangered by the effects of climate change, as argued by the authors.

¹⁵¹ B. Arnoldy, Greta and 15 Kids Just Claimed Their Climate Rights at the UN, EarthJustice, (<https://earthjustice.org/article/greta-thunberg-young-people-petition-UN-human-rights-climate-change>), last visited (01-07-2024).

¹⁵² Sacchi et al. v. Argentina et al. (9th/ 10th November 2021), para.2.3, para.2.5.

¹⁵³ Ibid. para.2.2, para.3.4.

¹⁵⁴ Ibid. para.2.3, para.2.5.

¹⁵⁵ Sacchi et al. v. Argentina et al., Communication to the Committee on the Rights of the Child (23rd September 2019), para.26 – para.158.

¹⁵⁶ Ibid. para.104, para.111.

¹⁵⁷ Ibid. para.97.

¹⁵⁸ Ibid. para.108.

¹⁵⁹ Ibid. para.132.

¹⁶⁰ Ibid. para.91, para.296, para.297.

¹⁶¹ Ibid. para.96, para.133 – para.157.

¹⁶² Ibid. para.27.

¹⁶³ See preamble of the CRC.

¹⁶⁴ E.g. Article 17 (d), Article 24 (3) and Article 29 (1) (c).

¹⁶⁵ S. Lembrechts, G.E. Türkelli, W. Vandenhole, Article 30: Rights of Children from Minorities and Indigenous Origin, Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols, para.30.05; General comment No.17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), UN Doc. CRC/C/GC/17 (2013), para.28.

The aspect of intergenerational equity was also brought forward. The applicants also linked intergenerational equity to the principle of the child's best interests and non-discrimination.¹⁶⁶ The life-threatening consequences of climate change, if states fail to meet the 1,5°C-goal, were argued to be scientifically substantiated and foreseeable today and to affect children throughout their lives more severely and longer than current and past generations.¹⁶⁷ In summary, this line of argumentation argued that any negative consequences already felt by children today will be worsened over the course of time if states continue to not abide by their obligations of the Paris Agreement.

While the complaint was declared inadmissible due to the lack of exhaustion of domestic resources, the Committee's view was still seen as a landmark decision on extra-territorial jurisdiction in climate change matters, creating a new standard in this issue.¹⁶⁸

4.3.3. Comparison

What is conspicuous when comparing the legal argumentation in these two cases is that both heavily claimed violations of cultural rights. One of the claimants in *Sacchi v. Argentina* is a member of an indigenous community in Alaska, a region where also many of the claimants in the case of *Arctic Athabaskan Peoples v. Canada* are from, therefore the claims are very similar in substance, concerning the loss of access to traditional food sources¹⁶⁹ and migration of animals.¹⁷⁰ Within the argumentation for violations of cultural rights, both cases claimed particular vulnerability to the effects of climate change and drew on the risk of livelihood and cultural practices. Yet, *Sacchi v. Argentina* did not only claim current violations and effects but argued on a larger scale that future impacts will be even more severe and impact claimants in their lifetime and how states have the responsibility to negate these foreseeable risks.

It is noteworthy that children and future generations are also mentioned in the argumentation of *Arctic Athabaskan Peoples v. Canada*. However, in *Sacchi v. Argentina* children and future generations are depicted as bearers of future burdens to negate climate change while in *Arctic Athabaskan Peoples v. Canada*, they are seen as a group of people to whom cultural knowledge and practices are to be passed down to. *Arctic Athabaskan Peoples v. Canada* generally only refers to future effects as losing their cultural knowledge.

4.4. Conclusions on the Comparisons

After comparing the legal argumentation in several child-led and adult-led cases in different jurisdictions, an overall similar line of argumentation is visible. Every case examined brings forward the foreseeable risks and worsening of conditions as climate change progresses in their legal argumentation. There is an overarching argumentation that states must act now to abide by their obligations under the Paris Agreement and prevent either more severe impacts of climate change on the claimant's rights or more severe restrictions on the claimant's rights to combat climate change at a later stage. In their legal

¹⁶⁶ *Sacchi et al. v. Argentina et al.*, Communication to the Committee on the Rights of the Child (23rd September 2019), para.192.

¹⁶⁷ *Sacchi et al. v. Argentina et al.* (9th/ 10th November 2021), para.3.4.

¹⁶⁸ M. Wewerinke-Singh, *Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on Sacchi v Argentina*, Leiden Children's Rights Observatory, (<https://www.childrensrightsobservatory.org/case-notes/casenote2021-10>), last visited (01-07-2024); for more analysis of the Committee's test for extraterritorial jurisdiction: International Human Rights Law - Extraterritorial Jurisdiction - Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test - *Sacchi v. Argentina* No. CRC/C/88/D/104/2019, *Harvard Law Review*, 7, (2022), p.1981-1988; B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.180-203.

¹⁶⁹ *Sacchi et al. v. Argentina et al.*, Communication to the Committee on the Rights of the Child (23rd September 2019), para.294.

¹⁷⁰ *Ibid.* para.294.

argumentation, child-led cases tend to be more ambitious and innovative, especially when it comes to the exhaustion of domestic remedies and the attempt to establish new justiciable rights. As Lewis points out, both *Sacchi v. Argentina* and *Duarte Agostinho v. Portugal* do this, emphasising their claim that urgent action must be taken to mitigate the effects of climate change.¹⁷¹ The attempts to establish a new right could also be due to the fact that all child-led cases examined were lodged before the establishment of the right to a healthy environment in July 2022.¹⁷² In this regard, Lewis remarks that a right to a healthy environment could help children establish the impacts climate change has on their lives in climate litigation.¹⁷³

It can also be observed that both child-led and adult-led cases draw on a particular vulnerability to the effects of states' insufficient action to combat climate change. However, children tend to use their vulnerability due to their age to argue for a disproportionate impact on a temporal level, that climate change effects will affect them longer and for a larger portion of their lifetime compared to adults and past generations. Adults on the other hand use particular vulnerability, e.g. due to old age or cultural practices, in a more substantive or physical way. Child-led cases therefore connect their particular vulnerability to intergenerational equity and a disproportionate burden on their generation. Adult-led cases simply refer to this as the worsening of already present violations and as a way to argue that each state must contribute their fair share to the fight against climate change, therefore rather establishing an ongoing rights violation. This reliance of child-led strategic climate litigation on intergenerational equity only partially reflects the disproportionate impact climate change has on children. While the child-led cases analysed above drew on a certain level of particular vulnerability of children, none of them methodologically or systematically set out the disproportionate impact of climate change on children. Daly and Donger had similar findings in their respective analyses of other child-led strategic climate litigation cases. Daly especially notes that the rights of the CRC are rarely drawn on in cases in front of national courts.¹⁷⁴ She explains this by remarking that, while most countries have ratified the CRC, few have incorporated it into their national law, so invoking CRC rights in front of national courts proves difficult.¹⁷⁵ Overall, Daly speaks of a "distinct lack of engagement with the CRC".¹⁷⁶ Donger furthermore sets out that, even if CRC rights are claimed, courts hardly address them or rather draw on prevailing national law.¹⁷⁷ Both Donger and Daly also both find a preference for the argument of intergenerational equity in child-led strategic climate litigation cases.¹⁷⁸ They both criticise this preference in legal argumentation, stating that solely children's rights-based arguments remain underused so far.¹⁷⁹ Daly concludes that this is "distracting from the realisation of the potential usefulness of CRC rights"¹⁸⁰ and Donger mentions how the focus on intergenerational equity and future generations in the legal argumentation "fails to generate much-needed attention on the present-day exclusion of children's

¹⁷¹ B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.197.

¹⁷² The human right to a clean, healthy and sustainable environment, UN Doc. A/RES/76/300 (2022).

¹⁷³ B. Lewis, *Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights*, *Nordic Journal of Human Rights*, 39 (2), (2021) p.120.

¹⁷⁴ A. Daly, *Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC*, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.149.

¹⁷⁵ A. Daly, *Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC*, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.151.

¹⁷⁶ *Ibid.*

¹⁷⁷ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.276.

¹⁷⁸ A. Daly, *Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC*, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.152; E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.277, p.280.

¹⁷⁹ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.280.

¹⁸⁰ A. Daly, *Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC*, *Netherlands Quarterly of Human Rights*, 41 (3), (2023) p.152.

vulnerabilities from environmental law and policy.”¹⁸¹ The examination above goes along with this assessment. It is rather conspicuous how much focus there is on the argument of intergenerational equity when the effects of climate change are not only a concern for future, unborn generations but for humans, especially children living in the present day. Even more so, considering the concept of intergenerational equity itself is rather abstract and concerns future events. Courts upon examining rights violations must stick to foreseeable and present circumstances, so this line of argumentation bears a lot of risk. This is also visible in the court’s rulings of the cases examined. Courts have denied claims based on intergenerational equity, considering them to be too abstract and far in the future and therefore not justiciable in the present day, this especially shows in *Neubauer v. Germany*.¹⁸² In this context, it must also be noted that the aforementioned lack of clarity surrounding intergenerational equity and its connection to children’s rights Nolan found in child-led climate litigation¹⁸³, can also be observed in the cases examined. While *Sacchi v. Argentina* and *Neubauer v. Germany* set out the principle of intergenerational equity quite detailed,¹⁸⁴ they still do not clarify how the rights of children in the present day relate to it. The applicants’ argumentation in *Duarte Agostinho v. Portugal* on the other hand only refers to intergenerational equity¹⁸⁵ without any detailed explanation of the concept itself or how children’s rights relate to future generations. So, this thesis’ examination goes along with Nolan’s remark that the connection between children’s rights and intergenerational equity is only superficially dealt with in climate change litigation.¹⁸⁶

Still, strategic climate litigation remains a powerful tool for children to draw attention to their universal vulnerability to the effects of climate change and demand justice for cases where states fail to take that into account in their mitigation measures and policies. This is also pointed out by Papantoniou who finds that “the claim of the particularity of the vulnerability of children against climate change empowers children by highlighting their particular needs.”¹⁸⁷ This way child-led strategic climate litigation is a way to not exclude or dismiss children’s claims due to their vulnerability but to put them at the centre of policy and law regarding climate change mitigation¹⁸⁸, having children “demand the recognition of the universality of their vulnerability against their inevitable exposure to climate change equal to any claim that adults have.”¹⁸⁹

¹⁸¹ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.280.

¹⁸² *Neubauer et al. v. Germany* (24th March 2021), para.146.

¹⁸³ See 2.2.2.

¹⁸⁴ *Neubauer et al. v. Germany* (24th March 2021), para.116–137, para.182–194; *Sacchi et al. v. Argentina et al.*, *Communication to the Committee on the Rights of the Child* (23rd September 2019), para.192–194.

¹⁸⁵ *Duarte Agostinho et al. v. Austria et al.*, application to the ECtHR (2nd September 2020), para.28.

¹⁸⁶ See 2.2.2.

¹⁸⁷ A. Papantoniou, *Children and the Environment – Pathways to Legal Protection*, p.65 (2022).

¹⁸⁸ *Ibid.* p.67.

¹⁸⁹ *Ibid.* p.67.

5. Child-led Strategic Climate Litigation and the Right to Participation

As this chapter will show, child-led strategic climate litigation is a chance for children to make their voices heard on how climate change affects their everyday lives and how they see it fit for states to change their policy to combat climate change. Children are otherwise often excluded from decision-making processes, especially on a legislative level. Due to that leading strategic climate litigation is a way for children to bring the impact of climate change on them to the attention of judicial bodies as part of the state authorities. However, especially since the climate justice movement is gaining support and attention globally, a child rights-consistent approach is essential. Without such, child-led strategic climate litigation runs the risk of being instrumentalised and with that disregarding children's rights, the very thing it seeks to advance and benefit. This chapter will therefore also explore what standards Article 12 CRC sets for child-led strategic climate litigation and what a child rights-consistent approach would entail.

5.1. Standard Set by Article 12 CRC

First, the general scope of Article 12 CRC and how it relates to strategic climate litigation will be set out. Article 12 CRC is a crucial provision in the Convention and even one of the four general principles.¹⁹⁰

Article 12 CRC sets out that every child who is capable of forming their own views has the right to have those views heard and given due weight in accordance with their age and maturity. Regarding strategic climate litigation, Article 12 (2) CRC explicitly mentions judicial proceedings. It establishes the right of the child to have the opportunity “to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body [...]”.¹⁹¹ The wording “affecting the child” was clarified in General Comment no.12 on The right of the child to be heard (GC no.12) as “all relevant judicial proceedings affecting the child without limitation”.¹⁹² Also, judicial proceedings which children themselves initiate are encompassed in this provision.¹⁹³ What is notable is that the General Comment furthermore provides elaboration on specific obligations of states in certain proceedings and focuses on family law and custody proceedings, children in conflict with the law and administrative proceedings regarding education (e.g. suspensions and expulsions).¹⁹⁴ Overall, GC no.12 in its clarification of Article 12 (2) CRC rather focuses on children as objects of judicial proceedings than as claimants and plaintiffs who are exercising their own rights. Article 12 (2) CRC also includes that children must be informed “about the process for listening to them, how their views will be considered and what weight will be given to their views, as well as the mechanisms that will facilitate the exercise of this right”¹⁹⁵ in any judicial proceedings. Furthermore, direct hearings in any judicial proceedings are necessary to assess if there is a conflict of interest with people who represent the child.¹⁹⁶ Usually, this concerns parents and guardians¹⁹⁷, but in strategic climate litigation cases this could also be the lawyer legally representing the child.

Regarding environmental matters, Article 12 CRC should include procedural rights for children to access information and participate in community movements.¹⁹⁸ For climate change in particular, climate

¹⁹⁰ S. Lembrechts, G.E. Türkelli, W. Vandenhoe, Article 12: The Views of the Child, Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols, para.12.02 (2019).

¹⁹¹ Article 12 (2) CRC.

¹⁹² General Comment No. 12 (2009) on the right of the child to be heard, UN Doc. CRC/C/GC/12 (2009), para.32.

¹⁹³ Ibid. para.33.

¹⁹⁴ Ibid. para.50–67.

¹⁹⁵ S. Lembrechts, G.E. Türkelli, W. Vandenhoe, Article 12: The Views of the Child, Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols, para.12.25 (2019).

¹⁹⁶ R. Thorburn Stern, Implementing Article 12 of the UN Convention on the Rights of the Child - Participation, Power and Attitudes, p.66 (2017).

¹⁹⁷ Ibid.

¹⁹⁸ A. Papantoniou, Children and the Environment – Pathways to Legal Protection, p.95 (2022).

change is indeed a matter “affecting the child” according to Article 12 (1) CRC since the economic, social and environmental effects of insufficient actions to fight climate change will be felt most by children of today in their lifetime.¹⁹⁹ So, Article 12 CRC should be read to “cover also the right of children to express their views on how they, their families, their communities, their governments, and even the international community should respond to climate change and its consequences”.²⁰⁰

5.2. Child-led Strategic Climate Litigation as a Realisation of Article 12 CRC

Having established the standard set by Article 12 CRC, the following paragraphs numbered 5.2.1. and 5.2.2. examine how this right is realised in child-led strategic climate litigation. Since the very core of Article 12 CRC is to have a child’s voice and opinion heard on a matter affecting them and given due weight, child-led strategic climate litigation is at first glance a realisation of that right. The simple fact that children have the opportunity to lodge a complaint at court is already the first step towards the realisation of the right to be heard. Also, GC no.26 mentions how child-friendly access to justice is essential in furthering children’s agency in climate change.²⁰¹

5.2.1. Barriers to Access to Courts

However, the effectiveness of this also depends on access to courts. In their access to courts and justice children often encounter many restrictions due to their age and legal capacities.²⁰² Smith puts it best when she states: “This is something unique to the Convention on the Rights of the Child as the main beneficiaries of the rights and freedoms articulated in the treaty inevitably lack legal capacity to institute judicial and often quasi-judicial proceedings in their own country.”²⁰³

One of the biggest obstacles to children’s access to courts, as Kilkelly points out, is the lack of children’s awareness of their rights.²⁰⁴ It is only logical that children are not able to take steps to exercise their rights if they are unaware of them.²⁰⁵ Other than this overarching barrier there are specific barriers depending on the levels of jurisdiction: domestic, regional and international bodies.

Domestic legal systems often lack child-sensitive procedures, information and judicial staff.²⁰⁶ Furthermore, national rules on procedural capacity may vary, often entailing minimal age limits.²⁰⁷ Such

¹⁹⁹ C. Bakker, *Climate Change and Children’s Rights* in S.H. King, J. Todres (eds.), *The Oxford Handbook of Children’s Rights Law*, p.458 (2020).

²⁰⁰ *Ibid.*

²⁰¹ General comment No.26 (2023) on children’s rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.66.

²⁰² E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.268; R. Smith, *The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality*, *International Journal of Children’s Rights*, 21, (2013) p.311.

²⁰³ R. Smith, *The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality*, *International Journal of Children’s Rights*, 21, (2013) p.311.

²⁰⁴ U. Kilkelly, *Children’s Rights To Access Justice at the International Level - Challenge and Opportunity* in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children’s Access to Justice – A Critical Assessment*, p.145 (2022).

²⁰⁵ U. Kilkelly, *Children’s Rights To Access Justice at the International Level - Challenge and Opportunity* in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children’s Access to Justice – A Critical Assessment*, p.145 (2022); R. Smith, *The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality*, *International Journal of Children’s Rights*, 21, (2013) p.309.

²⁰⁶ *Access to justice for children*, UN Doc. A/HRC/25/35 (2013), para. 14.

²⁰⁷ U. Kilkelly, *Children’s Rights To Access Justice at the International Level - Challenge and Opportunity* in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children’s Access to Justice – A Critical Assessment*, p.146 (2022); T. Liefaard, S. Rap, E. Schmidt, *Safeguarding the dynamic legal position of children: a matter of age limits? Reflections on the Fundamental Principles and Practical Application of age limits in light of international children’s rights law*, *Erasmus Law Review*, 13 (1), (2020) p.6.

domestic rules exclude children from leading litigation in their own name.²⁰⁸ As noted in a report of the United Nations High Commissioner for Human Rights in 2013, children's access to courts therefore often depends on the support of adults – parents, guardians and litigators alike.²⁰⁹ And, while a conflict of interest with parents or guardians is less likely in climate change cases than in family law proceedings, it still is a circumstance that can pose an obstacle to children's access to courts.²¹⁰ The Committee in GC no.26 also recognises such barriers in children's access to justice in climate change matters and recommends states to remove them, especially for children initiating proceedings themselves.²¹¹

For regional bodies, details will depend on the courts' rules of procedure. It stands though, that, in theory, children formally have the possibility to bring cases to regional human rights courts.²¹² However, the process is still very exhaustive, considering both financial and temporal aspects.²¹³ Since a child-led case in front of the ECtHR is examined above, access to this regional human rights court will be elaborated on. Bakker especially points out how no action popularis is possible in front of the ECtHR since Article 34 ECHR requires an individual victim status.²¹⁴ As mentioned above²¹⁵, the victim status for climate change cases was even further defined by the ECtHR in the recent judgement for *KlimaSeniorinnen v. Switzerland*. These new victim requirements might pose another obstacle to children's access to the ECtHR. Analyses of the judgement remark that this new standard sets a rather high bar for future cases.²¹⁶ And while children suffer a disproportionate impact by climate change, proving this in front of the ECtHR might be challenging with these new thresholds. In *Duarte Agostinho v. Portugal*, the court noted a lack of clarity in the applicants' claims which, according to the court, made it impossible to assess whether the victim status as set out in *KlimaSeniorinnen v. Switzerland* was fulfilled. Therefore, it is fair to assume that the heightened standard for victim status might restrict children's access to the ECtHR even more.²¹⁷

On an international level, individual communications to the Committee under OPIC are an evident possibility for children. However, an obstacle here might already be the availability of the communication procedure. So far, a relatively low number of states have ratified the OPIC in comparison to the CRC.²¹⁸ While 196 states are party to the CRC, only 53 are party to the OPIC as of July 2024.²¹⁹ Furthermore, the admissibility of such individual communications might be a problem, depending on how strictly the Committee interprets some requirements, e.g. the exhaustion of domestic resources. Regarding this requirement, Kilkelly accurately sets out how any barriers to access domestic courts might continue to

²⁰⁸ U. Kilkelly, *Children's Rights To Access Justice at the International Level - Challenge and Opportunity* in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children's Access to Justice – A Critical Assessment*, p.146 (2022).

²⁰⁹ Access to justice for children, UN Doc. A/HRC/25/35 (2013), para.16; following this report, the UN Human Rights Council issued a resolution on access to justice for children: UN Doc. A/HRC/25/L.10.

²¹⁰ A. Daly, L. Lundy, ENOC Synthesis Report – *Children's Rights & Climate Justice*, p.34 (2022).

²¹¹ General comment No.26 (2023) on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.83.

²¹² C. Bakker, *Climate Change and Children's Rights* in S.H. King, J. Todres (eds.), *The Oxford Handbook of Children's Rights Law*, p.461 (2020).

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ See 4.1.2.1.

²¹⁶ Cf. DAC Beachcroft, *Landmark climate change decision by European Court of Human Rights: Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Lexology, (<https://www.lexology.com/library/detail.aspx?g=d79b0aad-3d9d-47c0-baf6-cb3fef6ca6a8>), last visited (01-07-2024).

²¹⁷ At least an overall restricted availability of remedies in front of the ECtHR is mentioned in an analysis of the judgement: L. Raible, *Priorities for Climate Litigation at the European Court of Human Rights*, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/priorities-for-climate-litigation-at-the-european-court-of-human-rights/>), last visited (01-07-2024).

²¹⁸ C. Bakker, *Climate Change and Children's Rights* in S.H. King, J. Todres (eds.), *The Oxford Handbook of Children's Rights Law*, p.460 (2020).

²¹⁹ (<https://indicators.ohchr.org/>), last visited (01-07-2024); (<https://indicators.ohchr.org/>), last visited (01-07-2024).

have an effect on an international level. If children cannot access their domestic resources, exhausting them is challenging, making their complaint to the Committee possibly inadmissible, in turn restricting their access to this remedy as well.²²⁰ While the rules for admissibility in Article 7 (e) OPIC provide a certain level of freedom to the Committee when assessing whether requiring the exhaustion of domestic resources is proportionate in the individual case, the jurisprudence so far points towards a strict interpretation of this admissibility requirement.²²¹ This strict interpretation has been criticised as hindering speedy justice for climate change cases. Especially child-led litigation and especially climate change issues require a speedy justice mechanism as the effects of climate change on children can significantly worsen in just a few years.²²² The exhaustion of domestic remedies puts a time-intensive barrier between children and a decision on the merits of climate change cases, an issue where change is urgently needed, as depicted e.g. in the 2022 IPCC report.²²³ Parker et al. even go so far as to argue that the strict interpretation of such admissibility requirements and thereby the denial to deal with the merits of the cases is undermining children's agency in the matter and denying them their right to redress rights violations.²²⁴ However, as Nolan explains, even in the face of a children's rights crisis such as climate change, the Committee must abide by its procedural rules and not exceed its mandate by undermining the OPIC provisions.²²⁵ This assessment is supported by the fact that OPIC is supposed to supplement any domestic mechanisms for remedies, not replace them.²²⁶ Despite these obstacles, it must be remarked that, as Wewerinke-Singh notes in her analysis of *Sacchi v. Argentina*, the Committee still held an oral hearing for this case, where the children personally could express their views, before ultimately declaring it inadmissible.²²⁷ This first oral hearing with child authors presents a premiere in the history of OPIC communications.²²⁸ The children's voices and views on the case therefore were heard by the Committee despite the overall inadmissibility of the communications, and this in itself is already furthering and realising children's rights.²²⁹

It also must be noted that, despite all the barriers depicted above, it is now widely accepted that children have a right to access to justice, in addition to the resolution of the Human Rights Council in 2014, even the Committee's upcoming General Comment will deal with this issue.²³⁰

²²⁰ U. Kilkelly, *Children's Rights To Access Justice at the International Level - Challenge and Opportunity* in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children's Access to Justice – A Critical Assessment*, p.146 (2022); cf. R. Smith, *The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality*, *International Journal of Children's Rights*, 21, (2013) p.309.

²²¹ T. Liefgaard, *A Decade of the Optional Protocol to the CRC on a Communications Procedure - Progress, Challenges and the Pathways Ahead for Children's Access to Justice*, *International Journal of Children's Rights*, *International Journal of Children's Rights*, 32 (1), (2024) p.1.

²²² A. Daly, L. Lundy, *ENOC Synthesis Report – Children's Rights & Climate Justice*, p.35 (2022).

²²³ IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, para.D.5.3; cf. A. Daly, L. Lundy, *ENOC Synthesis Report – Children's Rights & Climate Justice*, p.35 (2022).

²²⁴ S. Jodoin, J. Mestre, L. Parker, M. Wewerinke-Singh, *When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World*, *Journal of Human Rights and Environment*, 13 (1), (2022) p.86.

²²⁵ A. Nolan, *Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina*, *Blog of the European Journal of International Law*, (https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2), last visited (01-07-2024).

²²⁶ T. Liefgaard, *Children's Rights Remedies under International Human Rights Law: How to Secure Children's Rights Compliant Outcomes in Access to Justice?*, *De Jure Law Journal*, 56, (2023) p.493.

²²⁷ M. Wewerinke-Singh, *Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on Sacchi v Argentina*, *Leiden Children's Rights Observatory*, (<https://www.childrensrightsobservatory.org/case-notes/casenote2021-10>), last visited (01-07-2024).

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ See Concept Note: General Comment on Children's Rights to Access to Justice and Effective Remedies, available at: (<https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc27/2023-01-31-gc27-concept-note.pdf>), last visited (01-07-2024).

5.2.2. Overall Meaning for Article 12 CRC

Donger finds in her analysis that child-led strategic climate litigation has been reported by plaintiffs to give them a sense of fulfilment and personal purpose.²³¹ Even if a case is not successful, child-led strategic climate litigation still gives children a place in the public debate regarding climate change, thereby posing a chance for a politically underrepresented group to participate in the broader public dialogue.²³² Drawing on the indirect effects of strategic climate litigation mentioned above, public coverage of cases by the media might also ensure that children's claims and voices in the cases come to the attention of the broader public and decision-making bodies.²³³ Child-led strategic climate litigation thereby, despite the aforementioned restrictions of the access to courts, generally contributes to the realisation of Article 12 CRC.

Historically, there has been a lot of attention on implementing children's participation in family law proceedings, especially considering custody issues or separation from parents.²³⁴ Even GC no.12 concerns itself mainly with those cases of child participation.²³⁵ Children themselves claiming rights violations and accessing courts as litigants have only been gaining attention in the past 15 years, especially since the adoption of OPIC and the Guidelines on Child-friendly Justice, issued by the Council of Europe.²³⁶ Strategic climate litigation fits into this shift of focus on children's roles in judicial proceedings. As Daly sets out, environmental matters have been present in front of courts for a long time, but the Paris Agreement in 2015 triggered a new wave and type of climate change litigation based on human rights.²³⁷ In line with this also child-led strategic climate litigation became more present.²³⁸ This does not only benefit the climate justice movement but also the child's right to participation. Children are a group that has been excluded from any legal area generally.²³⁹ And, as Mendelson points out, litigation is a critical opportunity for underrepresented groups to participate in the public debate.²⁴⁰ So children accessing human rights law to hold states accountable for their climate change measures, and at such a global level and with so much media attention, contributes to the shift from children as objects of rights to active rights holders. Especially since children themselves cannot vote and by that influence climate change action of a state, strategic climate litigation is a powerful tool for them to enforce their rights.²⁴¹ This is emphasised by the fact that political processes are not exactly child-friendly.²⁴² Due to

²³¹ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.283.

²³² N. A. Mendelson, *Tribes, Cities and Children: Emerging Voices in Environmental Litigation*, *Journal of Land Use & Environmental Law*, 34 (2), (2019) p.257, p.258.

²³³ *Ibid.* p.258.

²³⁴ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.269; J. Doek, *Child Participation in S.M. King, J. Todres (eds.), The Oxford Handbook of Children's Rights Law*, p.268 (2020).

²³⁵ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.269.

²³⁶ T. Liefwaard, *Children's Rights Remedies under International Human Rights Law: How to Secure Children's Rights Compliant Outcomes in Access to Justice?*, *De Jure Law Journal*, 56, (2023) p.486; U. Kilkelly, *Children's Rights To Access Justice at the International Level - Challenge and Opportunity in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), Children's Access to Justice – A Critical Assessment*, p.143 (2022).

²³⁷ A. Daly, *Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law*, *Human Rights Law Review*, 22, (2022) p.14.

²³⁸ *Ibid.* p.17, p.22.

²³⁹ *Ibid.* p.22.

²⁴⁰ N. A. Mendelson, *Tribes, Cities and Children: Emerging Voices in Environmental Litigation*, *Journal of Land Use & Environmental Law*, 34 (2), (2019) p.257.

²⁴¹ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.281; N. A. Mendelson, *Tribes, Cities and Children: Emerging Voices in Environmental Litigation*, *Journal of Land Use & Environmental Law*, 34 (2), (2019) p.253; cf. A. Papantoniou, *Children and the Environment – Pathways to Legal Protection*, p.61 (2022).

²⁴² N. A. Mendelson, *Tribes, Cities and Children: Emerging Voices in Environmental Litigation*, *Journal of Land Use & Environmental Law*, 34 (2), (2019) p.253.

their lack of voting rights children are dependent on adults to vote in their favour.²⁴³ This circumstance emphasises how strategic climate litigation poses a chance for participation in the public debate for children.²⁴⁴

5.3. Child-led Strategic Climate Litigation as Part of the Post-Paternalistic Movement

This ground-breaking momentum of children demanding space and to be heard can also be seen as part of the post-paternalistic era children's rights have been entering since the adoption of the CRC in 1989.²⁴⁵

5.3.1. Paternalistic Approach

The paternalistic approach to children's rights can be defined as one that restricts the freedoms or responsibilities of children and sidelines children's wishes and views.²⁴⁶ This especially concerns the right to participate in Article 12 CRC. This right, while transformative and innovative²⁴⁷, is still often gatekept by adults, who are "ultimately weighing and judging the abilities of children and young people to participate based on their age, maturity or perceived best interests".²⁴⁸

5.3.2. Youth Climate Justice Movement as a Turning Point

However, the global youth climate justice movements that have erupted since 2018²⁴⁹ mark a turn in this narrative, since children are taking up space and demanding attention.²⁵⁰ Such a movement on such a large scale is unprecedented.²⁵¹ Child-led strategic litigation is very much part of this movement and the post-paternalistic approach.²⁵² Still, it must be noted that this largely concerns older children, those above the age of 12.²⁵³ For many children who are just as, if not more, disproportionately affected by climate change, the possibility to engage in strategic litigation themselves is limited due to their young age and lack of agency.²⁵⁴ While children are defined by the CRC as anyone under the age of 18, this encompasses a broad range of maturity and awareness of their surroundings and issues.²⁵⁵ Therefore, a large part of children, as defined by the CRC, are rather dependent on their caregivers to stand up on their behalf.²⁵⁶ Of course, this is all dependent on the individual characteristics of a child. A nine-year-

²⁴³ N. A. Mendelson, Tribes, Cities and Children: Emerging Voices in Environmental Litigation, *Journal of Land Use & Environmental Law*, 34 (2), (2019) p.253.

²⁴⁴ Ibid.

²⁴⁵ A. Daly, Children/youth advocates 'doing' rights themselves: Post-paternalism for the UN Convention on the Rights of the Child?, *Childism*, (<https://www.childism.org/post/children-youth-climate-advocates-doing-rights-themselves-post-paternalism>), last visited (01-07-2024).

²⁴⁶ Ibid.

²⁴⁷ Cf. L. Krappmann, The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child), *International Journal of Children's Rights*, 18 (4), (2010) p.502.

²⁴⁸ P. Cuevas-Parra, L. Lundy, M. Templeton, Children's Participation in International Fora: The Experiences and Perspectives of Children and Adults, *Children and Society*, (2022) p.3.

²⁴⁹ E.g. Fridays for Future.

²⁵⁰ A. Daly, Children/youth advocates 'doing' rights themselves: Post-paternalism for the UN Convention on the Rights of the Child?, *Childism*, (<https://www.childism.org/post/children-youth-climate-advocates-doing-rights-themselves-post-paternalism>), last visited (01-07-2024).

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ S. Bartlett, Children and the Culture of Climate Change, *Journal of the History of Childhood and Youth*, 4 (3), (2011) p.500.

²⁵⁴ Ibid. p.498

²⁵⁵ Ibid. p.501, p.502.

²⁵⁶ S. Bartlett, Children and the Culture of Climate Change, *Journal of the History of Childhood and Youth*, 4 (3), (2011) p.500.

old might be very passionate about climate justice advocacy and having their voice heard²⁵⁷, while a seventeen-year-old might not feel the need to speak out about the issue at all.

This large variety of agency, awareness and willpower is the reason the mere existence or possibility of child-led strategic climate litigation does not automatically mean that children should be expected to take the lead in climate justice matters.²⁵⁸ At the end of the day, children still lack political power and even Article 12 CRC is interpreted in a way that the decision, while the child's view must be given due weight, is ultimately in the hands of the adults.²⁵⁹ A balance must be struck between treating children as victims without agency and expecting them to take the lead and thereby placing too big a burden on their shoulders.²⁶⁰

5.4. Janus-faced? Possible downsides to Child-led Strategic Climate Litigation

As the previous remarks introduce, there are also possible downsides to child-led strategic climate litigation.

5.4.1. Financial Risk

One of those possible downsides is the financial risk children face. Strategic litigation bears a large financial risk, de facto excluding marginalised children from leading it.²⁶¹ Since children are usually still in education without a major source of income²⁶², this burden becomes especially heavy on them. This could be negated by having lawyers work on strategic climate litigation cases pro bono.²⁶³ But it is unlikely that every child who wishes to bring forward a strategic climate litigation case will find a lawyer who is willing to take the case on pro bono. Additionally, even if the case is taken up as pro-bono by a lawyer or law firm, courts might still issue cost orders against children as litigants.²⁶⁴ This is why the Committee, in GC no.26, recommends states to not only provide free legal aid to children but also to consider lowering any cost orders to limit the financial risk of strategic climate litigation.²⁶⁵

5.4.2. Mental Burden

Also not easily negated is the mental burden child-led strategic climate litigation can place on a child applicant. Leading figures in climate justice movements, including leaders of strategic climate litigation, are often exposed to public opposition, hostilities and even bullying on large scales, especially in social media networks.²⁶⁶ Due to their ongoing emotional and physical development children are usually more

²⁵⁷ E.g. Franciso Vera, who started climate justice advocacy at the age of nine: <https://franciscoactivista.com/francisco-vera/>.

²⁵⁸ S. Bartlett, Children and the Culture of Climate Change, *Journal of the History of Childhood and Youth*, 4 (3), (2011) p.500.

²⁵⁹ L. Krappmann, The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child), *International Journal of Children's Rights*, 18 (4), (2010) p.508.

²⁶⁰ S. Bartlett, Children and the Culture of Climate Change, *Journal of the History of Childhood and Youth*, 4 (3), (2011) p.500.

²⁶¹ E. Donger, Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization, *Transnational Environmental Law*, 11 (2), (2022) p.268, p.283.

²⁶² Cf. *ibid.*

²⁶³ Cf. A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, (2022) p.7.

²⁶⁴ Cf. General comment No.26 (2023) on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.86.

²⁶⁵ General comment No.26 (2023) on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (2023), para.86.

²⁶⁶ E. Donger, Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization, *Transnational Environmental Law*, 11 (2), (2022) p.283; A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.15; A. Nolan, A. Skelton and K. Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (ACRiSL, 2022), para.6.5.

vulnerable in their reaction to such public dismay than adults.²⁶⁷ Therefore, as recommended in the report published by Advancing Child Rights Strategic Litigation, children should receive support throughout the litigation process.²⁶⁸ The report also highlights the need for different forms of support, including psychological, social-economic, and emotional.²⁶⁹ Since climate change itself already has a negative impact on children's mental health²⁷⁰, this issue is especially present in strategic climate litigation. It is likely that climate anxiety, grief and frustration arise, and children should receive psychological help from professionals, ideally especially trained on the matter.²⁷¹ Furthermore, the legal process itself can be incredibly disempowering, since the coordination with lawyers is time-intensive.²⁷² In this regard, lawyers should ensure that children have the possibility to halt the judicial proceedings if the stress and attention become too much for them.²⁷³ And even successful cases might be discouraging.²⁷⁴ The lived reality of children is hardly likely to change even with a successful case.²⁷⁵

5.4.3. Risk of Instrumentalising Children for the Climate Justice Movement

Despite the drive and passion children have for the topic themselves strategic litigation always bears the risk of instrumentalising plaintiffs.²⁷⁶ This applies to children and adults alike²⁷⁷ but again, children are especially vulnerable here. Strategic litigation often happens in the context of social movements and NGOs or litigation firms.²⁷⁸ This poses the risk that children are excluded from the aim and strategy of the litigation.²⁷⁹ Children have become "popular" applicants in strategic climate litigation since they are well-suited to bring forward future-focused arguments and intergenerational equity in legal argumentation.²⁸⁰ There is therefore a risk to have children simply as an addition to a pre-existing plan or strategy of strategic litigators rather than placing them at the centre of the case and legal strategy.²⁸¹ Lawyers are also often not used to working with children or familiar with what a child rights-consistent approach requires.²⁸² Being instrumentalised in strategic climate litigation would go to the disadvantage of children and their rights, the advancement of which is supposed to be the very core of child-led strategic climate litigation. It can therefore be argued that the most crucial aspect to ensure that children's right to participation is truly realised in strategic climate litigation is their participation outside of the courtroom, in the preparation and planning of the case.²⁸³

²⁶⁷ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.283.

²⁶⁸ A. Nolan, A. Skelton and K. Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (ACRiSL, 2022), para.6.4.

²⁶⁹ *Ibid.*

²⁷⁰ See 2.2.5.

²⁷¹ A. Nolan, A. Skelton and K. Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (ACRiSL, 2022), para.6.4.

²⁷² E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.284.

²⁷³ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.9.

²⁷⁴ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.284.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.* p.285.

²⁷⁷ *Ibid.* p.285.

²⁷⁸ A. Nolan, A. Skelton, *Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice*, *Human Rights Law Review*, 22, (2022) p.14.

²⁷⁹ *Ibid.*

²⁸⁰ As seen in the cases examined in 4., these lines of argumentation are regularly brought up in child-led strategic litigation and pose a significant difference to adult-led strategic climate litigation.

²⁸¹ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.4.

²⁸² *Ibid.*

²⁸³ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.284.

5.5.A Child Rights-consistent Approach to Child-led Strategic Climate Litigation

Whether children are involved in the strategy, in the planning and preparation of the case is what differentiates between a strategic climate case which is only formally in a child's name and a case where a child's voice and concerns are truly heard. While litigators and lawyers are not states, thereby not obliged by the CRC, it is still important that the child's right to participation, and other rights, are realised in the process of the strategic litigation itself, not just in the oral hearings of a case and the legal argumentation.

Even though Article 12 (2) CRC requires children to be directly heard by the court in any judicial proceedings, children are still more reliant on their legal representatives since they have less standing than adults who are by default more legally empowered.²⁸⁴ Therefore, communication between children and their lawyers is fundamental to the realisation of their right to participation according to Article 12 CRC.²⁸⁵ Since the right according to Article 12 CRC includes access to all information necessary in the matter²⁸⁶, lawyers must pay particular attention to communicating all information necessary for the child to understand the benefits, risks, opportunities and chances of the planned strategic climate litigation.²⁸⁷ This should not only substantially cover the necessary information but it should also be ensured that they are communicated in an age-appropriate way so that the children involved understand them, especially language is crucial for this.²⁸⁸

Coming back to the mental burden strategic climate litigation can place on child applicants, any communication should also include the management of expectations. As set out in the report by Advancing Child Rights Strategic Litigation, this includes age-appropriate explanations of how the litigation works, when the court will decide and all possible outcomes of the litigation.²⁸⁹ Upon explaining the possible outcomes of the case, it may show that children are more concerned about being heard by a judicial body than winning.²⁹⁰ However, part of managing expectations must also be the possible let-down of a successful case not bringing the change it aimed for.²⁹¹ Not just the risk of losing the case but also the risk of a successful case not having immediate positive effects on the child's life should be discussed. In summary, children should be at the centre of any planning, and strategizing and given opportunities to instruct lawyers and direct the course of litigation.²⁹² Still, the level of maturity and ability of a child to weigh the risks and opportunities of a certain litigation course must be taken into consideration, and again, in compliance with Article 12 CRC, due weight should be given to the child's views according to that, striking a balance.²⁹³

In the case that media forms a part of the strategic litigation process, children should also be given the opportunity to speak to them and support them in the process.²⁹⁴ Often children who lead strategic

²⁸⁴ A. Nolan, A. Skelton, *Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice*, *Human Rights Law Review*, 22, (2022) p.14.

²⁸⁵ *Ibid.*

²⁸⁶ S. Lembrechts, G.E. Türkelli, W. Vandenhole, *Article 12: The Views of the Child*, *Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols*, para.12.09 (2019).

²⁸⁷ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.5.

²⁸⁸ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.5.

²⁸⁹ A. Nolan, A. Skelton and K. Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (ACRiSL, 2022), para.6.6.

²⁹⁰ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.9.

²⁹¹ See for that 5.4.2.

²⁹² A. Nolan, A. Skelton, *Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice*, *Human Rights Law Review*, 22, (2022) p.15.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

climate litigation are already involved in activism and advocacy before, so are often also already used to contact with the media.²⁹⁵ However, if that is not the case, children should be supported in this process to mitigate negative effects.²⁹⁶

Overall, the issue of a child rights-consistent strategic litigation practice has only gained attention recently, even though it is essential to achieve the aim that child-led strategic climate litigation is pursuing: ensuring a comprehensive enjoyment of children's rights. Especially legal professionals and litigators are a target group for any efforts to further the issue. For example, a study on children's involvement in judicial proceedings in the EU member states showed that training on children's rights for legal professionals is either not available or, if available, is not uniform in its mandatory or voluntary nature.²⁹⁷ Any training available in the EU was found to be lacking system and rudimentary overall.²⁹⁸ This circumstance shows the need for more work in the area to ensure the realisation of children's rights with a child rights-consistent approach not only in- but also outside of the courtroom.

5.6. Conclusion

At first glance, child-led strategic climate litigation contributes to the realisation of Article 12 CRC. Upon further examination, however, this can really only be achieved through a balanced approach to the matter. The actual realisation is mostly done outside the courtroom and requires a nuanced approach to strike the balance between not overburdening the child with responsibility and giving due weight to its views in accordance with its age and maturity. The issue of a child rights-consistent strategic litigation practice is essential to achieving the aim that child-led strategic climate litigation is pursuing: ensuring a comprehensive enjoyment of children's rights. Therefore, it should never be forgotten that children and their rights are the very core of child-led strategic climate litigation, and any practice must never go to their disadvantage, even if it might further the cause of the climate justice movement itself.

²⁹⁵ E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), (2022) p.280.

²⁹⁶ A. Nolan, A. Skelton & K. Ozah, 'Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation' (ACRiSL, 2023), p.18.

²⁹⁷ N. Kennan, U. Kilkelly, *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU*. Policy Brief, Publications Office of the European Union (2015), p.26.

²⁹⁸ *Ibid.* p.26 – 28, p.34.

6. Conclusions

Like the ECtHR remarks about climate change in its judgement for *Klimaseniorinnen v. Switzerland*: “the number of persons affected, in different ways and to varying degrees, is indefinite.” In this context, child-led strategic climate litigation poses the unique opportunity to raise awareness for children's voices on the issue and bring their disproportionate impact to the attention of courts, state bodies with legal power which can truly further children's rights in the context of climate change by assessing governments' climate change policies and demanding change where needed.

The comparison of legal argumentation in child-led and adult-led cases shows certain differences. While it can be observed that both forms of litigation follow a similar course of argumentation, the child-led cases examined display a higher level of ambition and innovation, e.g. attempting to establish new constitutional principles and include claims of extraterritorial jurisdiction. Moreover, child-led cases are more focused on future violations and forms of intergenerational equity or burden-sharing rather than the extent of present effects of climate change. The according legal argumentation however does not provide a detailed connection between children's rights to the principle of intergenerational equity. It is unclear if the applicants claim future generations' rights as members, representatives or proxies. This question also remains unanswered in academic literature, UN documents and legal frameworks such as the Maastricht principles. So, while a certain connection between children's rights and intergenerational equity in the context of climate change cannot be denied, children's standing remains unclear despite the growing attention and awareness for the issue. Due to this focus on intergenerational equity and the lack of clarity on children's exact standing regarding future generations, the children's rights lens can get neglected. Still, it can be said that child-led strategic climate litigation draws on intergenerational equity so much because it does not only seek remedies for current violations but rather wants to invoke long-lasting change in states' policies which will affect their future lifetimes. While adult-led cases also touch upon the temporal aspect of climate change, the long-term perspective by referring to intergenerational equity is a unique value found in child-led strategic climate litigation. Overall, child-led strategic climate litigation does provide a rights-based perspective on the current impact of climate change on children as one of the most vulnerable groups and the future impact of climate change on their lifetimes, something severely lacking from adult-led litigation.

Regarding the right to participation, child-led strategic climate litigation proves to be a valuable way for children to have their views on climate change issues heard. Children are often excluded from political and policy-shaping processes, so strategic litigation is a way for them to participate in the public debate. Often children are not as concerned with the outcome of the case, but rather seek for courts to hear their voices on how climate change concerns them. However, due to the rising popularity of child-led strategic climate litigation, there is a growing risk of instrumentalising children for the climate justice movement as applicants in strategic climate litigation. Other risks children encounter in this context are financial and mental burdens and barriers to their access to courts. All this must be taken into account when assessing the value child-led strategic climate litigation has for the realisation of the right to participation. In addition to negating these risks, it is essential that children are not only heard in the courtroom but are able to participate in planning the argumentation and course of litigation outside the courtroom. While the trait “strategic” is part of child-led strategic climate litigation, its aim is after all to broaden the enjoyment of children's rights. Therefore, strategy must take a back seat to children's rights in the process of litigation. A legal action that is supposed to further children's rights itself should not go to the disadvantage of those it seeks to empower. Therefore, child-led strategic climate litigation is not by default furthering the right to participation but requires an according implementation.

Child-led strategic climate litigation bears a lot of potential to valuably contribute to bringing the disproportionate impact of climate change on children to the attention of courts and realise the right to

participation. This thesis finds that ultimately this potential is yet not fully realised. But as the issue progresses there is hope for further realisation of this potential in the future.

Bibliography

International Legal Instruments

United Nations Convention on the Rights of the Child, 1989.

Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2011.

Regional Legal Instruments

American Convention on Human Rights, 1969.

European Convention on Human Rights, 1950.

UN Documents

Access to justice for children, 16 December 2013, UN Doc. A/HRC/25/35.

Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, 4 May 2017, UN Doc. A/HRC/35/13.

General Comment No.12 (2009) on the right of the child to be heard, 1 July 2009, UN Doc. CRC/C/GC/12.

General comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, UN Doc. CRC/C/GC/15.

General comment No.17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), 17 April 2013, UN Doc. CRC/C/GC/17.

General comment No.26 (2023) on children's rights and the environment, with a special focus on climate change, 22 August 2023, UN Doc. CRC/C/GC/26.

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc. A/HRC/37/58.

The human right to a clean, healthy and sustainable environment, 1 August 2022, UN Doc. A/RES/76/300.

Academic Literature

Journal Articles

A. Daly, Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law, *Human Rights Law Review*, 22, 1 – 24, (2022).

A. Daly, Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC, *Netherlands Quarterly of Human Rights*, 41 (3), 132 – 154, (2023).

A. Nolan, A. Skelton, Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22, 1 – 20, (2022).

A. Nolan, Children and Future Generations Rights before the Courts: The Vexed Question of Definitions, *Transnational Environmental Law*, 13 (3) (forthcoming), (2024).

A. Saravesi, Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, *Journal of Human Rights and the Environment*, 13 (1), 7 – 34, (2022).

- A. Savaresi, *Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation*, *Questions of International Law Zoom-In*, 77, 1 – 3, (2021).
- B. Lewis, *Children’s Human Rights-based Climate Litigation at the Frontiers of Environmental and Children’s Rights*, *Nordic Journal of Human Rights*, 39 (2), 180 – 203, (2021).
- C.G. Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, *Boston College Third World Law Journal*, 24 (2), 283 – 331, (2004).
- E. Brown Weiss, *Climate Change, Intergenerational Equity and International Law: an Introductory Note*, *Vermont Journal of Environmental Law*, 15 (1-2), 327 – 335, (1989).
- E. Brown Weiss, *In Fairness to Future Generations*, *Environment*, 32 (3), 7 – 11, 30 – 31, (1990).
- E. Brown Weiss, *In Fairness to our Children: International Law and Intergenerational Equity*, *Childhood*, 2, 22 – 27, (1994).
- E. Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, *Transnational Environmental Law*, 11 (2), 263 – 289, (2022).
- E.D. Gibbons, *Climate Change, Children’s Rights, and the Pursuit of Intergenerational Climate Justice*, *Health and Human Rights*, 16 (1), 19 – 31, (2014).
- H. Schoukens, *Strategic Climate Change Litigation and the EU Habitats Directive: Squaring the Circle with the Help of the U.S. Endangered Species Act?*, *Journal for European Environmental & Planning Law*, 20, 51 – 94, (2023).
- International Human Rights Law - Extraterritorial Jurisdiction - Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test - Sacchi v. Argentina No. CRC/C/88/D/104/2019*, *Havard Law Review*, 7, 1981 – 1988 (2022).
- J. Lin, *Climate Change and the Courts*, *Journal of the Society of Legal Scholars*, 32 (1), 35 – 57, (2012).
- J. Nedevska, *An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges*, *Sustainability*, 13, 1 – 7, (2021).
- J. Peel, R. Markey-Tower, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, *German Law Journal*, 22, 1484 – 1498, (2021).
- J.A. Patz, D. Campbell-Lendrum, T. Holloway, J.A. Foley, *Impact of regional climate change on human health*, *Nature*, 438, 310 – 317, (2005).
- K.L. Ebi, J. Paulson, *Climate Change and Children*, *Pediatric Clinics of North America*, 54, 213 – 226 (2007)
- L. Krappmann, *The Weight of the Child’s View (Article 12 of the Convention on the Rights of the Child)*, *International Journal of Children’s Rights*, 18 (4), 501 – 514, (2010).
- M. McCann, *Law and Social Movements: Contemporary Perspectives*, *Annual Review of Law and Social Science*, 2, 17 – 38. (2006).
- N. A. Mendelson, *Tribes, Cities and Children: Emerging Voices in Environmental Litigation*, *Journal of Land Use & Environmental Law*, 34 (2), 237 – 299, (2019).
- P. Cuevas-Parra, L. Lundy, M. Templeton, *Children’s Participation in International Fora: The Experiences and Perspectives of Children and Adults*, *Children and Society*, 1 – 20, (2022).
- R. Smith, *The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality*, *International Journal of Children’s Rights*, 21, 305 – 322, (2013).
- S. Bartlett, *Children and the Culture of Climate Change*, *Journal of the History of Childhood and Youth*, 4 (3), 497 – 505, (2011).
- S. Jodoin, J. Mestre, L. Parker, M. Wewerinke-Singh, *When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World*, *Journal of Human Rights and Environment*, 13 (1), 64 – 89, (2022).

S.E.L. Burke, A.V. Sanson, J. Van Hoorn, The Psychological Effects of Climate Change on Children, *Current Psychiatry Reports*, 20 (35), 1 – 8, (2018).

S.L. Cummings, D.L. Rhode, Public Interest Litigation: Insights from Theory and Practice, *Fordham Urban Law Journal*, 36 (4), 603 – 651, (2009).

T. Liefwaard, A Decade of the Optional Protocol to the CRC on a Communications Procedure - Progress, Challenges and the Pathways Ahead for Children's Access to Justice, *International Journal of Children's Rights*, *International Journal of Children's Rights*, 32 (1), 1 – 8, (2024).

T. Liefwaard, Children's Rights Remedies under International Human Rights Law: How to Secure Children's Rights Compliant Outcomes in Access to Justice?, *De Jure Law Journal*, 56, 486 – 504, (2023).

T. Liefwaard, S. Rap, E. Schmidt, Safeguarding the dynamic legal position of children: a matter of age limits? Reflections on the Fundamental Principles and Practical Application of age limits in light of international children's rights law, *Erasmus Law Review*, 13 (1), 4 – 12, (2020).

Books and Book Chapters

A. Papantoniou, *Children and the Environment – Pathways to Legal Protection*, (2022).

A.V. Sanson, K.V. Padilla Malca, J.L. Van Hoorn, S.E.L. Burke, *Children and Climate Change*, (2022).

A.V. Sanson, S.E.L. Burke, *Climate Change and Children: An Issue of Intergenerational Justice* in N. -Balvin, D.J. Christie (eds.), *Children and Peace – From Research to Action*, 343 – 362, (2020).

C. Bakker, *Climate Change and Children's Rights* in S.H. King, J. Todres (eds.), *The Oxford Handbook of Children's Rights Law*, 448 – 473, (2020).

J. Doek, *Child Participation* in S.M. King, J. Todres (eds.), *The Oxford Handbook of Children's Rights Law*, 257 – 278, (2020).

K. Arts, *Children's Rights and Climate Change* in C. Fenton-Glynn (ed.), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, 216 – 235, (2019).

M. Nettesheim, Artikel 59 GG in G. Dürig, R. Herzog, R. Scholz (eds.), *Grundgesetz Kommentar*, 103. Edition, (2024).

R. Thornburn Stern, *Implementing Article 12 of the UN Convention on the Rights of the Child - Participation, Power and Attitudes* (2017).

S. Lembrechts, G.E. Türkelli, W. Vandenhole, Article 12: The Views of the Child, *Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols*, 143 – 159, (2019).

S. Lembrechts, G.E. Türkelli, W. Vandenhole, Article 30: Rights of Children from Minorities and Indigenous Origin, *Children's Rights – A Commentary on the Convention on the Rights of the Child and its Protocols*, 303 – 311, (2019).

S.I. Skology, The Right to Continuous Improvement of Living Conditions and Human Rights of Future Generations – A Circle Impossible to Square ? in B. Goldblatt, J. Hohmann (eds.), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges*, 147 – 163, (2021).

U. Kilkelly, Children's Rights To Access Justice at the International Level - Challenge and Opportunity in M. Bruning, T. Moreau, M. Paré, C. Siffrein-Blanc (eds.), *Children's Access to Justice – A Critical Assessment*, 139 – 152, (2022).

Reports

A. Daly, L. Lundy, ENOC Synthesis Report – Children’s Rights & Climate Justice (2022).

A. Nolan, A. Skelton & K. Ozah, ‘Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation’ (ACRISL, 2023).

A. Nolan, A. Skelton and K. Ozah, ‘Advancing Child Rights-Consistent Strategic Litigation Practice’ (ACRISL, 2022).

IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

L. O’Callaghan-White, A. White, Taking Governments to Court Climate Litigation and its Consequences, Institute of International and European Affairs.

N. Kennan, U. Kilkelly, Children’s involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU. Policy Brief, Publications Office of the European Union (2015).

Open Society Justice Initiative, Strategic Litigation Impacts – Insights from Global Experience, (2018).

UNICEF Innocenti Research Centre, The Challenges of Climate Change: Children on the Front Line (2014).

Web Resources

(<https://indicators.ohchr.org/>), last visited (01-07-2024).

(<https://indicators.ohchr.org/>), last visited (01-07-2024).

A. Daly, Children/youth advocates ‘doing’ rights themselves: Post-paternalism for the UN Convention on the Rights of the Child?, Childism, (<https://www.childism.org/post/children-youth-climate-advocates-doing-rights-themselves-post-paternalism>), last visited (01-07-2024).

A. Nolan, Children’s Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*, Blog of the European Journal of International Law, (https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2), last visited (01-07-2024).

A. Nolan, Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights’ *Klimaseniorinnen* Decision, Blog of the European Journal of International Law (<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>), last visited (01-07-2024).

A. Nolan, Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights’ *Klimaseniorinnen* Decision, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>), last visited (01-07-2024).

B. Arnoldy, Greta and 15 Kids Just Claimed Their Climate Rights at the UN, EarthJustice, (<https://earthjustice.org/article/greta-thunberg-young-people-petition-UN-human-rights-climate-change>), last visited (01-07-2024).

DAC Beachcroft, Landmark climate change decision by European Court of Human Rights: *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Lexology, (<https://www.lexology.com/library/detail.aspx?q=d79b0aad-3d9d-47c0-baf6-cb3fef6ca6a8>), last visited (01-07-2024).

F. Bretscher, C. Nacht, V. Hirsiger, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*: European Court of Human Rights identifies shortfalls in Swiss climate mitigation measures and access to justice, Global Litigation News, (<https://globallitigationnews.bakermckenzie.com/2024/04/17/verein-klimaseniorinnen-schweiz-and-others-v-switzerland-european-court-of-human-rights-identifies-shortfalls-in-swiss-climate-mitigation-measures-and-access-to-justice/>), last visited (01-07-2024).

General Comment on Children's Rights to Access to Justice and Effective Remedies, available at: (<https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc27/2023-01-31-gc27-concept-note.pdf>), last visited (01-07-2024).

L. Raible, Priorities for Climate Litigation at the European Court of Human Rights, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/priorities-for-climate-litigation-at-the-european-court-of-human-rights/>), last visited (01-07-2024).

M. Milanovic, A Quick Take on the European Court's Climate Change Judgments, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>), last visited (01-07-2024).

M. Wewerinke-Singh, Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on *Sacchi v Argentina*, Leiden Children's Rights Observatory, (<https://www.childrensrightsobservatory.org/case-notes/casenote2021-10>), last visited (01-07-2024).

M.A. Tigre, Guest Commentary: An Unexpected Success for Czech Climate Litigation, Climate Law – A Sabin Center Blog, (<https://blogs.law.columbia.edu/climatechange/2022/10/18/guest-commentary-an-unexpected-success-for-czech-climate-litigation/>), last visited (01-07-2024).

O.W. Pedersen, Climate Change and the ECHR: The Results Are In, Blog of the European Journal of International Law, (<https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/>), last visited (01-07-2024).

REV1 Declaration on Future Generations, para.3, (<https://www.un.org/sites/un2.un.org/files/sof-declaration-on-future-generations-rev1.pdf>), last visited (01-07-2024).

Case Law

Association for the Protection of All Children (APPROACH) Ltd v. France in front of the European Committee of Social Rights (3rd November 2014).

Climate Action Czech Republic v. Czech Republic (15th June 2022).

Duarte Agostinho et al. v. Austria et al. (9th April 2024).

Duarte Agostinho et al. v. Austria et al., application to the ECtHR (2nd September 2020).

Environmental And Consumer Protection Foundation v. Delhi Administration And Others (3rd October 2012).

European Court of Human Rights, Press Release, ECHR 046 (2023) (9th February 2023).

Mathur et al. v. His Majesty the King in Right of Ontario (14th April 2023).

Neubauer et al. v. Germany (24th March 2021).

O'Donoghue v. Minister for Health (27th May 1993).

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Artic Athabaskan Peoples Resulting From Rapid Artic Warming and Melting Caused by Emissions of Black Carbon by Canada, (23rd April 2013).

Sacchi et al. v. Argentina et al. (9th / 10th November 2021).

Sacchi et al. v. Argentina et al., Communication to the Committee on the Rights of the Child (23rd September 2019).

Verein Klimaseniorinnen et al. v. Switzerland (9th April 2024).

Verein Klimaseniorinnen et al. v. Switzerland, application to the ECtHR (26th November 2020).